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**Folder Title:**

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**6**

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**6**

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**10**

**Position:**

**1**

# Withdrawal/Redaction Sheet

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                                                                        | DATE       | RESTRICTION |
|--------------------------|------------------------------------------------------------------------------------------------------|------------|-------------|
| 001a. letter             | Sonia Sotomayor to the Committee on Financial Disclosure re:<br>Financial Disclosure Report (1 page) | 04/21/1997 | P2, P6/b(6) |
| 001b. form               | Financial Disclosure Report (4 pages)                                                                | 04/18/1997 | P2, P6/b(6) |
| 002. form                | Financial Statement (2 pages)                                                                        | n.d.       | P6/b(6)     |
| 003. form                | Personal Data Questionnaire (18 pages)                                                               | 04/01/1997 | P2, P6/b(6) |

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### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Doug Band  
OA/Box Number: 12689

### FOLDER TITLE:

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2009-1007-F

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### RESTRICTION CODES

#### Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

#### Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE**  
**PART ONE QUESTION 15(2)**

**Attached are copies of all unpublished opinions referenced in Question 15(2)**

Ulf W. RUNQUIST, as trustee of Runquist and  
Co., Inc., Profit Sharing Trust.  
Plaintiff,

v.

DELTA CAPITAL MANAGEMENT, L.P., John  
M. Lefrere and William H. Gregory.  
Defendants

No. 91 Civ. 3335 (SS).

United States District Court, S.D. New York.

Feb. 18, 1994.

### OPINION AND ORDER

SOTOMAYOR, District Judge.

\*1 Pursuant to Fed.R.Civ.P. 60(b), plaintiff Ulf W. Runquist moves to reconsider my Order dated July 15, 1993 adopting the Second Supplemental Report and Recommendation of Magistrate Judge Barbara E. Lee. Magistrate Judge Lee recommended dismissing plaintiff's federal fraud claim pursuant to Fed.R.Civ.P. 56(c), and dismissing plaintiff's common law claims pursuant to Fed.R.Civ.P. 41(b) for failure to prosecute. For the reasons set forth below, the motion for reconsideration is denied.

### BACKGROUND

The facts of this case are set forth in detail in my Order dated July 15, 1993 (the "Order") adopting the Second Supplemental Report and Recommendation of Magistrate Judge Barbara E. Lee. Although I assume familiarity with the Order, I briefly summarize the relevant procedural history of this case.

Plaintiff Runquist purchased a limited partnership interest in Delta Capital Management ("Delta") allegedly in reliance upon false statements made by Delta's general partners, pro se defendants John LeFrere and William Gregory. On December 3, 1991, LeFrere moved for summary judgment on the ground that plaintiff could not prove reliance, a necessary element for a fraud claim under federal law.

The action was referred to Magistrate Judge Barbara E. Lee on December 13, 1991 by Judge

Kimba M. Wood. On February 20, 1992, Magistrate Judge Lee established April 6, 1992 as the deadline for plaintiff's submission of papers in opposition to the summary judgment motion. Plaintiff filed no papers by that deadline. On August 17, 1992, Magistrate Judge Lee issued her first Report and Recommendation (the "Report"). The Report concluded that plaintiff: (1) had completely failed to demonstrate reliance, an essential element of its case; (2) had not arrived at a scheduled Status Conference; (3) had not served defendant Gregory in a timely manner, despite repeated instructions by Judge Wood; (4) had failed to engage in discovery within the time frame established by Judge Wood; and (5) had made no timely effort to oppose plaintiff's summary judgment motion. On the record, Magistrate Judge Lee recommended dismissing the fraud claim against LeFrere for failure to demonstrate reliance, and dismissing the outstanding common law claims against LeFrere for failure to prosecute.

On August 28, 1992, plaintiff objected to the Report and moved for reconsideration. Plaintiff's counsel, Louis S. Sandler, alleged that he drafted an affidavit in opposition to the summary judgment motion in December 1991. Sandler claims he discussed the affidavit with plaintiff on January 2-3, 1992. However, no affidavit was ever filed with the Clerk of the Court. Sandler blames this omission on a disgruntled secretary who left his firm's employment in January 1992. Sandler attached what purported to be a copy of the lost affidavit to the motion for reconsideration. The copy was not signed, but Sandler represented that the affidavit would be re-executed upon plaintiff's return from Sweden on August 29, 1992. Affidavit of Lewis S. Sandler, sworn to August 28, 1992, ¶ 4.

\*2 On September 24, 1992, Magistrate Judge Lee considered an affidavit executed by plaintiff on September 14, 1992. The September 14 affidavit differs substantially from the draft affidavit attached to plaintiff's August 28, 1992 motion for reconsideration. Magistrate Judge Lee issued a Supplemental Report and Recommendation, which concluded that the new affidavit failed to establish a genuine dispute over a material issue of fact. Supplemental Report at 3. It also found that plaintiff's "lame excuses" for continued delay were insufficient to warrant modification of the prior recommendation to dismiss the common law claims

for failure to prosecute. *Id.* at 5.

Plaintiff renewed its objections and filed another motion for reconsideration. The motion contained yet another affidavit, this time identical to the draft attached to the August 28 motion. Apparently this affidavit was sent to Judge Wood's Chambers on or about August 31, 1992. This affidavit was not filed with the Clerk of the Court, and was not part of the record considered by the Magistrate Judge. Curiously, this affidavit was executed in New York on August 28, 1992. According to Sandler in his August 28 motion and affidavit, his client was in Sweden until August 29.

On November 17, 1992, Magistrate Judge Lee issued a Second Supplemental Report and Recommendation. After considering the latest affidavit, she determined again that it failed to establish material issues of fact sufficient to pierce the pleadings. Magistrate Judge Lee also adhered to her recommendation to dismiss the remaining claims for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

I issued an Order on July 15, 1993 (the "Order") adopting Magistrate Judge Lee's Second Supplemental Report and Recommendation. The Order concluded that reliance had not been proven, and that summary judgment of the federal fraud claim was appropriate. The Order also found that:

[A] plaintiff who, *inter alia*, repeatedly fails to serve one defendant after being so instructed by the Court, fails to serve another altogether, fails to arrive at a scheduled Status Conference, fails to engage in discovery, fails to oppose a motion for summary judgment, and engages in a pattern of suspicious, dilatory tactics with regard to the production of affidavits, has evidenced, at a minimum, a failure to prosecute warranting dismissal with prejudice pursuant to Fed.R.Civ.P. 41(b).

Order at 11-12 (footnote omitted). The Order dismissed the complaint with prejudice. *Id.* at 13.

Plaintiff brings this motion for reconsideration of my Order. In the motion, plaintiff states that it opposed the summary judgment motion in a timely manner. As evidence of this proposition, plaintiff offers two forms of proof. First, plaintiff attaches a copy of a receipt from a notary public, who notarized a document for Runquist on January 2,

1992. Plaintiff alleges that that notarized document was the original affidavit in opposition to the defendant's motion for summary judgment.

\*3 Second, plaintiff attaches a letter it sent to defendant LeFrere. The letter is dated January 14, 1991, [FN1] and advises LeFrere that attached is a copy of "the affidavit of Ulf W. Runquist in opposition your Motion for Summary Judgment." Pl.Ex. B. At the bottom of the letter appears a handwritten endorsement by LeFrere that reads:

Lew,

I will be sending a retort to Bill Runquist's affidavit against my motion for Summary Judgment in the next several days. I will send you a copy of such the same day it is mailed to the court.

Sincerely,

John M. LeFrere

Plaintiff maintains that this note demonstrates that LeFrere misled the Court into believing that he never received the affidavit. Plaintiff points out that LeFrere's most recent papers are now unsworn.

Plaintiff concedes that it "cannot explain" what happened to the original affidavit prepared in December 1991. Affidavit of Lewis S. Sandler, executed July 30, 1993 (hereinafter "Sandler Aff."),

¶ 2. However, plaintiff argues that because the affidavit was "promptly re-executed," the loss of the affidavit was not a sufficient basis for granting summary judgment or dismissing the remaining claims. Sandler Aff. ¶ 12. Plaintiff also denies that there was anything surreptitious about the re-execution of the original affidavit. Sandler claims that the document is simply misdated August 28 instead of August 31. In Sandler's words, "[i]t was a classic slip." Sandler Aff. ¶ 7. To support this claim, Sandler submitted a photocopy of Runquist's passport, which bears a stamp indicating that plaintiff returned to the United States on August 29, 1992.

Plaintiff also maintains it was "not at fault for not pressing discovery." Sandler Aff. at 3. Plaintiff argues that it believed discovery had been stayed until resolution of the summary judgment motion. Plaintiff supports this claim with a letter from LeFrere to Judge Wood's Chambers in which he states that the upcoming pretrial conference and trial date are "stayed indefinitely until resolution on my Motion for Summary Judgment." Pl.Ex. C.

Plaintiff also states that engaging in discovery would have been futile, "[a]s co-defendant Gregory had not been served, and therefore, any depositions in his absence would have been a nullity as to him and would have had to be repeated." Sandler Aff. ¶ 6.

### DISCUSSION

Rule 60(b), F.R.Civ.P., provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence ...; (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied ...; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) strikes a balance between "serving the ends of justice and preserving the finality of judgments." *Neimaizer v. Baker*, 793 F.2d 58, 61 (2d Cir.1986) (citing *House v. Secretary of Health and Human Services*, 688 F.2d 7, 9 (2d Cir.1982); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir.1981)). The district court's responsibility is to "maintain a balance between clearing its calendar and affording litigants a reasonable chance to be heard." *Enron Oil Corp. v. Diakuhara, Bulk Oil (U.S.A.), Inc.*, 10 F.3d 90, 95 (2d Cir.1993) (citations omitted). The Rule should be construed broadly to do substantial justice, while keeping in mind that final judgments should not be lightly reopened. *Neimaizer* at 61 (quotation omitted). Because 60(b) motions seek extraordinary judicial relief, they should be granted only on a showing of exceptional circumstances. *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir.1990), *aff'd*, 501 U.S. 115, 111 S.Ct. 2173 (1991) (citations omitted). See also *Bicicletas Windsor, S.A. v. Bicycle Corp. of America*, 783 F.Supp. 781, 787 (S.D.N.Y.1992) (60(b) motions "not granted lightly") (citations omitted).

\*4 The decision to grant 60(b) relief lies within the discretion of the district court. *Maduakolam v. Columbia Univ.*, 866 F.2d 53, 55 (2d Cir.1989). In cases where the party seeking 60(b) relief has not been heard on the merits, all doubts should be

resolved in favor of that party. *Salomon v. 1498 Third Realty Corp.*, 148 F.R.D. 127, 128 (S.D.N.Y.1993) (citing *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 539-49 (S.D.N.Y.1985)).

Plaintiff has not specified which subsection of 60(b) underlies its motion. Rule 60(b) motions seeking to undue the mistakes or omissions of counsel could, on the face of the statute, be considered under 60(b)(1) or 60(b)(6). Rule 60(b)(6) may be used to rectify mistakes or omissions by counsel that are the result of "extraordinary circumstances." *PT Busana Idaman Murani v. Marissa by GHR Industries Trading Corp.*, 151 F.R.D. 32, 34 (S.D.N.Y.1993) (citing *United States v. Cirami*, 563 F.2d 26, 34-35 (2d Cir.1977) ("*Cirami II*") (other citations omitted)). See also *United States v. Cirami*, 535 F.2d 736, 741 (2d Cir.1976) ("*Cirami I*") (even gross negligence by attorney does not justify use of 60(b)(6)). Plaintiff, however, does not allege any extraordinary circumstances that would justify considering the mistakes and omissions of counsel under Rule 60(b)(6). Attorney Sandler even characterizes one of his mistakes as a "classic slip." Sandler Aff. ¶ 7.

Under Rule 60(b)(1), however, the Second Circuit has "consistently declined" to alter judgments in cases where the mistake or omission was the result of counsel's "ignorance of the law or other rules of the court, or his inability to efficiently manage his caseload." *Neimaizer* at 62 (quoting *Cirami I* at 739 (other citations omitted)). Furthermore, 60(b)(1) relief will not be granted to remedy the consequences of a poor litigation strategy. *Id.* (citing *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 695 (5th Cir.), cert. denied sub nom., *Chick Kam Choo v. Esso Oil Corp.*, 464 U.S. 826 (1983)). See also *Spray Tech Corp. v. Wolf*, 113 F.R.D. 50, 51 (S.D.N.Y.1986) (same).

Speaking in the context of vacating default judgments, the Second Circuit has provided additional guidance. District courts should not grant a 60(b) motion made by an "essentially unresponsive party" whose actions have halted the adversary process. *Maduakolam* at 55 (citing *Sony* at 540). In cases where the unresponsive party seeks 60(b) relief, denial of the motion is justified as a means to protect the other party from "interminable delay and continued uncertainty as to his rights." *Id.*

In cases where counsel's mistake or omission falls within one the previously enumerated examples of an inexcusable mistake or omission, clients cannot seek 60(b) relief. *Neimaizer* at 63. This principle is based on the theory that a person who selects counsel cannot avoid the consequences of the agent's acts or omissions. *Id.* at 62 (citing *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962) (other citations omitted)).

\*5 Guided by these principles, I turn to plaintiff's motion. I start by noting that plaintiff's numerous arguments concerning the affidavit in opposition to the summary judgment motion miss an important point. The summary judgment motion was not granted because no affidavits were ever filed. The fraud claim was carefully evaluated by both Magistrate Judge Lee and myself prior to dismissal.

Magistrate Judge Lee generously considered the substance of each submitted affidavit, despite their irregularities. In her Supplemental Report and Recommendation of September 24, 1992, Magistrate Judge Lee concluded that the affidavit executed on September 14, 1992, failed to establish a genuine issue of material fact. Supplemental Report at 3. The affidavit misdated August 28 was considered by Magistrate Judge Lee in her Second Supplemental Report dated November 17, 1992. She again determined that even in the light most favorable to plaintiff, the affidavit still did not establish material issues of fact sufficient to defeat defendants' motion.

I refused to consider the misdated affidavit because it was never filed with the Clerk of the Court pursuant to Fed.R.Civ.P. 5(e), and therefore was not part of the record as required for de novo review under Fed.R.Civ.P. 72(b). Order at 8-9. I did, however, consider the substance of the September 14 affidavit, which was drafted with the benefit of the guidance provided by Magistrate Judge Lee's Original Report and Recommendation. Viewing the affidavit in the light most favorable to plaintiff, I agreed with Magistrate Judge Lee that "its failure to pierce the pleadings made it inadequate to defeat the defendant's motions." *Id.* The affidavit made nothing more than "conclusory assertions of fact" that repeat the pleadings. *Id.* No new information had been submitted to the Court that would have suggested that plaintiff would be able to pierce the pleadings and establish a genuine issue of material fact. See *id.* at 9-10 (citing cases).

Repetition of arguments that have received full consideration fails to constitute a genuine ground for 60(b)(1) relief. *Peterson v. Valenzo*, 803 F.Supp. 875, 877 (S.D.N.Y.1992), *aff'd*, 996 F.2d 303 (2d Cir.1993).

The complex saga encompassing plaintiff's affidavits is one of many factors suggesting that plaintiff has interfered with the adversary process and has consequently failed to prosecute under Fed.R.Civ.P. Rule 41(b). [FN2] Plaintiff's belief that the dismissal for failure to prosecute was unwarranted because the original affidavit was "promptly re-executed" belies reality. *Sandler Aff.* ¶ 12. Even if LeFrere received the affidavit in January, counsel fails to explain adequately why the affidavit was not filed with the Clerk of the Court. See, e.g., F.R.Civ.P. Rule 5(e); Local General Rule 1(a); Local Civil Rules 1(b), 3(a)-(c). Counsel cannot shift the responsibility for the failure to file to his secretary. The New York Code of Professional Responsibility provides, in part:

\*6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyers maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product.

New York Code of Professional Responsibility, Ethical Canon 3-6 (1990). That seven months, a missed Status Conference, and two reports by a Magistrate Judge passed before counsel re-executed the affidavit suggests that counsel's supervision over his client, his staff, and this case was lacking. I also note that when counsel re-executed the affidavit in August 1992, he again disregarded proper procedural rules by sending the affidavit to Judge Wood's Chambers rather than to the Clerk of the Court. The result of this action was a gross waste of the time and the resources of Magistrate Judge Lee, who issued two supplemental reports in less than eight weeks because she was, understandably, unaware of the existence of the re-executed affidavit at the time of her first supplemental report.

The failure to comply with the discovery schedule established by Judge Wood also justifies the conclusion that plaintiff failed to prosecute the case. In fact, the Second Circuit has held that failure to participate in discovery justifies denial of a 60(b) motion. *Salomon* at 128 (citing *Sieck v. Russo*, 869 F.2d 131, 134-35 (2d Cir.1989)). See also

Maduakolam at 56 (same). Plaintiff suggests that its failure to participate in discovery was in the interests of judicial economy. Plaintiff states that because defendant Gregory had not yet been served, "any depositions in his absence would have been a nullity as to him and would have had to be repeated." Sandler Aff. ¶ 6. This statement overlooks the fact that Gregory was not present in the litigation because plaintiff ignored Judge Wood's repeated instructions to serve a complaint on Gregory in a timely manner. Plaintiff's second justification for failing to participate in discovery, that somehow discovery had been stayed definitely because of the LeFrere's letter to Judge Wood, is also inadequate to warrant 60(b) relief. The letter does speak of postponing the trial date pending resolution of the summary judgment motion. Pl.Ex. C. However, the letter makes absolutely no reference to the discovery timetable. Id. Regardless, the letter of a pro se defendant does not render the timetable established by Judge Wood irrelevant.

should retain subject matter jurisdiction even though the main federal claim was dismissed on a summary judgment motion. 28 U.S.C. § 1367(c)(3).

END OF DOCUMENT

Finally, plaintiff's counsel offers absolutely no explanation for missing a scheduled Status Conference. Nor does plaintiff explain why it failed to serve a defendant despite being instructed to do so by Judge Wood. In short, plaintiff's actions display an inexcusable pattern of obstruction of the adversary process. Although the Second Circuit affords "extra leeway" to pro se defendants who fail to meet procedural requirements, such protection does not extend to plaintiffs who are represented by counsel. Enron Oil at 95-96. Plaintiff has failed, as a matter of law, to establish any valid reason for invoking this Court's extraordinary powers under Rule 60(b).

#### CONCLUSION

\*7 For the reasons stated above, plaintiff's motion for reconsideration of my Order of July 15, 1993 is DENIED, and the Clerk of the Court is instructed to enter judgment in favor of defendants and dismissing this action with prejudice.

SO ORDERED.

FN1. Sandler claims that this date is a mistake and should read January 14, 1992.

FN2. For purposes of this motion I assume that plaintiff would be able to convince this Court that it

MANDATE

91 CV 3335  
SDNY

Sotomayer

JAN 10 1994

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

DOC. 37

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of December, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE GEORGE C. PRATT,  
HONORABLE PIERRE N. LEVAL,  
HONORABLE GUIDO CALABRESI, Circuit Judges.

----- x

ULF W. RUNQUIST, as Trustee of RUNQUIST  
& CO., INC. PROFIT SHARING TRUST,

Plaintiff-Appellant,

- against -

Docket No. 94-7284

DELTA CAPITAL MANAGEMENT, L.P.,

Defendant,

JOHN M. LeFRERE & WILLIAM H. GREGORY,

Defendants-Appellees.

----- x

This appeal from a judgment of the United States District Court for the Southern District of New York, Sonia Sotomayer, Judge, came on to be heard on the transcript of record and was argued by counsel for plaintiff-appellant and by defendant-appellee John M. Lefrere, pro se.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment appealed from is hereby **reversed and remanded**.

Plaintiff Runquist alleged in his complaint that he had purchased a limited partnership interest in Delta Capital Management, L.P. ("Delta") in reliance upon false representations made by Delta's general partners, pro se defendants John LeFrere and William Gregory. Specifically, the complaint alleges that LeFrere and Gregory had furnished plaintiff with written materials, which they had prepared, that included a "confidential" offering memorandum stating that Delta did not intend to invest more than 50% of its total assets in any one industry, or more than 25% of its assets in the securities of any issuer. In reliance on that

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memorandum, Runquist invested \$750,000, his life savings, in Delta. Unfortunately for him, at the time of his investment, more than 75% of Delta's assets were invested in securities of First Executive Corp., a company which has since suffered severe financial reversals, and whose stock is now virtually worthless.

Runquist asserted violations of federal securities laws as well as state-law claims of breach of fiduciary duty, negligence, and common-law fraud. On December 3, 1991, LeFrere moved for partial summary judgment on the ground that Runquist could not prove reliance.

Judge Kimba M. Wood referred the motion to Magistrate Judge Barbara E. Lee. On February 20, 1992, Magistrate Judge Lee established April 6, 1992, as the deadline for Runquist's submission of papers in opposition to the summary-judgment motion. Runquist filed no papers by that deadline. On August 17, 1992, Magistrate Judge Lee issued her first report and recommendation, which concluded that plaintiff: (1) had completely failed to demonstrate reliance, an essential element of his case; (2) had not arrived at a scheduled status conference; (3) had not served the complaint on defendant Gregory in a timely manner, despite repeated instructions by Judge Wood; (4) had failed to engage in discovery within the time frame established by Judge Wood; and (5) had failed to "oppose LeFrere's timely motion for summary judgment". Magistrate Judge Lee recommended dismissing the fraud claim against LeFrere for failure to show a triable issue as to reliance; she further noted that "the absence of reliance \* \* \* is fatal to plaintiff's [federal] claims against all defendants". In addition, she recommended dismissal under F.R.C.P. 41(b) of the pendent state common-law claims against all defendants for failure to prosecute under F.R.C.P. 41(b).

On August 28, 1992, Runquist filed objections to the report and moved for reconsideration before the magistrate judge. Focusing on the magistrate judge's statement that plaintiff had failed to oppose the summary judgment motion, plaintiff's counsel alleged that he had drafted an affidavit in opposition to the motion in December 1991; that he had discussed the affidavit with Runquist on January 2-3, 1992, but later learned it was never filed with the clerk because of a disgruntled secretary who had left his firm's employment in January 1992. He attached to the motion for reconsideration what purported to be a copy of the unfiled affidavit. The copy was not signed, but the attorney represented that the affidavit would be re-executed upon Runquist's return from Sweden the next day, August 29, 1992.

In a supplemental report and recommendation dated September 24, 1992, Magistrate Judge Lee considered a submitted affidavit execut-

ed by Runquist on September 14, 1992. That affidavit differed substantially from the draft affidavit attached to Runquist's August 28, 1992, motion for reconsideration. Magistrate Judge Lee concluded that the new affidavit failed to establish a genuine dispute over a material issue of fact. She also found that plaintiff's "lame excuses" for continued delay were insufficient to warrant modification of the prior recommendation to dismiss the state common-law claims for failure to prosecute.

Runquist renewed his objections and filed another motion for reconsideration before the magistrate judge. That motion contained an affidavit identical to the draft attached to the August 28th motion. Runquist claimed that this affidavit had been sent to Judge Wood's chambers on or about August 31, 1992; however, the affidavit was not filed with the clerk and was not part of the record considered by the magistrate judge. Curiously, Runquist's signature purported to have been notarized in New York on August 28, 1992, which was one day prior to Runquist's return from Sweden, according to his attorney's affidavit included in the August 28th motion. (The attorney later explained that, in notarizing his client's affidavit, he had simply made a mistake as to the date.)

On November 17, 1992, Magistrate Judge Lee issued a second supplemental report and recommendation. She determined that even with his latest affidavit Runquist still had failed to establish a material issue of fact. She also adhered to her earlier recommendation to dismiss the remaining claims for failure to prosecute.

On July 19, 1993, Judge Sotomayer, to whom the case had been reassigned, rejected Runquist's objections, adopted the second supplemental report and recommendation of Magistrate Lee, and dismissed the entire complaint.

Runquist's motion for reconsideration and for relief from the judgment under F.R.C.P. 60(b) was denied on February 16, 1994.

Runquist raises two issues on appeal: (1) whether the affidavits and exhibits submitted to the district court raise a triable issue of fact on his fraud and reliance claims under federal law; and (2) whether the district court abused its discretion by dismissing all of the remaining claims under rule 41(b).

A. Summary Judgment

When a district court reviews objections to a magistrate judge's report and recommendation for summary judgment, it must

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make a de novo determination of the motion "upon the record, or after additional evidence". Fed. R. Civ. P. 72(b); see also 28 U.S.C. § 636(b)(1)(c). Here we look at the entire record as it was before the district court.

The August 28th affidavit, submitted to the magistrate judge in draft form on the first motion for reconsideration and subsequently submitted in executed form, raised triable issues of fact as to whether defendants had misrepresented Delta's investment plan to Runquist and whether Runquist reasonably relied on those misrepresentations. In his motion for summary judgment, LeFrere attempted to show that Runquist could not have relied on any misrepresentation by defendants, asserting that Runquist had been provided with substantial information concerning Delta's investment practices prior to signing the subscription agreement. These allegations were directly countered by Runquist's August 28th affidavit. If the August 28th affidavit were considered, it is apparent that summary judgment would be inappropriate.

The question, then, is whether the district court should have considered the August 28th affidavit. By the time the matter came before the district court, Runquist had submitted a signed and sworn copy of the affidavit, albeit one bearing a questionable date. Runquist also had submitted both his sworn statement, contained in his September 14th affidavit, that he had in fact sworn to an affidavit identical to the August 28th affidavit when it was originally presented to him in January 1992, and a copy of a receipt from the notary public who notarized Runquist's signature on January 2, 1992. It was apparent that any failure either to oppose LeFrere's original summary judgment motion or to file the August 28th affidavit properly in the first instance was attributable to counsel's manifold shortcomings, rather than to Runquist's default. We do not condone counsel's numerous missteps. Simple adherence to the Federal Rules of Civil Procedure would have avoided the need for numerous motions for reconsideration and additional explanatory affidavits. However, under the particular circumstances of this case, where the plaintiff himself has repeatedly taken timely action to present evidence to the court, we believe that, given our well-established preference that cases be decided on the merits, the August 28th affidavit should have been considered and summary judgment should have been denied.

B. Dismissal for Lack of Prosecution

Runquist also contends that the district court's rule 41(b) dismissal of his remaining claims was an abuse of discretion.

Rule 41(b) provides:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant. Unless the court in its order for dismissal otherwise specifies a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Although this rule speaks of dismissal on a defendant's motion, a district court may also act on its own motion, Schenck v. Bear, Stearns & Co., 583 F.2d 58, 60 (2d Cir. 1978), as it did in this case. We have noted, however, that "dismissal [for failure to prosecute under 41(b)] is a 'harsh remedy to be utilized only in extreme situations.'" Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988) (quoting Thielmann v. Rutland Hosp., 455 F.2d 853, 855 (2d Cir. 1972)). Our standard of review for such dismissals under Rule 41(b) is abuse of discretion. Schenck, 583 F.2d at 60.

We assess a rule 41(b) dismissal in light of the record as a whole, considering the following factors: (1) the duration of the plaintiff's failures; (2) whether the plaintiff had received notice that further delays would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) whether the judge has adequately assessed the efficacy of lesser sanctions. Harding v. Federal Reserve Bk. of New York, 707 F.2d 46, 50 (2d Cir. 1983).

Applying these factors to the record in this case, we conclude that the district court should not have dismissed these claims. There is no doubt, of course, that the failures of Runquist's attorney were many and continued over several months. However, the district court did not discuss the possible efficacy of other, lesser sanctions, a factor to which we have attached particular importance. See Schenck, 583 F.2d at 60 (stating that "[t]he sound exercise of discretion requires the judge to consider and use lesser sanctions in the appropriate case"). Moreover, it is conceded that no express warning that further inaction would result in the termination of the case was given before dismissal.

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We understand and sympathize with the district court's frustration in dealing with the repeated inadequacies of Runquist's counsel. We think, however, that, despite counsel's many failings, the imposition of the harsh sanction of dismissal, without warning and without considering the efficacy of lesser sanctions, was excessive in the circumstances of this case.

The judgment of the district court is reversed and the case is remanded for further proceedings.

George C. Pratt, U.S.C.J.

Pierre N. Leval, U.S.C.J.

Guido Calabresi, U.S.C.J.

**A TRUE COPY  
GEORGE LANGE III, SLEEK**

Генд. Секрет

**BOLT ELECTRIC, INC., Plaintiff,**  
**v.**  
**The CITY OF NEW YORK and Spring City**  
**Electrical Manufacturing Co., Defendants.**

No. 93 CIV. 3186(SS).

United States District Court, S.D. New York.

March 23, 1994.

**OPINION AND ORDER**

SOTOMAYOR, District Judge.

\*1 Pursuant to Fed.R.Civ.P. 12(b)(6), defendant, the City of New York ("NYC"), moves to dismiss the amended complaint in this diversity action for contract nonpayment. Defendant NYC contends that the alleged contract at issue is unenforceable because it does not comply with NYC statutory and regulatory requirements, and because it violates public policy. For the reasons discussed below, defendant's motion is granted.

**Background**

Plaintiff, Bolt Electric, Inc. ("Bolt"), is a New Jersey corporation which seeks payment for lighting and related materials it designed or supplied for a reconstruction project of the Eastern Parkway in Brooklyn, New York ("the Project"), supervised by the Department of Transportation ("DOT"). In 1987, after a competitive sealed bidding process, NYC awarded Naclerio Contracting Co., Inc. ("Naclerio"), a 58.7 million dollar contract for the Project ("the Contract").

At issue in the instant motion before me are outstanding payments for materials ordered by Naclerio from Bolt in February 1988 and October 1991. The February 1988 purchase order included materials which Bolt claims it specially designed for the Project. The subsequent October 1991 purchase order included several of the February 1988 materials, as well as certain new items. It is unclear how much payment Bolt received for the materials in these purchase orders.

Bolt also contracted with L.K. Comstock & Company, Inc. ("Comstock"), a Naclerio electrical subcontractor under the Contract, to supply lighting

materials for the Project. Bolt claims that these materials were specifically required under the Contract. NYC, however, was not a party to either agreement between Bolt and Naclerio, or Bolt and Comstock.

The Naclerio Contract with NYC was ill-fated. As time passed, the Project fell further and further behind schedule and was delayed several years. As the Project languished, Naclerio's financial status also grew tenuous and, in 1990, Naclerio filed for bankruptcy protection. [FN1] Naclerio did not pay Bolt or Comstock during 1990 and 1991, and both informed NYC of their respective nonpayment problems with Naclerio. Eventually, in 1991, Comstock informed NYC that it was withdrawing from the Project because of nonpayment.

Naclerio thereafter requested that Bolt provide the lighting materials it had ordered. Despite the existing and potential nonpayment problems, Bolt agreed to continue with the Project on two conditions. First, Bolt demanded full payment for outstanding debts on materials it had already provided. Second, it wanted NYC to guarantee payment of all remaining materials.

Although it is unclear whether Naclerio complied with Bolt's first condition, Bolt claims that it continued producing the Naclerio items because NYC met its second condition by providing a guarantee of payment. Bolt alleges this guarantee is commemorated in a letter dated September 25, 1991, from DOT Deputy Commissioner Bernard McCoy ("the McCoy Letter").

\*2 The McCoy Letter states, in pertinent part, that:

[a]ll conforming material ordered by Naclerio on their Purchase Order with [Bolt] will be paid to Naclerio by the City of New York.

In the event Naclerio Contracting Co., Inc. defaults in its contract with the New York City Department of Transportation, the Department will purchase from Bolt Electric, Inc. all materials ordered specifically for the Eastern Parkway contract.

Affidavit of Gilman J. Hallenbeck ("Hallenbeck Affidavit"), Exhibit H.

Relying upon the McCoy Letter as a guarantee, Bolt accepted another purchase order from Naclerio

for over two million dollars of lighting materials, including materials previously ordered but which Bolt had refused to deliver due to nonpayment problems. Bolt states that some of the materials included in this order had previously been inspected and approved by NYC. Bolt also continued to prepare and deliver other materials for the Project.

Bolt learned, during the summer of 1992, that NYC might declare Naclerio in default. According to Bolt, at a meeting with NYC officials in August 1992 and at subsequent meetings, NYC officials "assured Bolt that even if Naclerio was released and a new general contractor was brought on board, NYC would honor its commitment to purchase from Bolt the materials ordered by Naclerio." Bolt's Memorandum of Law in Opposition to Defendant the City of New York's Motion to Dismiss ("Bolt's Memorandum"), p. 9. The NYC officials also instructed Bolt to continue working on the Project. *Id.*

Naclerio's default was indeed imminent and, in October 1992, the NYC declared Naclerio in default. Bolt maintains that at another meeting on October 26, 1992, with several NYC officials, including DOT Assistant Commissioner Lawrence Gassman and DOT chief lighting official Steve Galgano, NYC again explicitly directed Bolt to continue work on the materials ordered by Naclerio and on new materials not previously ordered. Bolt claims that, with the McCoy Letter in his hand, DOT Assistant Commissioner Gassman assured Bolt that "the City will honor its commitment to you," *id.* at 10, and Bolt, again relying on these assurances, continued to produce the requested items.

After the declaration of Naclerio's default, NYC decided to complete the Project by submitting it to the Project's surety, Aetna Casualty & Surety Company ("Aetna"). Although Aetna hired subcontractors other than Bolt to work on the Project materials, Bolt alleges that Aetna promised that Bolt would continue to serve as the electrical materials supplier of the Project and that the NYC guarantee in the McCoy Letter would be honored. Notwithstanding these assurances, on February 12, 1993, the Project's new electrical subcontractor notified Bolt that it was no longer on the Project. Defendant Spring City was ultimately selected to supply the materials previously contracted by

Naclerio in the October 1991 purchase order. [FN2]

In the case before me, Bolt seeks \$2,592,746.20 for payments due under the February 1988 and October 1991 purchase orders, which Bolt contends NYC is bound to pay pursuant to the guarantee set forth in the McCoy Letter. Bolt also claims that in reliance on NYC's assurances of payment, Bolt released its liens against Naclerio and Comstock for prior purchase orders, and, at NYC's request, withdrew its third-party complaint against NYC in an Ohio lawsuit against Bolt, filed by one of its suppliers for expenses associated with the Project. Hallenbeck Affidavit, ¶¶ 27-28.

\*3 Defendant NYC moves to dismiss Bolt's complaint against it, arguing that there is no legally viable agreement between NYC and Bolt which requires NYC to pay for the items in the purchase order. Initially, NYC argued that a municipal contract is valid and legally binding only if it complies with the express statutory requirements of competitive sealed bidding or the statutorily recognized alternatives to the sealed bidding process. NYC contends that because Bolt never participated in the bidding process, or otherwise complied with alternative procurement prerequisites, the McCoy Letter cannot constitute a valid contract with NYC. Also, a contract which does not satisfy the statutory prerequisites, according to NYC, is a nullity because it violates NYC's laws and rules and, hence, contravenes public policy.

At the oral argument on the extant motion, held October 23, 1993, NYC conceded that the bidding requirement was not absolute and that it could be avoided in certain situations, including when a contractor defaults. Transcript of October 23, 1993 Hearing, pp. 3-4; 7; 9. [FN3] However, NYC asserted that even in the case of a default, it may circumvent the bidding requirement only after it has formally declared the contractor in default. The timing of the default announcement, NYC argued, is dispositive and anything preceding the announcement is without legal significance unless it complies with the statutory bidding prerequisites.

A consistent theme of NYC's arguments is that, ultimately, any contract which has not satisfied the applicable statutory requirements is invalid as against public policy. Defendant NYC's public policy argument may be summarized succinctly as

alleging that the statutory restrictions on a municipality's right to contract cannot be ignored or avoided because they are fundamental to "responsible municipal government." Thus, public accountability, according to NYC, is paramount.

Bolt responds that the McCoy Letter did not have to comply with bidding requirements or any alternative contracting process, and that NYC's "official" declaration of Naclerio's default is irrelevant to whether NYC agreed to pay Bolt for the materials ordered for the Project. Bolt also argues that if I determine that some approval was required in order for NYC to enter a valid procurement agreement with Bolt, I should overlook such a requirement on purely equitable grounds because there is no proof of "fraud, collusion or other impropriety in the execution of the [McCoy Letter]." Bolt's Memorandum, p. 22. Bolt further contends that it is unfair to deny recovery against NYC where Bolt has acted in good faith and upon reliance of NYC's assurances.

#### DISCUSSION

##### A. The Motion to Dismiss for Failure to State a Claim

Dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is warranted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief." *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir.1991), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). The issue "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In considering the motion, the allegations in the complaint must be construed favorably to the plaintiff. *Walker v. New York*, 974 F.2d 293, 298 (2d Cir.1992), cert. denied, 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993).

\*4 Defendant NYC does not challenge Bolt's interpretation of the McCoy Letter, but rather, for purposes of this motion, NYC accepts the proposition that a contract between DOT and Bolt existed. Memorandum of Law in Support of City's Motion to Dismiss the Amended Complaint ("NYC's Memorandum"), pp. 1-2. NYC argues

that because the McCoy Letter does not comply with mandatory statutory requirements, however, it is an unenforceable contract, either because it is statutorily invalid or because it violates public policy. [FN4]

NYC agrees that there are two categories of valid contracts exempt from the competitive bidding requirement. The first category is best described as contracts which are formed in accordance with alternative methods to competitive bidding explicitly set forth in the Charter, like the non-bidding process for emergency procurements. See New York City Charter § 315. Since the parties agree that the alleged contract between Bolt and NYC does not come within the coverage of any of these alternative mechanisms, there are no viable arguments that the McCoy Letter satisfies these sections of the New York City Charter ("Charter"). [FN5]

The second category of bid-exempt contracts includes contracts which are valid if they are a consequence of a default of a contractor, and entered into in order to complete the work under a contract which has been previously submitted for bidding. See N.Y.C. Administrative Code § 6-102(b) (1992). The McCoy Letter arguably falls within this category. *Id.*; see also Contract, Article 48.

Nevertheless, regardless of whether the contracts were formed in accordance with recognized alternative nonbidding procedures, or as a consequence of a default, all NYC contracts must satisfy certain approval procedures set forth in the Charter, New York City's Administrative Code ("the Administrative Code") and the Procurement Policy Board Rules ("PPB Rules").

As discussed below, NYC's mandatory approval requirements and public policy claims are its most defensible and compelling arguments. Any agreement or contract with Bolt, in furtherance of the Contract and for purposes of completion of the Project, must satisfy the requirements set forth in NYC's rules and regulations. These requirements are alternatives to the competitive sealed bidding process which, though theoretically less burdensome, are mandatory and cannot be waived. Since the McCoy Letter does not comply with these statutory requirements, NYC argues it is invalid and to recognize such a contract would violate public policy. I agree.

**1. Declaration of Default as a Municipal Contract Prerequisite**

New York State's General Municipal Law § 103.1 requires that contracts for public works must be awarded to the lowest bidder.

Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than seven thousand dollars and all purchase contracts involving an expenditure of more than five thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein ..., to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section....

\*5 N.Y. GEN. MUN. LAW § 103.1 (McKinney 1986). [FN6]

The Charter specifically states that all City procurement contracts shall be awarded pursuant to a competitive bidding process initiated by NYC's issuance of an invitation for bids. Interested bidders submit sealed bids and NYC awards the contract to the lowest responsible bidder. New York City Charter § 313. However, as already stated, and as NYC recognizes, the bidding process is not inviolate or mandatory in all cases. See *United States v. City of New York*, 972 F.2d 464, 471-72 (2d Cir.1992) (New York City Charter includes valid exceptions to the traditional state law requirement that New York City bid all its contracts). The Charter provides for methods of awarding procurement contracts, without use of the bidding procedure, see e.g., New York City Charter § 312 (exceptions to the procurement process), § 315 (emergency procurement), § 317 (alternatives to competitive sealed bidding), and, as the parties agree, under the Contract here, NYC could complete the work without rebidding, if Naclerio defaulted.

Bolt argues that since NYC could contract without bidding to complete the work after Naclerio's default, it has the authority, as a matter of law, to enter into an agreement, such as the McCoy Letter, to pay for the Project materials. NYC counters that a formal declaration of a default is a prerequisite to the valid formation of a municipal contract to complete the work under the defaulted contract.

I am not persuaded that NYC cannot act on what ultimately is its discretionary authority to complete the Contract, in anticipation of a default, simply because it has not yet formally declared a default. To hold otherwise would place an unwarranted and unjustified burden on NYC from invoking its discretion—discretion which appears otherwise unencumbered. Cf. *In re Matter of Leeds*, 53 N.Y. 400, 403 (1873) (readvertising may be inappropriate where it causes an injudicious delay); *City of New York v. Palladino*, 146 A.D. 850, 131 N.Y.S. 807, 809 (1st Dept.1911) (readvertising for contract to collect refuse not required, in part, where accumulating refuse was menace to the public).

Despite the total absence in the General Municipal Law, the Administrative Code or the Contract of any time provision of the sort NYC proposes, NYC requests that I read into these sources a requirement that a formal declaration of default must precede any attempts to secure the means by which to complete the work under the contract. Such an interpretation is unwarranted and unjustified by the plain language of the law or the Contract which permits NYC to complete the Contract "by such means and in such manner" as it deems desirable. See Article 48. NYC must be free to react in potentially urgent situations, like securing specially-designed materials or the services of a subcontractor, prior to a default. Otherwise, NYC would bear an unnecessary risk in the completion of its defaulted contracts.

\*6 Defendant NYC relies on the language of Article 48 of the Contract to support its argument that the bidding-circumvention provisions found in this Article are triggered only once a default is actually declared and the contractual notice requirements are followed. Article 48, in relevant part, states simply that the Commissioner of the Department of Highways of the City of New York, after declaring the Contractor in default, may then have the work completed by such means and in such manner, by contract with or without public lettings, or otherwise, as he may deem advisable, utilizing for such purpose such of the Contractor's plan, materials, equipment, tools and supplies remaining on the site, and also such subcontractors, as he may deem advisable.

This language alone is insufficient to support NYC's conclusion that its discretion is limited. This Article addresses only the actual act of

completing the Contract, it does not state that NYC could not take, pre-default, actions to facilitate such completion.

In fact, the language of the Contract clearly provides that if the contractor defaults, NYC may complete the work "by such means and in such manner" as advisable. Thus, the Contract grants NYC broad discretion in furtherance of completing the work, without any prohibition on NYC from agreeing, pre-default, to pay Bolt for the undelivered Project materials should Naclerio default. Nothing therein suggests that the notice requirements which exist, in part, for the benefit of the contractor, also prohibit NYC from acting in anticipation of a default, without bidding.

## 2. Comptroller Requirements on All Municipal Contracts

The ability to exercise discretion to complete work without rebidding before or upon a default does not, however, relieve the City and contractors from complying with other legal obligations and requirements. NYC maintains that any contracts or agreements not submitted for bidding, must still comply with other statutory requirements set forth in the Charter, the Administrative Code and the PPB Rules. These requirements mandate that contracts be filed and registered with the NYC Comptroller prior to their implementation. NYC's Memorandum, pp. 14-22.

Three provisions control in the instant case. First, Charter § 328(a) states:

Registration of contracts by the comptroller. a. No contract or agreement executed pursuant to this charter or other law shall be implemented until (1) a copy has been filed with the comptroller and (2) either the comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner, unless an objection has been filed pursuant to subdivision c of this section, or the comptroller has grounds for not registering the contract under subdivision b of this section. (emphasis added) [FN7]

Thus, all contracts and agreements are effective only upon filing and registration with the Comptroller. See *Prosper Contracting Corp. v. Board of Educ. of the City of New York*, 73 Misc.2d 280, 341 N.Y.S.2d 196, aff'd, 43 A.D.2d 823, 351 N.Y.S.2d 402 (1st Dept.1974).

\*7 Second, § 6-101 of the Administrative Code states, in relevant part:

Contracts; certificate of comptroller. a. Any contract, except as otherwise provided in this section, shall not be binding or of any force, unless the comptroller shall indorse thereon the comptroller's certificate that there remains unexpended and unapplied a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same.

\* \* \*

c. It shall be the duty of the comptroller to make such indorsement upon every contract so presented to him or her, if there remains unapplied and unexpended the amount so specified by the officer making the contract, and thereafter to hold and retain such sum to pay the expense incurred until such contract shall be fully performed. Such indorsement shall be sufficient evidence of such appropriation or fund in any action.

d. The provisions of this section shall not apply to supplies, materials and equipment purchased directly by any agency pursuant to subdivisions (c) and (d) of section three hundred [twenty nine] of the charter. [FN8] (emphasis added)

By reference to Charter §§ 329(c) and (d), § 6-101 excludes any small purchases such as direct agency purchase of goods in amounts not exceeding \$1,000 in costs per transaction, or, upon the prior approval of the Commissioner of General Services or the Mayor's approval, an amount not exceeding \$5,000. The \$5,000 limit may only be increased with the additional approval of the Comptroller. These increases must be published in the City Record.

Lastly, PPB Rule § 5-07(b) provides that:

[n]o contract or agreement executed pursuant to the New York City Charter or other law shall be effective until:

(1) The Comptroller has registered the contract or thirty (30) days have elapsed from the date of filing, during which the Comptroller has neither raised an objection pursuant to subdivision (i) below nor refused to register the contract pursuant to subdivision (h) below. (emphasis added)

These sections establish that, with the exception of contracts for goods costing small amounts, clearly

not the situation in Bolt's case, NYC and its agencies cannot unilaterally enter contracts or agreements absent approval by or registration with the Comptroller.

Recognizing the extent of NYC's discretion and the need for flexibility, especially under exigent circumstances, does not equate with discarding statutory and regulatory requirements governing NYC contracts. In accordance with New York law, even if NYC chose to proceed with Bolt under the Naclerio Contract, before or after the default, the McCoy Letter would not be enforceable unless it satisfied all requirements which govern contracts awarded by other than the competitive sealed bidding process.

Bolt argues, and NYC concedes, that a mere irregularity or technical violation of statutory requirements does not prohibit recovery on a quasi-contract basis. See, e.g., *Ward v. Kropf*, 207 N.Y. 467, 101 N.E. 469 (1913) (contractors can recover under a quasi-contract analysis where local entity failed to comply with legal requirement that the maximum and minimum cost of improvement be stated in proposition to electors, in order to avoid unjust enrichment by local entity for benefit received from actual services provided); *Littlefield-Alger Signal Co. v. County of Nassau*, 43 Misc.2d 239, 250 N.Y.S.2d 730 (Sup.Ct. Nassau Co.1964) (low bidder is entitled to recover for the services it provided even though contract is invalid because county executive failed to execute it where defendant received a benefit from the services and there is no offense to public policy). However, even quasi-contract recovery is unavailable where "the making of the contract flouted a firm public policy or violated a fundamental statutory restriction upon the powers of the municipality or its officers...." *Cassella v. City of Schenectady*, 281 A.D. 428, 120 N.Y.S.2d 436, 440 (3rd Dept.1953) (citing *McDonald v. Mayor*, 68 N.Y. 23, 28; *Seif v. City of Long Beach*, 286 N.Y. 382, 36 N.E.2d 630 (1941); *Brown v. Mt. Vernon Housing Auth.*, 279 A.D. 794, 109 N.Y.S.2d 392 (2d Dept.1952); 6 WILLISTON, CONTRACTS (rev. Ed.) § 1786A; 2 Restatement, Contracts § 598).

\*8 The Bolt case is not a case of a mere technical failure in executing an otherwise valid contract. As discussed below, the Bolt contract clearly violates New York's public policy against recognizing

agreements by municipal agents who act without authority to contract on behalf of the municipality. See *McDonald v. Mayor*, 68 N.Y. 23 (1867).

### 3. NYC's Public Policy Claim

New York's public policy is clear that municipal contracts or agreements which do not satisfy all of its procurement requirements are neither valid nor enforceable. In New York, a municipality's authority to contract is strictly limited statutorily. *Henry Modell & Co. v. City of New York*, 159 A.D.2d 354, 355, 552 N.Y.S.2d 632, 634 (1st Dept.) (citing *Genesco Entertainment, A Div. of Lymutt Industries, Inc. v. Koch*, 593 F.Supp. 743, 747-48 (S.D.N.Y.1984), appeal dismissed, 76 N.Y.2d 845, 559 N.E.2d 1288, 560 N.Y.S.2d 129 (1990)). The restrictions exist to "protect the public from the corrupt or ill-considered actions of municipal officials." *Id.* It is well established that a municipal contract which violates express statutory provisions is invalid. *Granada Bldgs., Inc. v. City of Kingston*, 58 N.Y.2d 705, 708, 444 N.E.2d 1325, 1326, 458 N.Y.S.2d 906, 907 (1982) (citations omitted). Thus, where municipal agents act without authority, any contract formed is without legal validity. *Id.* According to the court in *Modell*,

"where there is a lack of authority on the part of agents of a municipal corporation to create a liability, except by compliance with well-established regulations, no liability can result unless the prescribed procedure is complied with and followed."

*Id.*, quoting *Lutzken v. City of Rochester*, 7 A.D.2d 498, 501, 184 N.Y.S.2d 483 (4th Dept.1959).

Moreover, to accord legal validity to a contract which fails to comply with the statutory mandates is contrary to public policy. As stated in *Genesco*, [t]o allow recovery under a contract which contravenes [statutory restrictions on a municipal corporation's power to contract] gives vitality to an illegal act and grants the municipality power which it does not possess "to waive or disregard requirements which have been properly determined to be in the interest of the whole." [ ] *Genesco*, 593 F.Supp. at 747-48 & n. 14, quoting *Lutzken*, 7 A.D.2d at 499, 184 N.Y.S.2d at 486.

The alleged agreement with NYC contravenes

public policy because it does not comply with NYC's registration and filing requirements, critical components of a process designed, in part, to avoid corruption, to ensure sufficient appropriations for municipal contracts and to protect against fiscal excess. Cf. *Cassella v. City of Schenectady*, 281 A.D. 428, 120 N.Y.S.2d 436, 440 (3rd Dept.1953) (plaintiff cannot recover in quasi-contract where local Civil Service Commission failed to certify plaintiff for appointment as fire surgeon, where invalidity is based on irregularity or technical violation because contract flouts firm public policy, and contract violates a fundamental statutory restriction upon powers of municipality or its officers). In the Bolt case, the Comptroller's oversight is exactly the type of monitoring of a financially strapped project envisioned by the legislature, for, as the parties concede, the Project had exceeded its expected completion schedule and expenses. Thus, concerns over financial viability, which are fundamental aspects of municipal contracts, were practical realities of the Project. Thus, the manner in which the Bolt contract was formed undermines the very purpose of the municipal law in failing to have the Comptroller, the entity responsible for the monitoring of the fiscal integrity of NYC projects, certify and approve the agreement.

#### B. Bolt's Estoppel Claims and Request for Relief

\*9 Bolt contends that since the McCoy Letter is not tainted by any impropriety chargeable to Bolt, however, that I should recognize NYC's promises and assurances for payment of the Project materials. Bolt maintains that it acted completely in good faith and upon reliance of NYC's assurances when it withdrew liens against Naclerio and Comstock, and dismissed third-party claims against NYC in pending litigation. Bolt's allegations, in essence, are complaints that NYC acted in a devious manner in seeking Bolt's abandonment of these legal claims and that, therefore, NYC should be estopped from asserting mandatory compliance with the statutory and regulatory prerequisites as a defense to this litigation.

Generally, estoppel is not available in New York against public entities for the unauthorized acts of their agents. *Granada*, 58 N.Y.2d at 708, 444 N.E.2d at 1326, 458 N.Y.S.2d at 907 ("because a governmental subdivision cannot be held answerable

for the unauthorized acts of its agents ..., we have frequently reiterated that estoppel is unavailable against a public agency.") (citations omitted).

The estoppel rule is based, in part, on New York's public policy which charges those bargaining with municipalities with the burden of determining the contracting authority of municipal representatives. Those dealing with NYC must ascertain the extent of the municipal agent's authority and must be aware of the statutory and regulatory requirements applicable to municipal contracts. *McDonald*, 68 N.Y. 23. A party bargains or contracts with a municipality at its own risk and bears the burden of being informed of the applicable procedures and requirements. *Modell*, 159 A.D.2d 354, 552 N.Y.S.2d at 634; *Gill*, 152 A.D.2d at 914, 544 N.Y.S.2d at 395 (citing 27 NY JUR 2D, Counties, Towns and Municipal Corporations, §§ 1217, 1218). Cf. *Parsa v. State of New York*, 64 N.Y.2d 143, 147, 474 N.E.2d 235, 237, 485 N.Y.S.2d 27, 29 (1984) ("A party contracting with the State is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them.") (citations omitted). As clearly stated by the First Department, "those dealing with municipal agents must ascertain the extent of the agents' authority, or else proceed at their own risk." *Modell*, 159 A.D.2d 354, 552 N.Y.S.2d at 634, citing *Genesco*, 593 F.Supp. 743.

Bolt is responsible for knowing the extent of DOT's authority, as well as the limits of that authority in entering any agreements on behalf of NYC. See *id.* In this case, as already fully discussed, the statutory and regulatory prerequisites were never satisfied. Those requirements are clearly set forth in the Charter, Administrative Code and the PPB Rules--public documents which are available to those who contract with NYC agencies and employees. The alleged promises or assurances by NYC contained in the McCoy Letter are not enforceable merely because Bolt claims it was treated unfairly. Bolt may seek payment from other responsible parties, such as Naclerio or Comstock. What it cannot do is demand that NYC pay for Project materials, pursuant to an agreement which is not valid under the law, or as a public policy matter.

\*10 Moreover, under New York law, a party cannot recover on an invalid contract or in quantum

meruit. *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 305, 298 N.E.2d 105, 108, 344 N.Y.S.2d 938, 942 (1973). New York recognizes an exception to this harsh rule of complete forfeiture in cases where the plaintiff "entered into the contract in good faith, the contract does not violate public policy, and the circumstances indicate that the municipality would be unjustly enriched." *Gill, Korff, and Associate, Architects and Engineer, P.C. v. County of Onondaga*, 152 A.D.2d 912, 914, 544 N.Y.S.2d 393, 395 (4th Dept.1989) (citing *Vrooman v. Village of Middletown*, 91 A.D.2d 833, 834-35, 458 N.Y.S.2d 424 (4th Dept.1982), appeal denied, 58 N.Y.2d 610, 449 N.E.2d 427, 462 N.Y.S.2d 1028 (1983)). While Bolt relies on cases which have held that recovery is possible where these mitigating factors exist, these factors do not exist in the case before me.

For example, in *Vrooman v. Village of Middletown*, 91 A.D.2d 833, 834-35, 458 N.Y.S.2d 424, 426 (4th Dept.1982), the court held that the plaintiff could recover, even though the contract was unenforceable for failure to comply with a statutory requirement that the Commissioner of Health be a party to the contract, because there was no violation of public policy and the village benefited from plaintiff's services. The court concluded that the contract did not violate the public policy against extravagance and collusion because the State had mandated the local project and because the services provided by the plaintiff "were essential to effectuate [the State's] directive." *Id.* at 426. To excuse the local entity from any liability, where the local entity clearly benefited from plaintiff's services, would "encourage disregard of the statutory safeguards by municipal officials." Since there was no harm to the taxpayers the court determined that recovery was appropriate. [FN9]

The Bolt case is different. As noted previously, the agreement here violates a clearly established public policy. The filing and registration requirements were essential checks on the financial stability of the Project--a Project financially overextended and with a tenuous fiscal status--to ensure that NYC and the taxpayers were not overpaying for services or committing otherwise unavailable City dollars. In direct contrast to *Vrooman*, the instant case presents a situation where recognizing the municipal agreement could result in NYC paying twice--first to the main contractor

Naclerio or the surety, and then to Bolt. This "harm" to the taxpayers is exactly what the municipal legislation intends to avoid.

Also, unlike *Vrooman*, NYC did not benefit from essential services provided by the plaintiff. Indeed, it is unclear how much of the Bolt materials were actually provided to the Project. Lastly, I cannot agree that the concern in *Vrooman* over judicially encouraged official circumvention of statutory requirements, is relevant to the instant case. Since there was no clear "benefit" which accrued to NYC or DOT, this case does not present a situation wherein illegal or inappropriate conduct results in unjust enrichment or a windfall for the municipality.

\*11 The other cases cited by Bolt are similarly unconvincing and distinguishable. See *Shaddock v. Schwartz*, 246 N.Y. 288, 294, 158 N.E.2d 872, 874 (1927) (Cardozo, C.J.) (plaintiff may recover based on a moral obligation to pay the reasonable value for work performed, despite drafting error in its bid for public contract, where there is no injury to the City's fisc and the City actually benefited by accepting the bid since it was the lowest); *Gladsky v. City of Glen Cove*, 563 N.Y.S.2d 842, 846 (2d Dept.1991) (plaintiff may recover, pursuant to its agreement with the municipality, for expenses, such as title examination costs, incurred in reliance on the contract for sale of real property); *Albert Elia Bldg. Co. v. New York State Urban Development Corp.*, 54 A.D.2d 337, 344-45, 388 N.Y.S.2d 462, 468 (4th Dept.1976) (where competitive bidding statutes were violated, contractor's good faith and lack of fraud, collusion or wrongdoing by the State mitigates against the harsh remedy of contractor's full forfeiture and, instead, contractor must refund the difference between the costs for work done and an estimated bidding price for the work); *Galvin v. New York City Housing Auth.*, 78 Misc.2d 312, 315, 356 N.Y.S.2d 942, 946 (Sup.Ct. N.Y. Co.1974) (absent collusion between Housing Authority and contractor, Housing Authority may negotiate modifications to contract without public bidding for a new contract).

Bolt's unsupported allegations that NYC acted in a deceptive manner to induce it to release NYC, Naclerio and Comstock from liability does not alter my decision. In its opposing memorandum, Bolt accuses DOT officials of acting "somewhat deviously, it now appears" in directing Bolt to abide

by the promises in the McCoy Letter, and encouraging it to withdraw its claim against NYC in the Ohio lawsuit. Bolt also charges that, in direct reliance of NYC's guarantees of payment, Bolt released liens on the purchase orders against Naclerio and Comstock. See Hallenbeck Affidavit, ¶¶ 27-28. NYC raises serious questions as to the veracity and accuracy of these claims, and argues that what Bolt is seeking in this litigation is lost profits, not the costs for goods supplied to NYC. For example, NYC states that Bolt has received a \$100,000 payment from Comstock for supplies for the Project and that NYC has not received any items for which Bolt now seeks payment.

Assuming, as I must on a motion to dismiss, that NYC acted in a deceptive manner, Bolt's allegations are still without sufficient support to withstand the motion to dismiss. [FN10] Bolt's conclusory statements setting forth a tale of deceit fail to set forth conduct so unconscionable on the part of NYC so as to warrant avoiding the usual prohibition on estoppel in cases involving municipalities. As discussed above, this is certainly not the case where the actions of the municipal representatives are so egregious that they have tainted the entire contractual bargaining process, or where the municipality is accorded a windfall based on deceptive actions by its representatives. [FN11]

\*12 I also note that, although Bolt has made unsupported allegations of injury and loss attendant to its withdrawal of legal claims, based on NYC's false statements, Bolt's submissions suggest otherwise. For example, Bolt's withdrawal of the liens against Naclerio and Comstock is without prejudice to refile, and, apparently, since the suit is still pending in Ohio, there has not been a judgment issued against Bolt. See Hallenbeck Affidavit, Exhibit G.

#### Conclusion

For the reasons stated, defendant the City of New York's motion to dismiss the amended complaint for failure to state a cause of action as a matter of law, as against the City of New York, is GRANTED and the Clerk of the Court is directed to enter judgment dismissing the amended complaint against this defendant. The amended complaint otherwise stands against the remaining defendant, Spring City.

The claims against the City of New York are separate and distinct from the claims involving Spring City, and there being no just reason for delay of entry of a final judgment, I order that final judgment be entered in favor of defendant the City of New York and that the Order be certified pursuant to Fed.R.Civ.P. 54(b).

#### SO ORDERED.

FN1. Judge Cornelius Blackshear of the United States Bankruptcy Court for the Southern District of New York dismissed Naclerio's bankruptcy petition on January 5, 1993.

FN2. Plaintiff claims that it provided defendant Spring City certain crucial information about the design of its materials and the bid price, which Spring City then improperly used to obtain the work assignment under the Contract. Amended Complaint ¶¶ 23-26. Defendant Spring City is not a party to the instant motion and I do not consider the claims against it at this time.

FN3. The Contract established that once NYC declared Naclerio in default, NYC could complete the contract without proceeding through the competitive sealed bidding process. NYC admitted that in the case before me, it had, in fact, chosen to complete the Project by submitting it directly to the surety. Transcript of October 23, 1993 Hearing, pp. 3-4, 9. Consequently, any argument that bidding for the Bolt contract was mandatory is without support.

FN4. Defendant NYC argues, however, that even if one assumes the existence of a valid contract between NYC and Bolt, the only appropriate permissible interpretation of the McCoy Letter is that NYC promised to pay Naclerio for delivered goods or, in the case of a default, to pay Bolt, for unpaid, undelivered materials.

FN5. In November 1989, the New York City Charter abolished the Board of Estimate, effective January 1990. Under the 1989 Charter, New York City's Mayor and appointed officials approve awards of contracts which have not gone through the competitive bidding process. This Charter provision predated NYC's September 1991 McCoy Letter to Bolt.

FN6. General Municipal Law § 103.1 has been amended to increase the contractual price of contracts subject to the bidding process. The last such amendment, effective January 1, 1992, raised the contract amount to \$20,000 for public contracts and \$10,000 for purchase expenditures. This amendment does not affect the case before me since its effective date postdates the formation of the contracts at issue here and the outstanding debts to Bolt for the February 1988 and October 1991 purchase orders clearly exceed the monetary requirements under the amendment.

FN7. Section 328 became effective under the 1989 Charter on September 1, 1990. Subdivisions (b) and (c) do not apply to the case before me.

FN8. According to the Charter's historical notes, § 344 was renumbered § 329, effective September 1, 1990. However, § 6-101(d) of the Administrative Code continues to refer to Charter §§ 344(c) and (d) rather than § 329. For purposes of clarity, my Opinion refers to § 329 not 344.

FN9. The court also noted that, by ordering the preparation of the plans for the project and subsequently approving the plaintiff's plans, the Commissioner of Health had acted sufficiently in compliance with the statutory requirement to be a party to the contract. *Vrooman v. Village of Middleville*, 91 A.D.2d 833, 835, 458 N.Y.S.2d 424, 426 (4th Dept.1982).

FN10. On the present record, Bolt's allegations of intentional deceptive conduct by NYC appear suspect. Notably, Bolt's submissions to this Court contradict its claim that NYC deceived Bolt into withdrawing legal action against NYC. The correspondence from Bolt's vice president, Gilman J. Hallenbeck, for example, fails to lend credence to Bolt's claims of fraudulent inducement regarding the Ohio lawsuit. Bolt Electric had New York City dismissed as a defendant [in the Ohio lawsuit] as a courtesy since the Corporation Council had assured Bolt that New York City was aware of the problem Bolt was experiencing and the City was going to do everything in its power to solve the problem. Gilman J. Hallenbeck Affidavit, Exhibit G, Hallenbeck's Letter to Commissioner Chris Ann Halpin, Department of Highways, dated October 1, 1992.

FN11. I do not decide here whether Bolt reasonably relied on NYC's assurances. Arguably, any such reliance on NYC's statements as to payment in accordance with the McCoy Letter is not reliable because Bolt was bound to ascertain the authority to make such promises and should have known that the alleged agreement set forth in the McCoy Letter was invalid for failure to comply with the legal requirements discussed fully in this Opinion.

END OF DOCUMENT

EUROPEAN AMERICAN BANK, Appellant,  
v.  
Dolores BENEDICT, a/k/a Dolores Cogliano,  
Appellee.

94 CIV. 7110 (SS).

United States District Court, S.D. New York.

July 17, 1995.

Helfand & Helfand, New York City, for  
appellant; Bruce H. Babitt, of counsel.

Finkel Goldstein Berzow & Rosenbloom, New  
York City, for appellee; Neal M. Rosenbloom,  
Gary I. Selinger, of counsel.

AMENDED OPINION AND ORDER [FN1]

SOTOMAYOR, District Judge.

\*1 European American Bank ("EAB" or "appellant") appeals from an Order dated July 21, 1994 (the "July Order") by the Honorable Francis G. Conrad of the United States Bankruptcy Court for the Southern District of New York. Pursuant to Fed.R.Civ.P. 60(b) and Fed.R.Bankr.P. 9024, the July Order vacated an earlier Order of the bankruptcy court dated March 11, 1994 (the "March Order"), which had extended EAB's time to file a complaint against Dolores Benedict ("Benedict" or "appellee") declaring Benedict's guarantee obligation to EAB nondischargeable under § 523 of the Bankruptcy Code (11 U.S.C. § 523). [FN2] In addition, the July Order barred EAB from prosecuting a complaint objecting to Benedict's discharge or to the dischargeability of the obligation, and discharged appellee's obligation to EAB. For the reasons discussed below, I affirm the July Order of the bankruptcy court.

BACKGROUND

At issue in this appeal is whether EAB is barred from challenging the dischargeability of a loan it made to appellee's company, Cogliano Benedict Photographics Inc., which loan Benedict personally guaranteed. Benedict filed a Chapter 11 bankruptcy petition on April 13, 1993; the deadline to file complaints objecting to the discharge of debts under § 523(c) was set for August 23, 1993. Debts set

forth in § 523(a), including debts for fraud, are excepted from discharge in bankruptcy. Section 523(c), however, specifies that some of these nondischargeable debts, including debts for fraud, will be discharged unless the creditor timely requests the bankruptcy court to determine the dischargeability of the debt. In order to conduct discovery to test whether Benedict had procured the loan fraudulently, EAB timely moved to extend its time to file a complaint under § 523(c). The bankruptcy court granted a 30-day extension.

On or about September 1, 1993, appellee converted her Chapter 11 case to one under Chapter 7. The conversion notice to creditors indicated that the new deadline under Bankruptcy Rule 4007(c) for the filing of complaints to contest the dischargeability of debts was January 10, 1994. [FN3]

EAB maintains that despite its repeated attempts from September through November 1993 to obtain documents and examine appellee, Benedict refused to comply with EAB's discovery demands. EAB moved on November 18, 1993 to compel discovery and to require Benedict's attendance at a Rule 2004 examination, or alternatively, to dismiss the bankruptcy case (the "November Motion"). The motion's return date was set for December 20, 1993, three weeks before the January 10, 1994 Rule 4007(c) deadline. At the request of Benedict's counsel, however, the return date of the motion was adjourned until February 7, 1994. EAB did not move for an extension of time to file its complaint objecting to the dischargeability of the debt owed to it.

On January 11, 1994, the day after the 4007(c) deadline passed, appellant and appellee met. Benedict agreed to reaffirm EAB's debt under § 524(c) (the "Reaffirmation"), and stipulated to extend EAB's time to object to the discharge of its debt should she later rescind the Reaffirmation (the "Stipulation"). Upon being advised of the Reaffirmation, the bankruptcy court scheduled a hearing for February 7, 1994, later adjourned to March 3, 1994. After holding a Reaffirmation Hearing of the nonrepresented debtor, Judge Conrad indicated, without specifying his reasons on the record, that he would not approve the Reaffirmation or Stipulation. He also asked whether a meeting of creditors had been held and whether the 60 days had

expired with respect to objections to discharge. EAB's counsel replied, "It will expire, I believe, next week sometime." (Tr. March 3, 1994 at 3). Judge Conrad directed EAB's counsel to submit an order extending EAB's time to file a complaint under § 523 through June 20, 1994, and signed the Order on March 11, 1994.

\*2 Appellee thereafter obtained new counsel, who objected to the March Order, contending that it was untimely as it was entered after January 10, 1994. New counsel moved to have the March Order vacated as it was signed under a mistake of fact. In addition, appellee rescinded the Reaffirmation and Stipulation. At a hearing held on June 28, 1994, Judge Conrad agreed that he had signed the March Order extending EAB's time to file a complaint under the mistaken impression that the deadline for filing had not already passed. On July 21, 1994, Judge Conrad vacated the March Order pursuant to Fed.R.Civ.P. 60(b) [FN4] and ordered EAB not to file and prosecute a complaint objecting to appellee's discharge or the dischargeability of the obligation. In so doing, the bankruptcy court rejected EAB's argument that its motion to compel discovery should have been deemed a motion to extend time under 4007(c). This appeal followed.

#### DISCUSSION

This court has jurisdiction to hear this appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). On an appeal from an order of the bankruptcy court, the bankruptcy court's legal conclusions are reviewed de novo and its findings of fact are accepted unless clearly erroneous. See, e.g., *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1388 (2d Cir.1990).

Appellant argues that the bankruptcy court erred in two ways: first, by reading EAB's November Motion to compel discovery as not including a motion to extend the Rule 4007(c) deadline; and second, by refusing to recognize the Reaffirmation and Stipulation agreed to by the parties, and later rescinded by appellee.

##### 1. EAB's November Motion

EAB argues that a request for an extension of time to file a § 523 complaint was implicit in its November Motion to compel discovery, because its

need for additional time in which to secure documents and conduct a § 2004 examination should have been apparent to the bankruptcy court. Benedict responds that the bankruptcy court could not have construed the November Motion as a request for an extension to file a complaint, because a request for a 4007(c) extension must be explicit.

EAB relies on *In re Sherf*, 135 B.R. 810 (Bankr.S.D.Tex.1991) and *In re Lambert*, 76 B.R. 131 (E.D.Wis.1985), for its position that the bankruptcy court should have construed the November Motion as implicitly including a motion for an extension of time; Benedict relies on *In re Kennerley*, 995 F.2d 145 (9th Cir.1993), to counter that position. These cases are not binding authority on this court, although they are apparently the only precedent that discusses whether motions that do not explicitly request extensions under Rule 4007(c) may be construed as including such requests.

In *Sherf*, 135 B.R. 810, creditors filed an "objection" to dischargeability, which was served on the debtors. Thereafter, the clerk's office informed the creditors that they needed to file a complaint objecting to discharge, not merely an "objection." The creditors then timely served a complaint objecting to debtor's discharge, but neglected to file the complaint properly because they did not obtain a separate case number or pay a filing fee. The creditors were not informed of their mistakes until after the Rule 4007(c) deadline. The bankruptcy court held that a pleading filed before the Rule 4007(c) bar date that puts the debtor on notice as did the creditor's "objection" could be treated as a motion to extend time for filing a complaint. 135 B.R. at 815.

\*3 Unlike the "objection" and the served but not filed complaint in *Sherf*, however, the November Motion to compel discovery here did not mention the filing of a complaint under § 523, nor did it even mention objections to discharge or dischargeability. The November Motion did not give any notice to appellee or the court as did the objection and the actual complaint served but not filed in *Sherf*.

In the second case relied on by appellant, *Lambert*, 76 B.R. 131, creditors moved the bankruptcy court for relief from a stay to permit them to pursue misrepresentation claims in state

court. Included with the motion for termination of the stay was a copy of a complaint the creditors intended to file in state court. The court construed the motion for relief from a stay as one for an extension of time for filing a complaint to determine dischargeability of a debt and allowed the state court action to proceed. In upholding the ruling by the bankruptcy court, the district court noted that the order was "consistent with the principles behind the bankruptcy law, which preclude a debtor from escaping liability for fraudulent actions." 76 B.R. at 132. The district court discussed no caselaw in its decision, and the decision was not appealed to the Seventh Circuit.

The Ninth Circuit, however, criticized Lambert in Kennerley, 995 F.2d 145. In Kennerley, the bankruptcy court had barred a fraud action from proceeding against the debtor because the creditor had failed to file a timely complaint of nondischargeability, and the district court had reversed the bankruptcy court's order. The Ninth Circuit reversed the district court, rejecting the creditor's argument that his motion to lift the automatic stay should be considered a motion to extend the deadline under Rule 4007(c). Quoting what it termed the "well-reasoned decision" of the bankruptcy court, the Ninth Circuit emphasized, "[Creditor's] motion for relief from the automatic stay did not request an extension of the deadline; it did not mention the deadline'.... In fact, the motion does not even mention Rule 4007 or § 523(c)." *Id.* at 147. In addition, the Kennerley court noted that Lambert conflicts with Ninth Circuit caselaw, which strictly construes Rule 4007(c). *Id.*

I am persuaded by the reasoning in Kennerley. Like the motion in Kennerley, EAB's November Motion did not request an extension of the dischargeability bar date, nor did it mention Rule 4007 or § 523(c). The bankruptcy court had no cause to scrutinize the November Motion to conclude that EAB might be asking for other forms of relief it had not requested, given the specificity of the notice of motion, which reads in part:

NOTICE OF MOTION FOR AN ORDER TO  
COMPEL DISCOVERY AND REQUIRE  
DEBTOR'S ATTENDANCE AT  
EXAMINATION AND/OR IN THE  
ALTERNATIVE TO DISMISS THE DEBTOR'S  
BANKRUPTCY CASE

PLEASE TAKE NOTICE that upon the annexed

motion (the "Motion") and proposed order of European American Bank ("EAB") by its counsel, Helfand & Helfand, will move this court ... for an order pursuant to Rule 45 of the Federal Rules of Civil Procedures [sic] made applicable by Rules 2004, 2005 and 9016 of the Federal Rules of Bankruptcy Procedure, to compel the debtor to permit discovery and require the Debtor to appear and be examined and/or in the alternative to dismiss the Debtor's bankruptcy case pursuant to Bankruptcy Code § 707(a)(1) and Bankruptcy Rule 2003.

\*4 Given the particularity of this notice of motion, EAB's contention that the bankruptcy court should have assumed that the motion sought an extension of time to object to dischargeability is unreasonable. Moreover EAB, a bank represented by counsel, had brought a specific motion for a deadline extension in the superseded Chapter 11 case; Judge Conrad had no reason to believe that EAB would not do the same in the Chapter 7 action, if EAB was seeking that relief. Finally, the November Motion was filed approximately seven weeks in advance of the 4007(c) deadline; there was no reason for the bankruptcy court to think that counsel for EAB would not subsequently file a timely motion for an extension if it perceived a need to do so. See Kennerley, 995 F.2d 145, 147 (9th Cir.1993) (creditor's motion for relief from automatic stay should not be considered a request for an extension of the deadline; "[a]t the time the motion was filed, the deadline was some six weeks in the future, and plenty of time remained for [creditor] to file a timely dischargeability complaint").

The Ninth Circuit's reasoning in Kennerley is also consistent with the conclusion of other circuits that have held Rule 4007(c) to be a strict statute of limitations. See, e.g., *In re Themy*, 6 F.3d 688, 689 (10th Cir.1993) (Rules 4007(c) and 9006(b)(3) "prohibit a court from sua sponte extending the time in which to file dischargeability complaints"); *In re Alton*, 837 F.2d 457, 459 (11th Cir.1988) ("There is 'almost universal agreement that the provisions of F.R.B.P. 4007(c) are mandatory and do not allow the Court any discretion to grant a late filed motion to extend time to file a dischargeability complaint.'"); *In re Pratt*, 165 B.R. 759, 761 (Bankr.D.Conn.1994).

I too find the "strict statute of limitations" view of Rule 4007(c) to be consistent with the language of

the Rule and its legislative history. The current Bankruptcy Rules, promulgated in 1983 and amended thereafter, eliminated the discretion of the bankruptcy courts in setting dischargeability deadlines. For example, former Rule 409(a) provided that the bankruptcy court set the deadline for filing a complaint objecting to dischargeability "not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors...." Current Rule 4007 removes the discretion of the bankruptcy court by statutorily fixing a 60 day period to file dischargeability complaints. In addition, the bankruptcy court's discretion to extend deadlines also has been eliminated: Former Rule 409 provided that the bankruptcy court "may for cause shown, on its own initiative or on application of any party in interest, extend the time for filing a complaint objecting to discharge." Current Rules 4007 and 9006 eliminate the court's authority to extend deadlines sua sponte; Rule 4007(c) provides that, in order to extend the bar date, "[t]he motion shall be made before the time has expired," and Rule 9006(b)(3) provides that enlargement of time under 4007(c) may be obtained "only to the extent and under the conditions stated in those rules." See, e.g., *In re Klein*, 64 B.R. 372, 374-75 (Bankr.E.D.N.Y.1986).

\*5 While the limitations on a court's ability to set and extend deadlines does not directly address appellant's argument that its November Motion should be construed as including a request for an extension, I agree with the reasoning in *Kennerley* that a broad reading of the November Motion that would construe a motion to compel discovery as a motion to extend the deadline for filing a dischargeability complaint would be inconsistent with the overall strict interpretation which should be accorded to Rule 4007(c). [FN5]

Appellant further argues that the bankruptcy court should have extended the dischargeability complaint deadline under its general authority granted in § 105(a) of the Code, which allows the court to act to prevent an abuse of the bankruptcy process. Appellant relies on *In re Greene*, 103 B.R. 83 (S.D.N.Y.1989), *aff'd* without opinion, 904 F.2d 34 (2d Cir.1990), cert. denied, 498 U.S. 1067 (1991), in which the district court upheld the bankruptcy court's use of § 105(a) to extend the deadline for objections to dischargeability. The

facts in *Greene*, however, are decidedly different from the situation here.

The *Greene* court extended the filing deadline for a creditor who was neither included on the creditor list nor had actual notice of the bankruptcy, unlike EAB, who was properly notified of appellee's filing of bankruptcy. Moreover, the *Greene* court was persuaded that the appellants before it were not honest debtors, but rather, had attempted to use the process "for purposes other than a good-faith effort to secure a fresh start." *Id.* at 88. Here, on the other hand, despite repeated cries by EAB of foul play on the part of appellee, Judge Conrad stated when granting appellee's motion to vacate the March Order, "The facts here cannot lead me to the conclusion that counsel for the bank has made here, that the Debtors have some sort of unclean hands." *Tr.* June 28, 1994 at 26. As the district court is bound to the bankruptcy court's findings of fact unless they are clearly erroneous, see, e.g., *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1388 (2d Cir.1990), I accept Judge Conrad's finding of the lack of bad faith on the part of appellee.

EAB further argues that its earlier deadline extension in appellee's Chapter 11 case and its discovery requests put Benedict on notice that EAB intended to object to the dischargeability of the obligation owed it. It is important to bear in mind that notice is not the only purpose of the Bankruptcy Rules. Instead, the Rules are intended to serve other goals, among them, "the prompt closure and distribution of the debtor's estate," *Pioneer*, 113 S.Ct. at 1495, and the promotion of "the expeditious and efficient administration of bankruptcy cases by assuring participants in bankruptcy proceedings 'that, within the set period of 60 days, they can know which debts are subject to an exception to discharge,'" *Rockmacher*, 125 B.R. at 384 (quoting *In re Sam*, 894 F.2d 778, 781 (5th Cir.1990)). While the operation of the Rules may lead in some cases to harsh results, "[t]he bankruptcy system simply could not operate if every deadline, which by its nature can cut off someone's lawful rights, could be contested on equitable grounds." *In re Collins*, 173 B.R. 251, 254 (Bankr.D.N.H.1994).

## 2. Rescission of Reaffirmation and Stipulation

\*6 EAB also argues that the Bankruptcy Court acted arbitrarily in overlooking the Reaffirmation

and Stipulation entered into by the parties on January 11, 1994, the day after the deadline passed for EAB to file an objection to appellee's discharge or the dischargeability of debts owed it. In the Stipulation, appellee agreed to extend EAB's time to object to dischargeability should she rescind the Reaffirmation. Benedict later rescinded both the Reaffirmation and Stipulation.

EAB's argument is specious. It provides no legal authority for the novel proposition that litigants, through a stipulation, can bypass a court's exercise of its obligation to decide whether cause exists to extend a statutorily controlled deadline. See, e.g., *In re Snyder*, 102 B.R. 874, 875 (Bankr.S.D.Fla.1989) ("[T]his court will not permit litigants to bind this court, by bargaining for delay beyond that specified by the Rules and the Code"). Judge Conrad did not abuse his discretion by refusing to recognize the Stipulation.

#### CONCLUSION

For the reasons stated above, I affirm the Order of the bankruptcy court dated July 21, 1994, case no. 93-B-41894 (FGC), and direct the Clerk of the Court to enter judgment accordingly.

#### SO ORDERED.

FN1. The substance of this Amended Opinion and Order is identical to the Opinion and Order issued on June 26, 1995; the changes in this Amended Opinion and Order are technical only and do not alter the legal conclusions of my previous Order.

FN2. Unless otherwise specified, all statutory references are references to the Bankruptcy Code, Title 11 of the United States Code. All references to "Rules" are references to the Federal Rules of Bankruptcy Procedure.

FN3. Rule 4007(c) mandates: A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors.... On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

FN4. Fed.R.Civ.P. 60(b) provides: On motion and

upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake....

FN5. Appellant does not argue that his failure to file for an extension of the Rule 4007(c) deadline was a result of "excusable neglect," presumably because most courts have interpreted Rule 9006(b)(3) as eliminating the possibility that a deadline may be extended under 4007(c) because of excusable neglect. See, e.g., *In re Rockmacher*, 125 B.R. 380, 383 (S.D.N.Y.1991) (when dealing with extensions of time under Rule 4007(c), "the excusable neglect standard of rule 9006(b)(1) is explicitly excepted from consideration by rule 9006(b)(3)"); *In re Savage*, 167 B.R. 22, 27 (Bankr.S.D.N.Y.1994) (Bankruptcy Rule 9006(b)(3) does not make allowance for excusable neglect); *In re Figueroa*, 33 B.R. 298, 300 (Bankr.S.D.N.Y.1983) ("It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim"). Accord *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 113 S.Ct. 1489, 1495 (Supreme Court explained that existence of excusable neglect doctrine for filing late claims in Chapter 11 cases but not in Chapter 7 cases reflects the different policies of the two chapters: "Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors.").

#### END OF DOCUMENT

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE**  
**PART ONE QUESTION 15(3)**

**Attached are copies of all unpublished opinions referenced in Question 15(3)**

**Estate of Joseph RE (by Vivian R. Re and  
Patricia Re Coarsely, the personal  
representatives of the Estate of Joseph Re),  
and  
Vivian R. Re, John M. Re and Joseph O. Re,  
Plaintiffs,  
v.  
KORNSTEIN VEISZ & WEXLER, Daniel J.  
Kornstein, Howard S. Veisz and Marvin  
Wexler, Defendants.**

**No. 94 CIV 2369(SS).**

United States District Court, S.D. New York.

April 2, 1997.

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#### AMENDED OPINION AND ORDER

#### SOTOMAYOR

\*1 Plaintiffs bring this action, advancing four claims arising out of defendants' allegedly inadequate representation of Joseph Re during arbitration proceedings held in connection with Mr. Re's removal from his position as a partner with Bear Stearns & Co. ("Bear Stearns"). Specifically, plaintiffs seek damages flowing from defendants' alleged breach of contract, breach of fiduciary duty, legal malpractice, and unjust enrichment. In an initial round of briefing, defendants moved for summary judgment as to the alleged breach of fiduciary duty and unjust enrichment claims, arguing that these claims are barred under an applicable three year limitations period. Though conceding that Mr. Re did not bring suit until four years after his claims accrued, plaintiffs responded that the applicable limitations period for a claimed breach of fiduciary duty, to the extent that it involves a relationship formed pursuant to a contract, is six years. Before the Court had an opportunity to resolve this issue, defendants submitted an omnibus motion for summary judgment, interposing numerous additional grounds

for the dismissal of all four claims. Following the Court's receipt of voluminous materials submitted by the parties in connection with this new motion, New York's legislature amended the statute of limitations applicable in malpractice actions to three years, "regardless of whether the underlying theory is based in contract or in tort." See C.P.L.R. 214[6] as amended by chapter 623 of the Laws of 1996.

For the reasons that follow, the Court finds that plaintiffs' claims were timely when filed, and that it would offend notions of due process under New York law to dismiss those claims by the retroactive application of the amended limitations period. With respect to the merits of plaintiffs' claims, there is insufficient evidence either of negligence or of causation to support plaintiffs' theories of malpractice and breach of contract. There are sufficient factual questions, however, to preclude summary judgment as to the alleged breach of fiduciary duty. [FN1]

#### BACKGROUND

In February 1985, Mr. Re was asked to resign from his position as a general partner with Bear Stearns. He was told, in essence, that he was no longer making any contribution to the partnership. Given no real choice in the matter, Mr. Re did not resist the formal termination of his partnership interest on April 30, 1985. Several months later, in October 1985, Bear Stearns "went public." Mr. Re concluded that the partnership's earlier decision to remove him from their ranks had been motivated by their desire to deprive him of the financial benefits of participating in Bear Stearns' public offering.

In the Fall of 1987, Mr. Re contacted the law firm of Kornstein, Veisz & Wexler ("Kornstein Veisz"), to represent him in an action against Bear Stearns. Though advising Mr. Re that he was unlikely to succeed in any action against his former colleagues, defendant Wexler accepted Mr. Re's ultimate decision to proceed with a lawsuit. (Wexler 4/18/96 Aff. Ex. 6, Ltr. from Wexler to Re of 6/1/88.) Hoping to avoid a binding arbitration provision in the Bear Stearns partnership agreement, defendants filed a state court action on Mr. Re's behalf, in August of 1988, alleging breach of fiduciary duty against the individual members of the Bear Stearns Executive Committee. Under Mr. Wexler's theory of the case, defendants had breached their fiduciary

duties by concealing from Mr. Re, as of the time they forced his resignation, their then existing intention to take Bear Stearns public.

\*2 As anticipated by defendant Wexler in his correspondence to Mr. Re, the Bear Stearns defendants resisted the state court action, through their counsel, Stroock & Stroock & Lavan ("Stroock"), by invoking an arbitration provision included in the partnership agreement. In February 1988, Bear Stearns succeeded on its motion to compel arbitration; the following month, defendants filed a Demand for Arbitration with the American Arbitration Association ("AAA"). (Wexler 4/18/96 Aff. Ex. 11.) Instead of requesting that Mr. Re's claims be heard before a panel three arbitrators, defendant Wexler elected to have the matter heard before a single arbitrator recommended by the AAA, Mr. Finley.

After considerable discovery, including depositions by defendant Wexler of the Bear Stearns defendants, the arbitration took place in December 1989. The proceedings lasted for three days, with defendant Wexler calling two witnesses on Mr. Re's behalf: Mr. Re as well as one of his former partners with Bear Stearns, Nicholas Purpura. Stroock called three witnesses for Bear Stearns, including two of the individual defendants, and Ernest Rubenstein, a partner with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul Weiss"). Paul Weiss had long been Bear Stearns' corporate counsel, and Mr. Rubenstein had advised Bear Stearns on the possibility of going public. Following the presentation of witnesses and evidence before Mr. Finley, defendant Wexler submitted a 93 page post-hearing brief, which prompted an opposition by Stroock, a reply by defendants, and a surreply by Stroock. (Wexler 4/18/96 Aff. Ex.'s 21, 22, 23, 24.)

At the conclusion of the arbitration proceedings, Mr. Finley complimented counsel for both sides on the "thoroughly professional" manner in which they conducted themselves. (Arbitration Hearing Tr. at 42 1.) Shortly thereafter, in February 1990, Mr. Finley ruled against Mr. Re. (Wexler 4/18/96 Aff. Ex. 26.) The ruling was issued without any written opinion. More than four years later, in April 1994, Mr. Re commenced this action, alleging that defendants failed to alert Mr. Re to a conflict of interest bearing upon their ability to provide him

adequate representation, and that they made numerous tactical errors in connection with the arbitration. Mr. Re died during these proceedings, and his estate has been substituted as plaintiffs.

## I. Defendants' Representation Of Plaintiffs During Arbitration

### A. Alleged Conflict Of Interest

The alleged conflict of interest involves defendants' professional relationship with Bear Stearns' corporate counsel, Paul Weiss. Defendant Wexler, like the other individual defendants (all partners with Kornstein Veisz), had worked as associates at Paul Weiss at various times between 1973 and 1981. (Wexler 4/18/96 Aff. ¶ 36; Pl.'s 3(g) stmt. ¶ 11.) After leaving Paul Weiss, defendants continued work on approximately five matters in which they were involved while associates, and have since had approximately a dozen cases referred to them from their former firm. (Wexler 4/18/96 Aff. Ex. 31.) In at least one instance, during the same period that they represented Mr. Re, defendants served as co-counsel with Paul Weiss. (Detiere 5/16/96 Aff. Ex. 31.) None of these cases are alleged to have involved matters at issue in Mr. Re's dispute with his former partnership. These cases amounted to approximately \$ 500,000 of business for defendants, with under \$ 200,000 of this coming after 1986. (Wexler 4/18/96 Aff. Ex. 31.) Paul Weiss referrals thus accounted for approximately 2%-3% of defendants' business during the mid to late 1980's, the period during which Kornstein Veisz represented Mr. Re.

\*3 In their capacity as Bear Stearns' corporate counsel, Paul Weiss was consulted by the partnership during the time that it was contemplating going public, or otherwise reorganizing. (Wexler 4/18/96 Aff. Ex. 32.) Prior to the arbitration, in an effort at "informal discovery" into the specifics of this consultation, Mr. Wexler visited with Mr. Rubenstein. (Wexler 4/18/96 Aff. ¶ 36.) In a letter to Mr. Re, Mr. Wexler reported that Mr. Rubenstein "had tried to persuade" Mr. Wexler that there was "no merit" to Mr. Re's claim. (Wexler 4/18/96 Aff. Ex. 30.) Mr. Wexler characterized the specific information provided by Mr. Rubenstein as "not favorable" to Mr. Re, and reiterated his earlier concern that Mr. Re's claim was "highly problematic." (Id.)

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Though Bear Stearns was not represented by Paul Weiss during the arbitration against Mr. Re, Mr. Rubenstein was one of only three witnesses called to testify on Bear Stearns' behalf. Mr. Rubenstein's testimony centered upon the timing and nature of Paul Weiss's involvement in Bear Stearns' decision to go public. (Arbitration Hearing Tr. 402-418.) Mr. Rubenstein further testified that he had recounted these same matters in a meeting with Mr. Re, which Mr. Re attended with an attorney (not one of the defendants), several months after Bear Stearns' public offering. Mr. Wexler did not cross examine Mr. Rubenstein. Plaintiffs contend that Wexler "may (or should)" have questioned Mr. Rubenstein, and that his failure to do so reflects defendants' friendly relationship with Paul Weiss. (Opposition and Cross Motion at 13.) Defendants insist that they had the greatest chance of neutralizing Mr. Rubenstein's testimony, not by refuting it, but by persuading the arbitrator that it was, as a matter of law, irrelevant. (Wexler 4/18/96 Aff. ¶ 35(c).)

#### B. Alleged Malpractice

In their amended complaint, plaintiffs point to numerous other examples of defendants' alleged "diminished rigor" in representing Mr. Re. The two most egregious errors, according to plaintiffs, concern defendants' failure to present the arbitrator with sufficient evidence as to Mr. Re's damages, and defendants' failure sufficiently to emphasize a particular legal argument during the arbitration proceedings.

Though he briefly consulted Mr. Re's accountant, Ms. Halpern, concerning the extent of Mr. Re's losses in connection with Bear Stearns' public offering, Wexler had no expert or other witness testify on the issue of damages during the arbitration hearing. (Halpern 4/26/96 Aff. ¶ 3.) According to plaintiffs, Wexler disregarded Mr. Finley's clear and repeated requests for evidence on the damages question. Mr. Wexler explains that he sought to avoid the risk that a damages witness would be subject to unfavorable cross-examination. (Wexler 4/18/96 Aff. ¶ 35(d).) Therefore, Wexler decided to rely upon documentary evidence introduced during the proceedings and to submit a full evaluation of damages in his post-hearing brief. In the post-hearing brief, there is a discussion of damages, referencing assorted documentary evidence

from the proceedings, and requesting approximately \$ 4 million in relief. (Wexler Aff. Ex. 21 at 76-91.) Plaintiffs criticize the discussion as both substantively flawed and procedurally too late.

\*4 Plaintiffs' other major complaint concerns defendants' failure, during the arbitration, to emphasize a supposedly "compelling" breach of contract theory. (Detiere 5/16/96 Aff. ¶ 58.) Plaintiffs rely upon Section 10.16 of Mr. Re's partnership agreement with Bear Stearns, which provides:

If, after the final payment of his Capital is made to a Withdrawing Partner ... an asset of the Partnership ... shall become known and liquidated, the Withdrawing Partner shall receive that share of such asset to which he was entitled (directly or indirectly) during the period or periods to which the asset is attributable. (Letter from Detiere to the Court of 11/26/96.) According to plaintiffs, "[s]ince the conversion of the partnership into a public corporation ... would have arguably been an asset discovered very shortly 'after the final payment of his Capital,' Re was presumably entitled to 'receive that share of such asset' under § 10.16 of the partnership agreement." (Detiere 5/16/96 Aff. Ex. P, at 82.) Defendants depict this argument as having little or no merit: its success depending upon a favorable reading of the term "asset," and the phrase "after the final payment." (Letter from Wexler to the Court of 12/20/96.) Defendants also point out that, in any event, they made the argument in their post-hearing brief. Plaintiffs note, however, that defendant Wexler gave the issue only cursory attention, relegating it to the tail end of his 93 page submission, and setting out the argument in little more than a page.

Though plaintiffs place their greatest emphasis upon those factors already discussed (i.e. the alleged conflict of interest, the failure to proffer evidence on damages, and the failure to stress Section 10.16 of the partnership agreement), they identify a host of other deficiencies in defendants' work as Mr. Re's attorneys. For instance, the only witness defendants called on Mr. Re's behalf, other than Mr. Re, was Mr. Purpura, one of Mr. Re's former partners with Bear Stearns. According to Mr. Purpura, the only subject matter that Mr. Wexler discussed with him in advance of the proceedings involved rumors that Mr. Purpura had heard to the effect that Bear Stearns planned to go public before the time that

Mr. Re was removed from the partnership. (Purpura 4/30/96 Aff. ¶ 3.) A review of the transcript from the arbitration proceedings reveals that Mr. Purpura was not questioned as to these rumors, however, and that he had difficulty responding to several of those questions that were posed to him. (Arbitration Hearing Tr. 249-91.) Thomas Fleming, one of defendant Wexler's former associates, had prepared Mr. Purpura in advance of his testimony, and questioned him during the proceedings. (Fleming 7/17/96 Aff.) In the view of both Mr. Fleming and defendant Wexler, Mr. Purpura simply turned out to be a disappointing witness. (Id. ¶ 7; Wexler 6/19/96 Aff. ¶ 22.)

A number of plaintiffs' other allegations concern Mr. Finley's suitability to preside over the dispute between Mr. Re and Bear Stearns. Plaintiffs also question defendants' decision to proceed before a single arbitrator instead of before a panel of three. (Am.Comp.¶ 46.) As for the particular selection of Mr. Finley, plaintiffs complain that Mr. Finley was of counsel at a law firm that had been retained to advise Bear Stearns on issues unrelated to Mr. Re's case, and that defendants never alerted Mr. Re to this potential conflict. (Id. ¶ 49.) Defendant Wexler responds that he viewed Mr. Re's case to be weak, and that he therefore thought it unlikely that two out of three arbitrators could be persuaded to rule in his client's favor. Moreover, Mr. Finley disclosed any potential conflict to the attorneys in Mr. Re's case, and assured both sides that his judgment would in no way be compromised. (Wexler 4/18/96 Aff. Ex. 16.) Defendants explain that they decided to remain with Mr. Finley because he was an experienced and well-regarded attorney who had himself been involved in a conflict with his former partners.

## II. The Motions For Summary Judgment

\*5 Defendants initially moved for summary judgment solely as to the alleged breach of fiduciary duty and unjust enrichment, and argued that those claims were untimely filed under an applicable three year statute of limitations. Conceding that they did not commence this action until four years after Mr. Re's claims accrued, plaintiffs responded that New York's six year statute of limitations, applicable to contract actions, governs the present dispute.

In an "omnibus" motion for summary judgment,

filed before briefing concluded on the limitations question, defendants asserted numerous substantive grounds for the dismissal of all four of plaintiffs' claims. They argued that the alleged mistakes in representation were actually reasonable strategic decisions, and that defendants' relationship with Paul Weiss did not create any conflict of interest and did not give rise to any breach of fiduciary duty. Moreover, defendants argued that any negligence by counsel was not the "but for" cause of plaintiffs' defeat at arbitration. In response, plaintiffs made a cross motion for summary judgment as to two sets of their allegations: i) the alleged malpractice arising out of defendants' failure to provide the arbitrator with evidence on the question of damages, and ii) the alleged breach of fiduciary duty involving defendants' relationship with Paul Weiss. As to their remaining claims and allegations, plaintiffs argued that there were facts in dispute requiring a trial.

Following this second round of briefing, New York's legislature amended C.P.L.R. 214[6], essentially for the purpose of overruling the very line of authority upon which plaintiffs had relied to defend their action as timely. Under the amended provision, a claim for legal malpractice must be brought within three years of accrual, whether that claim is framed in contract or in tort. The passage of this provision precipitated another round of letter briefing in which the parties argued as to whether the recent amendment to C.P.L.R. 214[6] can apply retroactively to bar plaintiffs' claims, even to the extent that those claims were timely when filed.

In short, there are numerous issues which have been raised by the parties, and the Court has had the opportunity to review a voluminous record in assessing the arguments which have been made. For the reasons which follow, defendants' motion for summary judgment is granted in part, and denied in part. Plaintiffs' motion for summary judgment is denied.

## DISCUSSION

Summary judgment is required when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The moving party has the initial burden of 'informing the district court of the basis for its motion' and identifying the matter

'it believes demonstrate[s] the absence of a genuine issue of material fact.' " *Liebovitz v. Paramount Pictures Corp.*, 948 F.Supp. 1214, 1996 WL 733015, \* 3 (S.D.N.Y. Dec.18, 1996) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Once the movant satisfies its initial burden, the nonmoving party must identify "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In assessing the parties' competing claims, the Court must resolve any factual ambiguities in favor of the nonmovant. See *McNeil v. Aguilos*, 831 F.Supp. 1079, 1082 (S.D.N.Y.1993). It is within this framework that the Court must finally determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." [FN2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

\*6 The Court will begin its analysis by considering the question initially briefed by the parties--i.e., whether plaintiffs' action was timely when filed. See Section IA, *infra*. Because plaintiffs' claims were timely when filed, the Court will proceed to consider whether C.P.L.R. 214[6], as amended, applies retroactively to require the dismissal of plaintiffs' Complaint. See Section IB, *infra*. Though it appears likely that New York's legislature intended for the amended C.P.L.R. 214[6] to apply retroactively, the Court finds that such an application would offend basic notions of due process under New York law. Because plaintiffs' claims cannot be barred by the revised limitations period, the Court must consider the sufficiency of the evidence in support of those claims. See Section II, *infra*. As the Court ultimately concludes, plaintiffs' malpractice and contract claims cannot survive defendants' motion for summary judgment, but plaintiffs have raised a sufficient factual dispute to proceed with the claimed breach of fiduciary duty.

#### I. Statute of Limitations

##### A. Pre-Amendment SOL

For reasons set forth by New York's Court of Appeals in *Santulli v. Englert, Reilly & McHugh*, 78 N.Y.2d 700, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992), plaintiffs' action was timely when

filed. Like the plaintiffs here, the plaintiff in *Santulli* waited until four years after his claims accrued before filing an action alleging attorney malpractice. Defendants moved to dismiss the complaint against them relying upon C.P.L.R. 214[6], which announces a three year limitations period applicable to malpractice actions. Acknowledging that their holding might effectively "nullify" this provision, the Court in *Santulli* rejected defendants' position, and permitted plaintiffs to proceed with their claims pursuant to the six year limitations period applicable in contract actions. *Santulli*, 78 N.Y.2d at 709, 579 N.Y.S.2d 324, 586 N.E.2d 1014.

As the starting point for its analysis, the Court in *Santulli* reiterated language from an earlier decision providing that "the choice of applicable Statute of Limitations is properly related to the remedy rather than to the theory of liability." *Id.* at 707, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (quoting *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 394-95, 401 N.Y.S.2d 767, 770, 372 N.E.2d 555 (1977)). The fact that plaintiff framed his claim as an alleged malpractice, then, according to the *Santulli* Court, did not automatically trigger the application of C.P.L.R. 214[6]. In assessing the nature of plaintiffs requested remedy, the Court noted that "all potential liability of the defendant ar[ose] out of the agreement retaining the firm as attorneys." *Id.* In other words, however he might have styled his cause of action, defendant was pursuing "damages to his pecuniary interest identical to those which would be recoverable in [a] contract action." *Id.* Because he pursued such relief, the Court concluded that plaintiff was entitled to proceed under the six year limitations period applicable to contract claims. *Id.*; see also *Video Corp. of America v. Frederick Flatto Assocs., Inc.*, 58 N.Y.2d 1026, 1028, 462 N.Y.S.2d 439, 448 N.E.2d 1350 (1983) ("an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to property or pecuniary interests recoverable in a contract action is governed by the six-year contract Statute of Limitations.").

\*7 As was the case in *Santulli*, plaintiffs in this action have framed a variety of different claims around defendants' alleged failure to perform adequately as plaintiffs' legal counsel. Under the reasoning of *Santulli*, the limitations period

(Cite as: 1997 WL 162918, \*7 (S.D.N.Y.))

applicable to these claims must accordingly be a function of the remedy plaintiffs seek, and not the theories they advance. Santulli, 78 N.Y.2d at 707, 579 N.Y.S.2d 324, 586 N.E.2d 1014; see also *Matter of Paver & Wildfoerster* (Catholic High School Assn.), 38 N.Y.2d 669, 672, 382 N.Y.S.2d 22, 23, 345 N.E.2d 565 (1976) ("the general principle [is] that time limitations depend upon, and are confined to, the form of the remedy."). In this regard, all of plaintiffs' claims against defendants arise out of a relationship formed between the parties pursuant to a retainer agreement (i.e., a contract), and plaintiffs are seeking to recover pecuniary losses they ascribe to defendants' misconduct. Under the logic of the Santulli line of authority, then, however plaintiffs' claims are characterized--as breach of fiduciary duty, malpractice, or breach of contract--plaintiffs filed their complaint within the six year limitations period then applicable.

Defendants resist this conclusion, at least as to the alleged breach of fiduciary duty, by relying upon the Court of Appeals decision in *Loengard v. Santa Fe Industries, Inc.*, 70 N.Y.2d 262, 519 N.Y.S.2d 801, 514 N.E.2d 113 (1987). In *Loengard*, the minority shareholders of Kirby Lumber Corp. ("Kirby"), alleging breach of fiduciary duty, sought to be restored to their status as full stockholders following a freeze out merger between Kirby and the defendant corporation. Reasoning that "legal remed[ies] would not be adequate," the Court characterized plaintiffs' desired relief as "equitable in nature." *Id.* at 267, 519 N.Y.S.2d 801, 514 N.E.2d 113. On this basis, the *Loengard* Court applied a six year limitations period, permitting plaintiffs to proceed with their claim.

Contrary to defendants' position, the *Loengard* Court did not announce a bright line rule pursuant to which an alleged breach of fiduciary duty is governed by a six year limitations period in the event that equitable damages are sought, and a three year limitations period in the event that legal damages (i.e., money) are pursued. See *Frank Management, Inc. v. Weber*, 145 Misc.2d 995, 549 N.Y.S.2d 317, (N.Y. County 1989) ("Although the court in *Loengard* applied the six year limitations period where the remedy sought was equitable ... the six year period has been applied where the damages alone have been sought."). Such an approach would not comport with the subsequent

Court of Appeals decision in *Santulli*. The Santulli Court cited *Loengard* for the proposition that the appropriate limitations period does not depend upon the theory pursued, but the remedy sought. *Santulli*, 78 N.Y.2d at 708, 579 N.Y.S.2d 324, 586 N.E.2d 1014. Thus, *Loengard* cannot be understood to have announced a rule uniquely applicable to claims alleging breach of fiduciary duty. Moreover, Santulli did not attach any particular significance to the legal/equitable distinction drawn by the Court in *Loengard*; the six year limitations period was applicable in Santulli because plaintiff sought "damages to his pecuniary interests identical to those which would be recoverable in the contract action." *Id.* These are the same damages plaintiffs now seek--whether in connection with the alleged malpractice, or breach of fiduciary duty--and their action was thus timely when filed. See *Sears Roebuck*, 43 N.Y.2d at 396, 401 N.Y.S.2d 767, 372 N.E.2d 555 ("It should make no difference then how the asserted liability is classified or described ... it suffices that all liability alleged in this complaint had its genesis in the contractual relationship of the parties.").

#### B. Retroactive Application of SOL

\*8 The Court of Appeals decision in Santulli came under attack because it allowed parties to circumvent the three year limitations period applicable to malpractice actions under C.P.L.R. 214[6]. The New York legislature recently responded by amending C.P.L.R. 214[6], in September 1996, such that it now governs malpractice actions "regardless of whether the underlying theory is based in contract or in tort." This is plainly a rebuke of the Santulli line of authority, with its emphasis upon the contractual "genesis" of malpractice claims. Under the amended provision, then, courts must treat any action involving a professional's alleged failure to exercise due care as a unique species of tort properly governed, in all circumstances, by a three year limitations period. The very grounds upon which plaintiffs managed to file a timely complaint four years after defendants' alleged malpractice have thus been written out of the governing legislation. If the revised provision applies to their complaint, plaintiffs' action must be dismissed.

#### I. State Law Retroactivity

(Cite as: 1997 WL 162918, \*8 (S.D.N.Y.))

"Generally, statutes are applied prospectively, unless there is a clear legislative indication to the contrary." *Rudin Management Co. Inc. v. Commissioner, Dept. Of Consumer Affairs*, 213 A.D.2d 185, 623 N.Y.S.2d 569 (1st Dep't 1995); see also *Brown*, 145 Misc.2d 1085, 548 N.Y.S.2d 841, 846 (Richmond County 1989) ("Ordinarily, statutes are presumed to operate prospectively unless a contrary intention unequivocally appears."), *aff'd*, 150 Misc.2d 375, 575 N.Y.S.2d 622 (1990); *McKinney's Cons.Laws of N.Y.*, Book 1, Statutes § 51(c). "An exception to the foregoing is that remedial statutes, which are to be liberally construed, are to be given retroactive construction to the extent that they do not impair vested rights or create new rights." *Mendler v. Federal Insurance Co.*, 159 Misc.2d 1099, 607 N.Y.S.2d 1000, 1003 (N.Y. County 1993); see also *Brown*, 548 N.Y.S.2d at 847; *McKinney's* § 54 ("Remedial statutes constitute an exception to the general rule that statutes are not to be given a retroactive operation, but only to the extent that they do not impair vested rights.").

Thus far, only two New York trial courts have invoked these principles in order to determine whether the amended C.P.L.R. 214[6] applies to require the dismissal of malpractice actions that were timely when filed. These courts have reached conflicting results. Compare *Garcia v. Jonathan*, N.Y.L.J., Jan. 17, 1997 (1st Dep't Jan. 17, 1997) (holding that the amendments to C.P.L.R. 214[6] have "prospective application only.") with *Russo v. Waller*, N.Y.L.J., Feb. 25, 1997 (2d Dep't Feb. 25, 1997) (applying the amended CPLR 214[6] to dismiss malpractice action that was timely "as of the date of its commencement"). This Court must therefore apply the governing standards in an effort to anticipate how New York's highest state court will likely resolve this current split in authority. See *Herman Miller, Inc. v. Thom Rock Really Co.*, L.P., 819 F.Supp. 307 (S.D.N.Y.1993) (citing *DeWeerth v. Baldurger*, 836 F.2d 103, 108 (2d Cir.1987).

\*9 The starting point for determining whether a provision is meant to apply retroactively, of course, is to look to the language of the provision itself. According to its terms, the recent amendment to C.P.L.R. 214[6] was to "take effect immediately." New York's Courts have considered virtually identical language on several occasions, but the

results have not been uniform. Compare *Murphy v. Bd. of Ed., North Bellmore Union*, 104 A.D.2d 796, 480 N.Y.S.2d 138, 139 (2d Dep't 1984) ("As a general rule statutes are to be construed as prospective only in the absence of an unequivocal expression of legislative intent to the contrary, and where a statute directs that it is to take effect immediately, it does not have any retroactive operation or effect"), *aff'd* 64 N.Y.2d 856, 487 N.Y.S.2d 325, 476 N.E.2d 651 (1985); *Lusardi v. Lusardi*, 167 A.D.2d 3, 570 N.Y.S.2d 376, 377 (3d Dep't 1991) ("Where, as here, the Legislature provides that the statutory provision shall take effect immediately, prospective application of the amendments is appropriate"); *Moynihhan v. NYS Employee's Ret. System*, 192 A.D.2d 913, 596 N.Y.S.2d 570, 571 (3d Dep't 1993) ("We find lacking any indication of intent to provide retroactivity. Quite to the contrary, the amendment recites that it shall take effect immediately, which language this court has held provides a clear indication that prospective application is appropriate.") (citations omitted), with *McGuirk v. City School District*, 116 A.D.2d 363, 501 N.Y.S.2d 477, 479 (3d Dep't 1986) ("[T]he limiting amendment was expressly provided to take effect immediately, a factor consistent with the purpose of giving it retroactive effect.") (citations omitted); *Meegan "S" v. Donald "T"*, 103 A.D.2d 913, 478 N.Y.S.2d 150, 151 (3d Dep't 1984) ("[W]e note that the amendment was made operative immediately, instead of prospectively, thus implying retroactivity."), *rev'd on other grounds*, 64 N.Y.2d 751, 485 N.Y.S.2d 982, 475 N.E.2d 449 (1984); *Cady v. County of Broome*, 87 A.D.2d 964, 451 N.Y.S.2d 206, 207 (3d Dep't 1982). The Court takes these divergent outcomes as indication that such language must be understood in context. See *McGuirk*, 501 N.Y.S.2d at 479 ("retroactivity need not be explicitly set forth in the statute."). Standing alone, the "effective immediately" provision of the amendment is inconclusive. When considered alongside the legislative pronouncements accompanying its passage, however, it is the more reasonable inference that the legislature intended to apply the amended C.P.L.R. 214[6] even to pending actions.

In a "Memorandum In Support" of the legislation amending C.P.L.R. 214[6], New York state's legislature adopted unusually blunt language expressing dissatisfaction with the approach taken

by the Court of Appeals in Santulli:

The legislature of the State of New York had originally expressed its intent in enacting the statute of limitations for general malpractice in CPLR section 214[6] to be three years ... The courts have recently expanded the statute of limitations, in cases where the essential actions complained of consist of malpractice, to six years under breach of contract theory, thereby abrogating and circumventing the original legislative intent. Unless the legislature reaffirms its intent as to the statute of limitations to be applied in cases governed by ... Section 214[6] ..., the courts will continue to expand the statute of limitations in general malpractice cases ... to be governed by the six year breach of contract theory as set forth in CPLR 213 [2]. It is essential that ... 214[6] ... of the CPLR be amended to reaffirm the legislative intent that where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts or omission or negligence are alleged or claimed, the statute of limitations shall ... be three years if the case comes within the purview of CPLR section 214[6] ... regardless of whether the theory is based in tort or in a breach of contract.

\*10 Thus, the legislature did not conceive of its amendment as a new provision, but as a rebuke of the Court of Appeals, designed to "reaffirm" that the limitations period applicable in malpractice actions is, and has properly been, three years. In view of the legislature's strong language, this Court finds it difficult to accept the Garcia Court's conclusion that the legislative history of the amendment to C.P.L.R. 214[6] is inconclusive. Garcia, N.Y.L.J., Jan. 17, 1997. By assailing Santulli as a misguided aberration, the legislature announced its intent to end the continued application of that decision--"effective immediately"--in all cases. See Reynolds v. Martin, 985 F.2d 470, 475-76 (9th Cir.1993) ("We would seriously undermine Congress' stated intent were we to hold that the decisions it repudiated would live on in the federal courts for several years.").

The Court does not mean to suggest that it accepts the legislature's view that Santulli was wrongly decided. The Court simply concludes that by rejecting Santulli, the legislature revealed its intention to apply its recent enactment retroactively. The legislature could not, however, make a binding determination that Santulli was wrongly decided

under the law in force at the time that the decision was rendered. See *Chatlos v. McGoldrick*, 302 N.Y. 380, 388, 98 N.E.2d 567 (1951) ("It is, of course, true that the legislature cannot come back a year later and by a new law, control the interpretation of the law that it passed a year earlier."); *City of New York v. Village of Lawrence*, 250 N.Y. 429, 447, 165 N.E. 836 (1929) ("Doubtless the legislative construction of the earlier statute is without binding force in any judicial proceeding."). As a practical matter, New York's present day legislature is simply in no better position than the state's courts to assess what the state's legislature intended, decades ago, when it originally enacted C.P.L.R. 214[6]. Of more basic concern, fundamental notions underlying the separation of powers counsel against permitting the legislature such a role in the interpretation of law. In more venerated terms, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

It is on the basis of these considerations that this Court cannot accept the approach adopted by the Court in Russo. Unlike the Garcia decision, which placed virtually no credence in the legislative history of the recent amendment to C.P.L.R. 214[6], the Russo Court was overly deferential. The Court avoided what it perceived to be constitutional problems relating to retroactivity by accepting the legislature's view that it was not passing new law, but merely correcting judicial error. Russo, N.Y.L.J., Feb. 25, 1997. Crediting this approach would compromise the separation of powers, and would provide too simple a tool for legislatures to enact improper ex post facto provisions under the guise of "correcting" prior court pronouncements. To the extent that there are constitutional implications to retroactivity, those implications cannot be so easily finessed; they must be dealt with directly.

## 2. Constitutionality

\*11 It has long been settled law in New York that, "[i]n order to pass constitutional muster, legislation retroactively shortening a period of limitations must provide a party within a reasonable time to commence an action." *O'Connor v. Maine-Endwell Central School District and Bd. Of Education*, 133 Misc.2d 1126, 509 N.Y.S.2d 472, 473 (Broome

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County 1986); see also *Alston v. Transport Workers Union Of Greater New York*, 225 A.D.2d 424, 639 N.Y.S.2d 359, 360 (1st Dep't 1996) ("The only restriction upon the legislature, in the enactment of statutes of limitation is that a reasonable time be allowed for suits upon causes of action theretofore existing." If a statute of limitations deprives a party 'of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law.'") (quoting *Gilbert v. Ackerman*, 159 N.Y. 118, 53 N.E. 753 (1899)); *Glod v. Ashland Chemical Co.*, 145 Misc.2d 200, 546 N.Y.S.2d 748, 754 (Oswego County 1989) (permitting the retroactive application of a reduced limitations period "so long as there remains a reasonable time for the commencement of suit."), *aff'd* 168 A.D.2d 954, 564 N.Y.S.2d 905 (1990); *McGuirk*, 501 N.Y.S.2d at 478 ("There is no constitutional impediment to legislation retroactively either extending a period of limitations or shortening such period, providing that a party has a reasonable time to commence the action under the shortened period."); *Dunkun v. Maceck Bldg. Corp.*, 256 N.Y. 275, 286, 176 N.E. 392 (1931) ("The validity of a statute of limitations which purports to bar a right which existed before the statute becomes effective depends upon whether the statute allows a reasonable time after it becomes a law within which a party may enforce his right."). It would plainly run afoul of this standard to apply the amended C.P.L.R. 214[6] in this case. Retroactive application of the amended provision would go further than merely depriving plaintiffs a reasonable time in which to file their action; it would extinguish a claim that plaintiffs had already filed within the limitations period then applicable.

New York's earliest ruling prohibiting the retroactive application of a reduced limitations period to bar an otherwise timely claim occurred nearly 100 years ago. See *Gilbert*, 159 N.Y. 118, 53 N.E. 753. The *Gilbert* decision was seemingly grounded in the due process provision of the 14th Amendment to the United States Constitution. *Gilbert*, 159 N.Y. at 122-123, 53 N.E. 753. In recent times, New York's courts have simply repeated the *Gilbert* rule, typically as part of the legal boilerplate framing discussions of retroactivity, without analyzing its underpinnings and without assessing its continued vitality. In light of recent Supreme Court precedent, those state courts that

have continued to cite *Gilbert* may be wrong in their unexamined assumptions regarding federal due process. See *Industrial Consultants, Inc. v. H.S. Equities, Inc.*, 646 F.2d 746, 749 (2d Cir.1981) ("The district court was not bound to adopt the Oklahoma court's interpretation of federal constitutional principles, even as applied to Oklahoma statutes.").

\*12 In its most recent discussion of retroactivity, the United States Supreme Court considered the evolving nature of due process in economic affairs, and determined that "the constitutional impediments to retroactive civil legislation are now modest." *Landgraf v. USI Film Products*, 511 U.S. 244, ---, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229 (1994). [FN3] The Court did suggest, however, that assorted Constitutional provisions, including the Contract Clause and the Due Process Clause, retain at least some role in matters of retroactivity. *Id.* at 1497 ("antiretroactivity principles find expression in several provisions of our Constitution."). The Court need not determine whether, after *Landgraf*, these "modest" constraints are enough to bar retroactivity in the circumstances of this case. [FN4] I find that the *Gilbert* rule is so firmly entrenched in state law that it is likely that New York's Court of Appeals will find that rule rooted in the state Constitution if necessary to preserve it. See *People v. Isaacson*, 44 N.Y.2d 511, 519, 406 N.Y.S.2d 714, 718, 378 N.E.2d 78 (1978) (New York's due process clause "may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provisions."); see generally Marshall J. Tinkle, *Forward Into The Past: State Constitutions And Retroactive Laws*, 65 Temp. L.Rev. 1253 (Winter, 1992) (proposing application of state constitutions to bar retroactivity as a feasible way in which to deal with the perceived inequity permitted under the modern federal approach).

The rule announced in *Gilbert* is routinely incorporated by New York's courts into discussions of retroactivity. See, e.g., *O'Connor*, 509 N.Y.S.2d at 473; *Alston*, 639 N.Y.S.2d at 360; *Glod*, 546 N.Y.S.2d at 754; *McGuirk*, 501 N.Y.S.2d at 478; *Dunkun*, 256 N.Y. at 285, 176 N.E. 392. The state's leading legal treatises have followed suit, incorporating this rule into their description of the state's black letter law on retroactivity. See, e.g. 75 N.Y.Jur.2d 48 (1989) ("a

reasonable time must be allowed after the effective date of the amended or new statute ..."); McKinney's Cons.Laws of N.Y., Book 1, Statutes § 59 ("Where a statute of limitations shortens the time for the enforcement of an existing right the Legislature must nevertheless afford the parties a reasonable time in which to prosecute their claims ..."). In recent decisions, coming after Landgraf, trial courts have relied upon Gilbert and declined to enforce amended limitations periods against litigants whose actions were otherwise timely filed. See, e.g. Alston, 225 A.D.2d 424, 639 N.Y.S.2d 359. In fact, the two decisions addressed specifically to the applicability of C.P.L.R. 214[6] to pending actions, though diverging in result, each reasoned that the retroactive application of the provision would violate the Constitution. See Garcia, N.Y.L.J. 26; Russo, N.Y.L.J. 29. [FN5]

These numerous expressions of state law counsel against retroactivity in the circumstances of this case. The fact that the Gilbert rule is still invoked--even after Landgraf--suggests that the New York courts continue to view it as antithetical to long-held notions of equity and fairness to apply a revised limitations period retroactively to bar an action that was timely when filed. Thus, if forced to confront the potentially faulty assumption that federal due process justifies the continued operation of the rule first announced in Gilbert, the New York Court of Appeals can be expected to preserve that rule--if need be--by tying it explicitly to the due process clause of the state constitution.

## II. Merits Of Plaintiffs' Claims

\*13 Defendants argue that plaintiffs' claims are substantively deficient. What plaintiffs have identified as malpractice, defendants contend, amounted simply to a series of reasonable decisions by defendants at the time they were made. Moreover, defendants maintain that plaintiffs cannot establish the "but for" causation necessary to sustain their cause of action under either a theory of breach of contract or malpractice. As to the alleged breach of fiduciary duty, relating to the supposed conflict of interest involving defendants and Paul Weiss, defendants argue that there were no actual conflicts, and that plaintiff is again unable to demonstrate causation.

Plaintiffs respond to defendant's motion by cross-

moving for summary judgment with respect to two of their claims; i) the alleged malpractice arising out of the failure to present evidence of damages, and ii) the alleged breach of fiduciary duty based upon defendants' conflict of interest. As for their remaining allegations of malpractice, plaintiffs argue broadly--without any particular discussion of the allegations in the complaint--that there are triable issues which require that defendants' motion be denied.

### A. Malpractice & Breach of Contract

To prevail in a claim of legal malpractice, plaintiffs must establish: "(1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney or some other conduct in breach of that relationship; (3) that the attorney's conduct was the proximate cause of injury to the plaintiff; and (4) that but for the alleged malpractice the plaintiff would have been successful in the underlying action." *Sloane v. Reich*, 1994 WL 88008, \* 3 (S.D.N.Y. March 11, 1994) (citations omitted); see also *L.I.C. Commercial Corp. v. Rosenthal*, 202 A.D.2d 644, 609 N.Y.S.2d 301, 302 (2d Dep't 1994) ("It is well settled that a claim of legal malpractice requires proof that the defendant 'failed to exercise that degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community, that such negligence was the proximate cause of the actual damages sustained by the [plaintiff], and that but for the [defendant's] negligence, the [plaintiff] would have been successful in the underlying action' ") (citations omitted).

Plaintiffs' breach of contract theory depends upon much the same showing as does their malpractice claim. Plaintiffs are not alleging that defendants guaranteed any particular result in the arbitration. Instead, they are arguing that, by committing "numerous omissions and negligence," defendants failed to meet their contractual obligation to make their best efforts on plaintiffs' behalf. (Am.Comp. ¶ 90.) Plaintiffs' contract and malpractice claims, "therefore, require identical proof of the deviation of the standard of care, causation, and damages." See *DaSilva v. Suozzi, English, Cianciulla & Peirez*, 165 Misc.2d 792, 797, 629 N.Y.S.2d 952, 955 (Sup.Ct. Queens County 1995), rev'd on other grounds, 649 N.Y.S.2d 680 (1st Dep't 1996). Thus, whether framing their claim as breach of

contract or attorney malpractice, plaintiffs must demonstrate the same thing, that defendants did not perform with the appropriate level of care, and that plaintiffs suffered damages as a result. Id.

#### 1. Reasonable Professional Decisions

\*14 In their Amended Complaint, plaintiffs marshal several allegations in support of their malpractice claim. According to plaintiffs, defendants erred by agreeing to proceed before a single arbitrator, by not objecting to the particular arbitrator selected, by failing to cross examine an adverse witness, by failing to prepare their own witness, by failing to name Bear Stearns as a defendant, by failing to comply with the arbitrator's instruction that they present evidence as to damages, and by failing to highlight Section 10.16 of the Bear Stearns partnership agreement. [FN6] As defendants contend, however, none of these decisions--whatever the alternatives then available--can now give rise to a viable claim for attorney malpractice.

An attorney cannot be held liable for malpractice for reasonable discretion exercised during the course of a litigation. See *Rosner v. Paley*, 65 N.Y.2d 736, 738, 492 N.Y.S.2d 13, 14, 481 N.E.2d 553 (1985) ("selection of one among several reasonable courses of action does not constitute malpractice."); see also *Hwang v. Bierman*, 206 A.D.2d 360, 614 N.Y.S.2d 51, 52-53 (2d Dept.1994) ("Even where there may be several alternatives, the selection of one of many reasonable defenses does not constitute malpractice."). "An attorney ... is not held to a rule of infallibility, and is not liable for an honest mistake of judgment where the proper course of action is open to reasonable doubt." *DaSilva v. Suozzi, English, Cianciulli*, 649 N.Y.S.2d 680, 683 (1st Dep't 1996) (citations omitted). Plaintiffs' kitchen sink approach cannot overcome this basic restraint on a claim of malpractice. None of the identified "errors" by defendant in connection with the unsuccessful arbitration were nearly so egregious that they could now be considered as unreasonable or otherwise sufficient to sustain a claim for malpractice.

In their opposition papers, plaintiffs discuss few of their malpractice allegations, focusing almost exclusively upon their claim that defendants disregarded the arbitrator's clear warning that

testimony was required to establish the appropriate measure of relief. In one exchange, Mr. Finley indicated that he found "nothing in the record so far to establish" Mr. Re's requested damages. (Arbitration Hearing Tr. at 209.) Near the end of the proceedings, Mr. Finley reiterated his concern:

Arbitrator: But the thing I fail to see here, and I am telling this to you: assuming hypothetically that the preponderance is with the petitioner, I still haven't got evidence of the money question. Which you said you're going to cover in your brief.

Mr. Wexler: Yes. Well, the evidence is in documentary fashion, and we will explain it to you in the brief.

Arbitrator: I haven't seen anything on the record. Now I would like to suggest to you that you go through the record tonight, if you can, before these hearings close and point out in the record which items in the exhibits are the ones you refer to. Because every one of them can't be referred to.

\* \* \*

\*15 Arbitrator: I am not being critical. Other than a statement of \$ 3,517,371 and a speculative million which comes to \$ 4,517,371, I haven't heard a word of evidence in the record so far other than you say it's in the documents, nothing on the record. Maybe they are incorporated by reference into the record. I don't know.

Mr. Wexler: That's because there just aren't witnesses who can talk to that issue, and it has to be in documentary form.

Arbitrator: Maybe God knows, I don't know. Someone's got to know. It's got to be established, documentary or otherwise.

Mr. Wexler: That's right, we will walk you through it in the brief.

(Id. at 389-390.) Plaintiffs view such exchanges as clear indications that Mr. Finley instructed defendant Wexler to put on testimony on the damages question, and that defendant Wexler unreasonably resisted doing so.

Defendants view these exchanges differently, arguing that the arbitrator never indicated that defendant Wexler should call a witness on damages, but only that damages would have "to be established, documentary or otherwise." (Id.) When Mr. Finley said that he had seen "nothing in the

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record" indicating an appropriate measure of relief, defendant Wexler assured him that defendants would "prove damages through the documents [they had] obtained in discovery". (Id. at 209-10.) Mr. Wexler responded that this was "fine." (Id.) Even towards the end of the proceedings, when Mr. Finley was most obviously troubled by the damages issue, he indicated that his mind was "wide open," and confirmed defendants' intention "to cover [the damages question] in [their] so-called brief." (Id. at 388.)

It is entirely possible that defendants misread Mr. Finley's comments, and that the arbitrator was expressing considerable skepticism as to whether a post-hearing brief would be sufficient to persuade him on the appropriate measure of relief. Plaintiffs have not, however, demonstrated either that defendant Wexler's fear of ruinous cross examination of a damages expert was unfounded, or that Wexler's decision to rely upon documentary evidence was unreasonable. Indeed, defendants did not ignore the damages element of Mr. Re's claim; they argued the point in the post-hearing brief, as they had set out to do, with the arbitrator's apparent approval. Defendants' approach may not have been optimal, but plaintiffs have not proffered any evidence from which a trier of fact could conclude that defendants' choice was malpractice.

As part of the flurry of correspondence to the Court following full briefing on the summary judgment motions, plaintiffs devoted significant attention to their position that defendants were not "rigorous" enough in arguing that Mr. Re should prevail under Section 10.16 of the Bear Stearns' partnership agreement. (Ltr. from Detiere to the Court of 11/26/96.) According to this provision:

If, after the final payment of his Capital is made to a Withdrawing Partner ... an asset of the Partnership ... shall become known and liquidated, the Withdrawing Partner shall receive that share of such asset to which he was entitled (directly or indirectly) during the period or periods to which the asset is attributable.

\*16 (Id.) Plaintiffs view this provision as "compelling," securing Mr. Re's rights with respect to the public offering. Defendants respond by identifying a number of difficulties with any argument based upon Section 10.16. For instance, it is not clear that Bear Stearns' decision to go public would qualify as an "asset." Also, defendants

disagree with plaintiffs' understanding that Section 10.16 entitles partners to a share in any asset liquidated "after the final payment of [their] Capital." The more reasonable interpretation, in defendants' view, is that a partner can recover a share of any such asset "to which he was entitled" during the time that he was active. As with Mr. Re's other claims, according to defendants, it would be difficult to prove that the decision to go public would be "attributable" to any period during which Mr. Re remained a partner. (Ltr. from Warner to the Court of 12/20/96, at 5.)

It is somewhat curious that plaintiffs waited so long to argue that defendants committed malpractice by waiting too long in invoking Section 10.16. In any event, defendants did make the very argument that plaintiffs now say should have been made. In hindsight, it is easy enough to reason that the presentation should have been different, but there is no evidence suggesting that it was malpractice that it was not. Defendants have identified numerous considerations which reasonably led them to conclude that any greater reliance upon Section 10.16 would be imprudent. In short, plaintiffs' hindsight determination that defendants' were not "rigorous" enough or quick enough in advancing the disputed position is precisely the sort of "second-guessing of counsel's strategic judgment ... [that] do[es] not rise to the level of legal malpractice." *Pacesetter Communications Corp. v. Solin & Breindel, P.C.*, 150 A.D.2d 232, 541 N.Y.S.2d 404, 406 (1st Dep't 1989).

With respect to the remaining allegations of malpractice set forth in their Amended Complaint, plaintiffs have given only cursory resistance to defendant's arguments for summary judgment. Plaintiffs simply recount the facts of a litany of cases cited in defendants' brief in support of summary judgment, and conclude that these cases "should require no further discussion." (Opp. to Mot. for S.J. at 31-32.) Plaintiffs are at least partly correct, defendants' cited authority is decisive. An attorney's reasonable decisions relating to such matters as cross-examination, witness presentation, and brief writing are not subject to second guessing in an action for malpractice. See e.g., *Stroock & Stroock & Lavan v. Beltramini*, 157 A.D.2d 590, 550 N.Y.S.2d 337, 338 (1st Dept.1990) (rejecting malpractice claim based upon "counsel's decision to proceed before the courts rather than in

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arbitration"); L.I.C. Commercial Corp., 609 N.Y.S.2d at 302 ("defendant's determination not to call the witness in the underlying action was clearly a reasonable strategic decision which did not constitute malpractice."). This is the sum of plaintiffs' allegations, and plaintiffs' malpractice claim must therefore be dismissed. *Id.*

## 2. Proximate Cause

\*17 As already noted, "to recover for legal malpractice, it must be shown not only that the attorney was negligent, but also that 'but for' the attorney's negligence the plaintiff would have prevailed in the underlying action." *Pacesetter*, 541 N.Y.S.2d at 405; see also *Hanlin*, 623 F.Supp. at 456 (S.D.N.Y.1985) ("in order to prevail, plaintiff must demonstrate that but for the alleged acts of malpractice, she would have been able to recover or proceed in a manner other than that which actually occurred."); *Stroock*, 550 N.Y.S.2d at 338. Plaintiffs cannot demonstrate such "but for" causation.

Plaintiffs have all but conceded that certain of defendants' decisions, though criticized in the Amended Complaint, were not the cause of plaintiffs' damages. Most notably, plaintiffs no longer ascribe their defeat against Bear Stearns to defendants' selection of Mr. Finley as the sole arbitrator in the matter. In fact, plaintiffs have most recently determined that "Mr. Finley was actually a very competent and qualified arbitrator [and that] Mr. Wexler may well have been right that Mr. Finley was an excellent choice." (*Detiere* 5/26/96 Aff. ¶ 16). It is simply impossible to reconcile this position with the conclusion that defendants' selection of Mr. Finley was actionable malpractice leading to plaintiffs' defeat against Bear Stearns.

It is also unlikely that defendants' alleged failure to present sufficient evidence on the question of damages explains Mr. Finley's adverse decision. First, damages was only one component of Mr. Re's claim against his former partners. While it is true that Mr. Finley expressed clear concern as to the adequacy of defendants' evidence on this point, there is no indication that he was satisfied that defendants had met their burden of proof with respect to the remaining elements of Mr. Re's claims. During the proceedings, Mr. Finley never did anything more than hypothesize that Mr. Re had

been treated unfairly. (Arbitration Hearing Tr. at 387 ("Arbitrator: I have no opinions yet ...").) Unless Mr. Finley was more firmly convinced, the damages question could not have effected his final determination.

Even if defendants had succeeded at proving the merits of Mr. Re's claims, it is not clear that any different presentation on the issue of damages would have been persuasive. It is simply impossible to know what would have happened had defendants followed the course now suggested by plaintiffs--that is, calling Mr. Re's accountant, Ms. Halpern, as a witness to testify on the damages question. Plaintiffs have not explained how Ms. Halpern, or any other witness, would have succeeded at deflecting cross-examination on the issue of Mr. Re's worth to Bear Stearns. Though plaintiffs freely criticize defendants' handling of the damages issue, they have not addressed defendants' strategic concerns, and they have not proposed any compelling alternative approach.

The foregoing discussion is perhaps unnecessary after plaintiffs' November 26, 1996 letter to the Court. There, plaintiffs refer to Section 10.16 of the Bear Stearns partnership agreement as Mr. Re's "only hope" of success at arbitration. By implication, then, plaintiffs accept that Mr. Re's loss was not the result of any of the other alleged errors by counsel (i.e., the failure of proof on damages, the selection of Mr. Finley, etc.). Plaintiffs have placed too much stock in Section 10.16, however: the Court cannot conclude that Mr. Re would have prevailed had defendants presented Section 10.16 even as "rigorously" as plaintiffs suggest. As already noted, there are significant uncertainties with respect to the appropriate application of that provision, and it is not at all clear that Mr. Finley could have been persuaded to apply it in Mr. Re's favor. See Section IIA1, *infra*. Moreover, defendants advanced the argument, merely declining to do so with the emphasis plaintiffs now deem appropriate. There is no evidence from which a trier of fact could infer that this same argument, rejected when set out in a page, would have been dispositive if delivered with a different gloss and with greater zeal.

\*18 Thus, plaintiffs can not establish that defendants' tactical decisions were unreasonable, and plaintiffs cannot establish that any mistakes that

defendants might have made resulted in Mr. Re's defeat. For each of these reasons, plaintiffs cannot proceed with their claim of malpractice.

#### B. Breach of Fiduciary Duty

"[A]n attorney stands in a fiduciary relationship to the client." Graubard Mollen Dannett & Moskovitz, 86 N.Y.2d 112, 118, 629 N.Y.S.2d 1009, 1012, 653 N.E.2d 1179 (1995). As such, an attorney is "charged with a high degree of undivided loyalty to his client." Kelly v. Greason, 23 N.Y.2d 368, 375, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968). In the event that defendants breached this duty of loyalty, plaintiffs are "not required to meet the higher standard of loss or proximate causation." Northwestern National Ins. v. Alberts, 769 F.Supp. 498, 506 (S.D.N.Y.1991). Instead, to prevail on their claim of breach of fiduciary duty, plaintiffs must demonstrate a conflict of interest which amounted merely to a "substantial factor" in their loss at arbitration. [FN7] See Milbank, Tweed, Hadley & McCloy, 13 F.3d 537, 543 (2d Cir.1994).

##### 1. Conflict of Interest

Plaintiffs argue that defendants' relationship with Paul Weiss posed a conflict of interest such that, at a minimum, defendants were under an obligation to inform Mr. Re of their association with their former firm. There are two aspects to defendants' relationship with Paul Weiss which give rise to plaintiffs' concerns. First, Kornstein Veisz is something of a "spin-off" from Paul Weiss: all of the individual defendants worked as associates with Paul Weiss early in their careers. Next, defendants' relationship with Paul Weiss was not a thing of the past; defendants maintained economic ties with their former employer throughout the time that they represented Mr. Re against Bear Stearns.

##### a. Defendants Status As Former Paul Weiss Associates

The Second Circuit has been called upon to determine whether a district court was correct in declining to disqualify an attorney based upon the fact that he was formerly an associate with a law firm opposing him in a particular matter. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir.1975). During his

time as an associate, the attorney in Silver Chrysler had even done some work for the opposing party in the litigation. Nevertheless, the Second Circuit agreed with the district court that disqualification was inappropriate. Reflecting upon the realities of large firm life, the Court found it unreasonable to assume that a junior associate with a large law firm would be privy to significant information concerning the affairs of any particular of the firm's clients. See Silver Chrysler, 518 F.2d at 753-54. It would therefore make little sense, in the Court's view, to "unnecessarily constrict[ ] the careers of lawyers who started their practice of law at large firms simply on the basis of their former association." Id. at 757. To the extent the realities of law firm life have changed since the holding in Silver Chrysler, they have changed in the direction of greater mobility by individual attorneys into and out of law firms. See Graubard, 86 N.Y.2d at 119, 629 N.Y.S.2d 1009, 653 N.E.2d 1179 (discussing the "current revolving door law firm culture"). In the present climate, it would be especially impractical to require that attorneys forever avoid representing clients in disputes involving their former firms.

\*19 Thus, the decision in Silver Chrysler confirms that defendants' former association with Paul Weiss does not, by itself, give rise to a conflict bearing upon their ability to represent Mr. Re. The decision in Silver Chrysler, however, does not speak to another matter of present concern. Defendants were not merely once associated with Paul Weiss; defendants maintained an ongoing relationship with their former firm throughout the time that they represented Mr. Re.

##### b. Paul Weiss Referrals

As New York's Court of Appeals recently explained, the attorney-client relationship requires an extraordinary degree of trust:

Sir Francis Bacon observed '[t]he greatest trust between [people] is the trust of giving counsel.' This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf--'giving counsel'--is imbued with ultimate trust and confidence. The attorney's obligations, therefore, transcend those prevailing in the commercial market place. The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client

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relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's.

*Matter of Cooperman*, 83 N.Y.2d 465, 471-72, 611 N.Y.S.2d 465, 467, 633 N.E.2d 1069 (1994) (citations omitted). As made emphatically clear by the Court in *Cooperman*, clients must be able to maintain extraordinary confidence in their attorneys, and attorneys must be unyielding in representing their clients with undivided loyalty.

The unique nature of the attorney client relationship requires that attorneys be sensitive not only to obvious conflicts, but also to forces that might operate upon them subtly in a manner likely to diminish the quality of their work. See *Kelly*, 23 N.Y.2d at 376, 296 N.Y.S.2d 937, 244 N.E.2d 456 ("the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship."). This is reflected, for instance, in Ethical Consideration (EC) 5-21 of Canon 5 of New York's Code of Professional Responsibility:

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client ...

These concerns are also given effect by operation of Disciplinary Rule (DR) 5-101(A): "Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." [FN8] In light of the factual record in this matter, it is possible that defendants were not adequately attuned to certain economic forces operating upon them, and that they were not sufficiently forthright in revealing these forces to Mr. Re.

\*20 While referrals from Paul Weiss constituted only a small fraction of defendants' overall business,

the Court cannot say that the total dollars involved--on the order of \$ 500,000 over several years--were insignificant. Indeed, a jury could reasonably conclude that this volume of referrals could have effected defendants' judgment in any action involving Paul Weiss, or that it might have left Paul Weiss in a position to exert considerable influence over defendants. Moreover, the record suggests at least some basis for supposing that such influence was brought to bear. Defendant Wexler relates that, during his meeting with Mr. Rubenstein, this Paul Weiss partner "tried to persuade" him that there was "no merit" to Mr. Re's claims. (Wexler 4/18/96 Aff. Ex. 30.) Though Mr. Wexler reported the substance of the meeting to Mr. Re, there is a factual dispute as to whether he reported the context. In other words, Mr. Wexler reported to Mr. Re that he had been urged by a likely witness that Mr. Re's claims lacked merit; but it cannot now be established that Mr. Wexler reported to Mr. Re that this likely witness was affiliated with a firm responsible for referring several hundred thousand dollars worth of business to Mr. Wexler and his partnership.

The Court recognizes that in most cases involving alleged conflicts of interest, there are law firms representing two sides to a dispute, or representing a client against a firm with which they have a relationship. See, e.g. *Kelly*, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 244 N.E.2d 456 (upholding sanctions against members of two-partner law firm, where partners represented claimants against insurance carrier, though one of the partners worked as "outside adjuster" for that same carrier); *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir.1976) (affirming disqualification of plaintiff's law firm whose partner was also a member of a firm simultaneously representing defendant in another matter "in other litigation of a somewhat similar nature."); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2d Cir.1976) (affirming disqualification of law firm representing "corporate officer against his former corporate employer when the firm and the client have both consulted with the former corporate house counsel on subjects at issue in the suit"). The Court recognizes further that many of the concerns animating decisions in such circumstances are not presently implicated. Most notably, defendants were not paid by Paul Weiss, and Paul Weiss was not representing Bear Stearns.

Despite these considerations, a number of factors gave rise to a possible conflict. Paul Weiss was the source of a significant income stream for defendants. Moreover, it was clear from the start of Mr. Re's relationship with defendants that Paul Weiss would figure prominently in any action by Mr. Re against Bear Stearns. Indeed, Paul Weiss was directly involved in the transaction that was at the vortex of Mr. Re's action, Bear Stearns' public offering. And, in meetings with both Mr. Re and defendant Wexler, Mr. Rubenstein unquestionably assumed the stance of an advocate for Bear Stearns. (Arbitration Hearing Tr. at 416 ("I told Mr. Re ... that if he brought a claim against Bear Stearns he would have to expect that it was going to be very rigorously defended, that this would not be settled, that they feel very strongly about it, they wouldn't pay a nickel, they were positive they did nothing wrong and I said and I will be a witness ...").) Paul Weiss thereby adopted a position adverse to Mr. Re. In sum, Paul Weiss was close to the situation involving Bear Stearns, and defendants were close to Paul Weiss; a reasonable jury could conclude that defendants should have alerted Mr. Re to their relationship with their former firm. [FN9]

\*21 Thus, there is a factual dispute as to defendants' alleged conflict of interest. The Court recognizes that this finding might unsettle the assumptions of some practicing attorneys who, undoubtedly well meaning, would never think to classify defendants' arrangement with Paul Weiss as problematic. These attorneys must bear in mind, however, that "[t]he standards of the profession exist for the protection and assurance of the clients and are demanding." *Gabri v. County of Niagara*, 127 Misc.2d 623, 486 N.Y.S.2d 682, 695 (Niagara County 1985). This Court is simply unable to tell plaintiffs that they are misguided in their frustration, that there was no problem posed by the fact that Mr. Re's attorneys--in a costly action against Bear Stearns--were former colleagues of, and were still associated with, Bear Stearns' long time legal counsel, a firm represented by an adverse witness at the proceedings. This scenario creates the risk of a conflict, and on the evidence before the Court, there is at least some evidence from which a jury could reasonably infer that such a conflict actually materialized.

## 2. Substantial Factor

In contrast to their malpractice claim, plaintiffs need not demonstrate that defendants' alleged breach of fiduciary duty was the proximate cause of Mr. Re's defeat at arbitration. See *Milbank*, 13 F.3d 537; see also *ABKCO Music, Inc. v. Harrisongs Music Ltd.*, 722 F.2d 988, 995-96 (2d Cir.1983) ("An action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach--not simply to compensate for damages in the event of a breach."). The causation requirement is appropriately relaxed with respect to an alleged breach of fiduciary duty, particularly in the attorney client context, "because of the attorney's unique position of trust and confidence." *Id.* at 543. In order to establish causation, then, plaintiffs need only demonstrate that the defendants' alleged breach of fiduciary duty was a "substantial factor" in Mr. Re's loss at arbitration. *Id.*

Though there is insufficient evidence to establish the "but for" causation necessary for malpractice, the "substantial factor" standard--"prophylactic" in nature--invites a more generous evaluation of plaintiffs' claims. See *Milbank Tweed*, 13 F.3d at 543; see also *ABKCO*, 722 F.2d at 995. Viewed through the lens of a potential conflict of interest, defendants' otherwise defensible tactical decisions take on a more troubling gloss, and suggest at least the possibility that defendants' divided loyalties substantially contributed to Mr. Re's defeat at arbitration. As plaintiffs contend, defendants might have been reluctant to disparage Paul Weiss, and, as a result, defendants may have pursued Mr. Re's claims with diminished rigor. See *Kelly*, 23 N.Y.2d at 377, 296 N.Y.S.2d 937, 244 N.E.2d 456. Such diminished rigor would have manifested itself in a number of poor choices which, taken together, substantially undercut Mr. Re's chances of success against Bear Stearns.

\*22 Without the specter of a conflict of interest, defendants' decision to delay any assessment of Mr. Re's damages until submission of the post-hearing brief was plainly defensible. Defendants might reasonably have feared that a damages expert would have faced harsh and effective cross examination. See Section IIA1. For present purposes, however, this explanation is unsatisfying. In preparing Mr. Re's case, it appears that defendants never fully analyzed the damages question. In advance of the proceedings, for instance, Mr. Wexler consulted Mr. Re's accountant, Ms. Halpern, but only briefly

(Cite as: 1997 WL 162918, \*22 (S.D.N.Y.))

and without inviting her feedback as to the appropriate calculations bearing upon Mr. Re's partnership interest with Bear Stearns. (Halpern 4/26/96 Aff. ¶¶ 2, 3.) Early in the proceedings, Mr. Finley asked defendant Wexler some preliminary questions regarding the appropriate measure of relief, and Mr. Wexler struggled to articulate a cogent explanation of Mr. Re's losses. (Arbitration Hearing Tr. 46-53.) When Mr. Wexler finally did settle on a figure during this early questioning, it is one he subsequently revised downward, by a considerable margin, citing "mathematical errors" in his "preliminary notes." (Wexler 4/18/96 Aff. Ex. 21 at 91.)

As set out in the Court's discussion of the alleged malpractice, Mr. Finley--near the end of the arbitration proceedings--expressed his clear concern that there was an absence of evidence going to Mr. Re's damages. (Arbitration Hearing Tr. 386-90.) On what would become the last day of the proceedings, Mr. Finley urged Mr. Wexler, at a minimum, to spend the evening identifying those documents relevant to the damages analysis, and to designate those documents, on the record, before the formal close of the proceedings. (Arbitration Hearing Tr. at 389.) Mr. Wexler did not do so, apparently unwilling even to modify or supplement his plan to present the damages issue in a post-hearing brief. In his post-hearing brief, however, Mr. Wexler did not make nearly the use of documentary evidence that he had repeatedly assured Mr. Finley during the proceedings. (Barrett 4/24/96 Aff. ¶ 20.) In light of defendants' possible conflict of interest, and considering Mr. Wexler's seeming lack of full diligence on the damages question, a jury could reasonably conclude that his strategic decision not to present evidence or testimony as to damages during the proceedings was influenced by the conflict. Moreover, given Mr. Finley's obvious discomfort with the absence of any presentation on damages, it is at least possible that defendants' approach--though not a "but for" cause of Mr. Re's defeat--contributed to the arbitrator's ultimate rejection of Mr. Re's claims.

Another potential shortcoming in defendants' representation of Mr. Re involved Mr. Purpura, the only witness--aside from Mr. Re--called on Mr. Re's behalf. As an initial matter, it appears that defendant Wexler, in combination with his associate, Mr. Fleming, never settled upon any

coherent plan for developing Mr. Purpura's testimony. (Compare Arbitration Hearing Tr. at 280 ("Mr. Fleming: This all goes to ... assist in calculating our damages ..."), with Arbitration Hearing Tr. at 281 (Mr. Wexler: Could I interject ... We are not going to make any comparison between Mr. Re and Mr. Purpura ...).) Moreover, Mr. Purpura explains that defendant Wexler never spoke to him regarding the subject matter of his testimony. (Purpura 4/30/96 Aff. ¶ 3.) Mr. Wexler's discussions with Mr. Purpura were limited to questions concerning rumors that Mr. Purpura had heard concerning the timing of Bear Stearns' decision to go public, a matter not elicited during Mr. Fleming's examination of Mr. Purpura. While it might have been perfectly reasonable for Mr. Wexler to give an associate primary responsibility for preparing and questioning Mr. Purpura, it is somewhat curious that Mr. Wexler was not more attuned to the role being devised for the only witness, besides Mr. Re, called on Mr. Re's behalf.

\*23 Mr. Wexler's failure to cross examine Mr. Rubenstein must also be revisited in light of the relationship between Paul Weiss and Kornstein Veisz. Undoubtedly, it is often times sensible to refrain from a cross examination. Wexler suggested at least a viable reason for his decision to do so--namely, Mr. Rubenstein's testimony was irrelevant under Mr. Wexler's theory of the case. However, given the relationship between defendants and Mr. Rubenstein's firm, this explanation now invites skepticism. It is possible, for instance, that defendants' very choice of arguments reflected a reluctance to challenge Paul Weiss during the proceedings.

In sum, the record permits the conclusion that Mr. Wexler's work on Mr. Re's behalf suffered on account of defendants' ties to Paul Weiss. The Court does not mean to suggest that defendants exhibited any bad faith, or that they meant to provide Mr. Re with anything less than vigorous counsel. It is possible, however, that defendants inadvertently relented to subtle financial pressures compromising their ability to work diligently on Mr. Re's behalf. Though Mr. Re's case was perhaps unlikely to succeed from the outset, it is plausible that a jury would conclude that defendants' failure to pursue that case vigorously was a "substantial factor" in Mr. Re's ultimate defeat. See *Milbank*, 13 F.3d at 543. For this reason,

defendants' motion for summary judgment, as to the alleged breach of fiduciary duty, must be denied.

### CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is granted in part, and denied in part, and plaintiffs' motion for summary judgment is denied. Specifically, the malpractice and breach of contract claims are dismissed, but plaintiffs can proceed to trial as to the alleged breach of fiduciary duty. A conference is scheduled for May 23, 1997, at 2:30 p.m., at which time the Court will schedule this matter for trial, unless the Second Circuit has by that time accepted this matter for interlocutory appeal.

The Court's decision to reject the retroactive application of the amended C.P.L.R. 214[6] raises special concerns. Though it is perhaps doubtful that the federal Constitution prohibits retroactivity in the circumstances of this case, for the reasons discussed, the Court is persuaded that New York's Court of Appeals would apply the state Constitution to achieve such a result. The New York Court of Appeals has not yet reached this question, however, and it is entirely possible that it will not ultimately adopt this Court's approach. There is a "substantial ground for difference of opinion" with respect to this issue. 28 U.S.C. § 1292(b). Moreover, because the question of retroactivity is potentially dispositive as to all of plaintiffs' claims, "an immediate appeal from this order may materially advance the ultimate termination of th[is] litigation." *Id.* Accordingly, the Court grants defendants' request and certifies this matter, solely as to the issue of retroactivity, for interlocutory appeal. The parties are to advise the Court in the event that the Second Circuit denies defendants' request for appeal prior to the next conference date.

FN1. Defendants have not submitted any briefing addressed specifically to the appropriate disposition of plaintiffs' claim for unjust enrichment, but have reasoned that the survival of this claim depends upon the Court's ruling as to the predicate breach of fiduciary duty. (Memo. in Sup. of Mot. For S.J. at 3, n. 2.) Plaintiffs have not disputed this assertion.

FN2. As noted, Mr. Re passed away during the proceedings in this case. Broadly speaking, under

New York's "Dead Man's Statute," defendants cannot testify as to transactions or communications with Mr. Re, but must rely upon documentary evidence of such interactions. See C.P.L.R. 4519; see generally *Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir.1996). Plaintiffs waive this protection, however, to the extent that they place at issue communications between Mr. Re and defendants. *Id.*

FN3. Though finding that the Constitution seldom bars retroactivity in the civil context, the Landgraf Court did preserve a strong presumption against the retroactive application of substantive provisions, and of certain procedural provisions, as well. 114 S.Ct. at 1504. As discussed in Section IB1, *supra*, New York maintains a similar presumption, which has been defeated with respect to C.P.L.R. 214[6].

FN4. The Second Circuit recently declined to reach a similar issue. See *Vernon v. Cassadaga Valley Central School District*, 49 F.3d 886, 889 n. 1 (2d Cir.1995) (applying amended limitations period to actions which accrued before the amendment, but not "address[ing] the situation where Congress replaces a statute of limitations with a shorter one that, if applied to a claim filed after the statute becomes effective, cuts off a plaintiffs right to sue without providing him an opportunity to comply with the new period.").

FN5. As discussed in Section IB1, *supra*, the Russo Court avoided the perceived retroactivity problem by improperly deferring to the legislature's position that it was merely "reaffirming" the proper application of the original C.P.L.R. 214[6].

FN6. The discussion in this section excludes the alleged conflict of interest, which plaintiffs do not frame as part of the alleged malpractice, but raise separately, as an alleged breach of fiduciary duty. See Section IIB, *supra*. By proceeding in this manner, plaintiffs avoid application of the rigorous "but for" standard to the claimed conflict of interest, which they cannot meet, and need only establish that defendants' relationship with Paul Weiss was a "substantial factor" in Mr. Re's defeat at arbitration. See *Milbank, Tweed, Hadley & McCloy*, 13 F.3d 537, 543 (2d Cir.1994).

FN7. Defendants argue that plaintiffs have not identified an expert prepared to testify as to the

appropriate standard of professional care, or as to proximate cause, and that plaintiffs are therefore precluded from advancing their claim alleging breach of fiduciary duty. However, plaintiffs have retained an expert, William Barrett, who has submitted two affidavits to this Court assessing defendants' handling of the damages question. Since this issue lies at the heart of plaintiffs' allegations of defendants' "diminished rigor," the Court is satisfied, for now, with plaintiffs' proffer.

FN8. "[T]he Code of Professional Responsibility [consists of] a series of nine canons promulgated by the American Bar Association and adopted by the New York State Bar Association. Each canon represents an expression of an axiomatic norm, and canons are further elucidated in Ethical Considerations and Disciplinary Rules. The ethical considerations (EC) are 'aspirational in character' and represent desired objectives; the disciplinary rules (DR) are, however, mandatory and violation of the rules may result in appropriate penalties." *Spilky v. Hirsch*, 102 Misc.2d 536, 425 N.Y.S.2d 934, 935 (1st Dept.1980). The Court draws upon New York's Code of Professional Responsibility to frame the appropriate standard of professional care. *Id.* at 935 ("While the provisions of the code do not rise to the status of decisional or statutory law, 'the courts should not denigrate them by indifference.'") (citations omitted); see also *Avianca, Inc. v. Corriea*, 705 F.Supp. 666, 679 (D.D.C.1989) (The Disciplinary Rules of the American Bar Association's Code of Professional Responsibility ... while not strictly providing a basis for a civil action, nonetheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the DR's is conclusive evidence of a breach of the attorney's common law fiduciary obligations."), *aff'd* 70 F.3d 637.

FN9. The Court is untroubled by the "absurd consequences" that defendants predict to follow from a ruling against them. (5/3/96 Motion For Summary Judgment at 36.) Defendants focus upon the following scenario: "If Firm A decides that it should not handle a litigation matter for a client because a lawyer at Firm A may be a witness, the matter will be referred to Firm B. Under plaintiffs' theory, unless Firm B discloses to the client every penny Firm B ever received from clients referred from Firm A ... Firm B will be liable if it loses the

litigation." *Id.* This simply is not the case. Firms need not provide clients with an accounting of "every penny" derived from referrals from all potentially adverse firms and parties; attorneys are simply advised to alert clients to the general nature of their economic involvements with entities likely to play a prominent, adverse role--perhaps as a witness--in their client's affairs. In defendants' hypothetical, having been referred from Firm A to Firm B, a client could be expected to surmise that Firm B was in the practice of receiving referrals from Firm A. Mr. Re, on the other hand, was not in a position to make any such assumptions.

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

96 Civ. 5305 SS

5 LOUIS MENCHACA, AMY  
6 BOISSONNEAULT, KATHRYN  
7 TRUDELL and SHERYL FITZPATRICK,

8 Defendants.

-----x

9 August 26, 1996  
4:45 p.m.

10 Before:

11 HON. SONIA SOTOMAYOR,

12 District Judge

13 APPEARANCES

14 MARY JO WHITE  
15 United States Attorney for the  
Southern District of New York  
16 MARTIN J. SIEGEL  
Assistant United States Attorney

17 JOHN BRODERICK  
18 Attorney for Defendants

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20 D E C I S I O N

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1 THE COURT: Well, counsel, I have read the papers  
2 and I'm ready to rule. If you have anything to add to the  
3 papers before I do so, let me know now.

4 MR. SIEGEL: No, ma'am.

5 MR. BRODERICK: I don't, your Honor.

6 THE COURT: All right. I'll read my decision  
7 into the record. I'm not usually ready to rule, but it  
8 seemed as if the positions were straightforwardly set forth  
9 in the papers and there wasn't much to add.

10 This action arises under the Freedom of Access to  
11 Clinic Entrances Law of 1994 ("FACE") 18 U.S.C. Section 248,  
12 which provides for injunctive relief and statutory monetary  
13 relief against any person who

14 by force or threat of force or by physical  
15 obstruction, intentionally injures, intimidates or  
16 interferes with or attempts to injure, intimidate or  
17 interfere with any person because that person is or has  
been, or in order to intimidate each person or any other  
person or any class of persons from, obtaining or providing  
reproductive health services.

18 In its initial application filed on July 18,  
19 1996, the government sought a preliminary injunction  
20 enjoining the defendants from violating FACE and coming  
21 within 15 feet of the Women's Medical Pavilion ("WMP") at  
22 Dobbs Ferry. At a conference held in this matter on August  
23 1, 1996, I consolidated the government's application for a  
24 preliminary injunction with a trial on the merits under  
25 Federal Rule of Civil Procedure 65(a)(2).

1           The government alleges and has provided evidence  
2   that the four defendants in this action have over the course  
3   of six years, repeatedly hindered medical care at the WMP by  
4   physically blocking patient and staff attempts to enter the  
5   building. Each defendant has been arrested by Dobbs Ferry  
6   police on numerous occasions, convicted, served jail  
7   services, and been barred by state court orders of  
8   protection from coming near the WMP. Defendant Menchaca was  
9   convicted of trespass three times; defendant Boissonneault  
10   has been convicted three times of disorderly conduct and  
11   once of violating a permanent order of protection; defendant  
12   Trudell has been convicted twice of trespass and once of  
13   disorderly conduct; and defendant Fitzpatrick has been  
14   convicted twice of disorderly conduct, twice for violation  
15   of a permanent order of protection and once for trespass.  
16   All defendants had prior arrests for trespass that resulted  
17   in the charges being dismissed because the time served  
18   exceeded the maximum penalty.

19           The last incident of obstruction occurred on  
20   April 3, 1996, when each defendant blocked the only entry to  
21   the clinic by sitting at its doorway, which is at the rear  
22   of the building and which can only be reached by traversing  
23   an 18-inch wide, walkway from the building's parking lot.  
24   Police officers issued trespass warnings to the defendants  
25   who refused to leave and then the defendants were arrested

1 and removed. By blocking the only entrance to the clinic,  
2 patients and employees were prevented from gaining access to  
3 the building and from receiving or giving reproductive care.  
4 Of the twelve women scheduled for treatment, only six  
5 ultimately appeared for treatment. Without protests of the  
6 type conducted by defendants, the normal "no-show" rate for  
7 treatment is only 10 percent and not 50 percent as occurred  
8 on this date. Moreover, employees scheduled to engage in  
9 counseling of patients were prevented from rendering those  
10 services.

11 Now, defendants Menchaca, Boissonneault and  
12 Fitzpatrick have not filed papers in opposition to the  
13 government's request for a permanent injunction. Because  
14 the government has amply proven that these defendants have  
15 violated FACE by their obstruction of the WMP's only  
16 entrance on April 3, 1996, and because there is more than  
17 reasonable cause, given their past history, to believe that  
18 these defendants will continue their unlawful conduct, I  
19 find that issuing the injunction sought by the government  
20 against these defendants is warranted. The standards for  
21 injunctive relief are more than met in this case given the  
22 irreparable injury presumed because of the statutory harm  
23 caused by the defendants to the public's interest, and the  
24 government's proof of the FACE violations by these  
25 defendants.

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1           The same finding for the same reasons can be  
2     applied to defendant Trudell but she has filed papers  
3     opposing the preliminary injunction and moving to dismiss  
4     the complaint in this action on the ground that FACE is  
5     unconstitutional. For the reasons to be discussed, I reject  
6     defendant Trudell's constitutional challenges to FACE.

7           The Government's Memorandum of Law in opposition  
8     to defendant's Trudell's Motion to Dismiss the Complaint and  
9     in Further Support of Plaintiff United States' Application  
10    for a Preliminary Injunction at pages 5, 10, 11-12 and 18,  
11    lists the circuit and district courts throughout the country  
12    that have addressed almost all of defendants' constitutional  
13    challenges to FACE. I have nothing new to add to the  
14    reasoning or analysis of those courts and merely incorporate  
15    those cases and their analysis by reference. Herein I am  
16    merely summarizing the essence of why I do not accept  
17    defendants' constitutional challenges.

18           I am aware of the deeply personal feelings that  
19    have motivated defendant's actions in this matter. I am  
20    also fully aware of the highly charged societal debate  
21    concerning reproductive rights in our nation. I further  
22    recognize the fine line between defendant's rights to  
23    passive, nonviolent protest, and the conduct prohibited by  
24    FACE. Nevertheless, I am compelled by Supreme Court  
25    precedence, including but not limited to *Cameron vs.*

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1     *Johnson*, 390 U.S. 611, 617 (1968) and *Cox vs. Louisiana*, 379  
2     U.S. 559 (1965) to conclude that FACE in the context of this  
3     case does not penalize ideas or religious beliefs, but only  
4     that conduct, intentional obstruction of another's property,  
5     that infringes on the rights of WMP and its patients.

6             For similar reasons, I reject defendant's  
7     challenge to FACE as vague. I agree with the government  
8     that FACE is substantially similar to the statute upheld in  
9     *Cameron vs. Johnson* 390 U.S. 611, 617 (1968), and  
10    accordingly, I am bound by the *Cameron* reasoning to conclude  
11    that FACE is not unduly vague.

12            With respect to the defendant's challenge to FACE  
13    under the commerce clause and *United States vs. Lopez*, 115  
14    S. Ct. 1624 (1995), I, like Judge Sprizzo in *United States*  
15    *vs. Lynch*, 95 Civ 9223 (JES), his decision of February 23,  
16    1996, have examined the extensive legislative history of  
17    FACE and conclude that Congress had an ample and adequate  
18    basis to conclude that the blockade of clinics and other  
19    conduct examined by Congress has a likelihood of and does  
20    affect interstate commerce. I make this conclusion under  
21    the traditional analysis of commerce clauses set forth by  
22    the Supreme Court, see *Preseault vs. Interstate Commerce*  
23    *Clause*, 494 U.S. 1, 17, (1990) (courts "must defer to a  
24    congressional finding that a regulated activity affects  
25    interstate commerce if there is any rational basis for such

1 a finding") I too find that FACE survives a commerce clause  
2 challenge to its constitutionality based on this stricture  
3 by the Supreme Court.

4 Defendant's equal protection argument fails for  
5 the reasons her First Amendment challenge does not survive.  
6 FACE, as it relates to defendant's conduct, only regulates  
7 her unlawful conduct, not expression, and FACE in any event  
8 is narrowly tailored to protect the government's interest as  
9 expressed by Congress.

10 Finally, defendant Trudell's Eighth Amendment  
11 challenge to FACE's criminal penalties is not ripe for  
12 resolution because this action is a civil, not criminal,  
13 action.

14 In summary, I find that FACE withstands Trudell's  
15 constitutional challenges and deny Trudell's motion to  
16 dismiss the complaint in this action for the reasons I just  
17 stated.

18 Trudell, however, maintains that FACE requires an  
19 individual to have "discriminatory animus" towards the  
20 employee or patients at reproductive service facilities  
21 before an injunction can issue. Defendant contends and  
22 requests that a hearing on this issue be held. I agree with  
23 the government that nowhere in Section 248 of FACE is  
24 discriminatory animus set forth as a requirement and that  
25 FACE only requires proof that a person has intentionally

1     interfered with others for obtaining or providing  
2     reproductive care. On this issue, there is no dispute.  
3     Defendant in her opposition papers concedes that on April 3,  
4     1996, at WMP, she and others took their  
5             accustomed places in a sitting position blocking  
6     the entrance. With reverence for life they sat down ... and  
7     devoutly awaited their arrest ... [T]hey were arrested. The  
8     clinic then opened. One-half of the women scheduled on that  
9     "abortion day" changed their minds and the clinic claims  
10    damages in this action for loss of that revenue.

11            This is taken from Trudell's opposition to the  
12    preliminary injunction at page 12.

13            This concession leaves no dispute at issue that  
14    plaintiff intentionally, albeit for deeply held personal  
15    views, obstructed the clinic's entranceway with the express  
16    purpose of interfering with the rights of the clinic's  
17    patients to obtain reproductive services and of the clinic's  
18    employees to give such services. No hearing, given  
19    defendant's concessions, on the issue of intent, the only  
20    requirement by FACE, is therefore necessary. Plaintiff has  
21    been fully heard and the injunction in Trudell's case will  
22    be issued for the same reasons it is issued against the  
23    three other defendants.

24            Finally, I, like Judge Sprizzo, in the exercise  
25    of my discretion, do not believe it warranted to impose  
26    statutory damages at this time. Defendants are advised,  
27    however, that any further conduct at WMP violating FACE will

1 both counsel the imposition of statutory damages at that  
2 time and constitute a contempt of this Court's order  
3 warranting other sanctions.

4 I note that I have carefully examined the  
5 description of the physical layout of this clinic and  
6 conclude that given the location of its driveway and only  
7 entrance, that a 15 feet injunction is the minimum amount of  
8 space necessary to safeguard the First Amendment rights of  
9 defendants while safeguarding the rights of persons using  
10 the clinic. The government should submit an order  
11 consistent with this opinion incorporating the Court's  
12 rulings on the motion to dismiss and the government's  
13 request for injunctive relief and statutory relief.

14 The government is warned that an injunction that  
15 says "don't violate the law" is meaningless. Read the case  
16 law on this issue. The injunction must specify the specific  
17 conduct which the defendant is prohibited from undertaking,  
18 not merely "don't violate the law." Everyone is under an  
19 obligation not to violate the law with or without an  
20 injunction, so set forth the specific conduct that the  
21 defendants are enjoined from engaging in.

22 I am going to request that the government give a  
23 copy of that order to Mr. Broderick. Mr. Broderick, you're  
24 representing all the defendants?

25 MR. BRODERICK: Yes, I am, your Honor.

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1 THE COURT: Including Ms. Trudell?

2 MR. BRODERICK: Yes, your Honor.

3 THE COURT: Give a copy of the order to  
4 Mr. Broderick for his review. If you have objections to the  
5 order, make up a letter explaining what the objections are  
6 and then submit the entire package to me. Let's get this  
7 done by the end of the week.

8 MR. BRODERICK: Yes, ma'am.

9 THE COURT: Okay. Mr. Broderick, take a day to  
10 review the order. No longer than a day because I don't want  
11 a delay in entering this.

12 MR. BRODERICK: Sure.

13 MR. SIEGEL: The government also requested civil  
14 penalties.

15 THE COURT: I thought that's what I was ruling on  
16 when I said no statutory damages.

17 MR. SIEGEL: Well, the law provides both for  
18 civil penalties and statutory damages.

19 THE COURT: My intent was to say no to both for  
20 the reasons I indicated. I think if there's further action  
21 by these defendants, then it's appropriate in the exercise  
22 of my discretion. I will await their future decision on how  
23 they want to proceed. They've been given due warning now --

24 MR. SIEGEL: Thank your Honor.

25 THE COURT: -- both by Congress and by me. All

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1 right. That will dismiss this case hereafter, correct, once  
2 the injunction is issued and my decision?

3 MR. SIEGEL: It will, your Honor.

4 THE COURT: Thank you, counsel. Good papers on  
5 both sides by the way and not unimportant issues. But I'm  
6 not the one to decide them, Mr. Broderick.

7 MR. BRODERICK: I see, your Honor..

8 THE COURT: I'm bound by the Supreme Court.  
9 Thank you, counsel.

10 MR. BRODERICK: Thank you, your Honor.

11 MR. SIEGEL: Thank you.

12 (Record closed)

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SOUTHERN DISTRICT REPORTERS (212) 637-0300

MANDATE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SDNY 93cv5182 Sotoma

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December one thousand nine hundred and ninety-five

PRESENT: HONORABLE JON O. NEWMAN  
Chief Judge  
HONORABLE JAMES L. OAKES,  
HONORABLE JOSÉ A. CABRANES  
Circuit Judges

SAVERIO SENAPE, M.D.,  
Plaintiff-Appellant,

v.

95-7274

JO ANN CONSTANTINO, Deputy Commissioner,  
New York State Department of Social Ser-  
vices; JOHN WRAFTER, Chief, Audit and  
Quality Control, New York State Depart-  
ment of Social Services; MICHAEL DOWLING,  
personally, and as Commissioner, New York  
State Department of Social Services, and  
JAMES WHITE, current Chief, Audit and  
Quality Control, New York State Department  
of Social Services,  
Defendants-Appellees.

APPEARING FOR APPELLANT:

Saverio J. Senape, M.D., pro se,  
New York, N.Y.

APPEARING FOR APPELLEES:

Ronald P. Younkings, N.Y. State  
Asst. Atty. Gen., New York, N.Y.

Appeal from the United States District Court for the

ISSUED AS MANDATE.

Senape v. Constantino, et al.  
Docket No. 95-7274

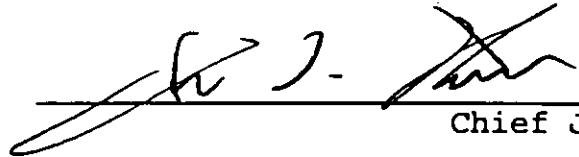
This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Saverio Senape, M.D. appeals pro se from the February 1, 1995, judgment dismissing on the pleadings his suit challenging the 1991 decision of officials of the New York State Department of Social Services to exclude him from participation as a Medicaid provider for five years and to collect \$334,205 of alleged over-billing. The administrative decision was based, among other things, on the submission of false claims and false statements. A prior decision not to re-enroll Senape as a Medicaid provider in 1988 was unsuccessfully challenged. See Senape v. Constantino, 740 F. Supp. 249 (S.D.N.Y. 1990), aff'd mem., 936 F.2d 687 (2d Cir. 1991).

Senape claims a denial of both a property and a liberty interest without due process. However, as the District Court correctly ruled, his due process rights were observed by affording him a post-deprivation administrative hearing, which has yet to be concluded. Senape himself is responsible for at least part of the delay. A pre-deprivation hearing is not required. See Interboro Institute Inc. v. Foley, 985 F.2d 90 (2d Cir. 1993); Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984). The complaint was properly dismissed.

Senape v. Constantino, et al.  
Docket No. 95-7274

  
Chief Judge.

  
Circuit Judges.

  
Circuit Judges.

A TRUE COPY  
GEORGE LANGE III, CLERK



Saverio J. SENAPE, M.D., Plaintiff,  
v.  
Jo Ann CONSTANTINO, Deputy Commissioner  
New York State Department of Social  
Services; John Wrafter, Chief, Audit and  
Quality Control New York State  
Department of Social Services; Michael Dowling,  
Personally and as Commissioner  
New York State Department of Social Services;  
James White, Current Chief,  
Audit and Quality Control New York State  
Department of Social Services,  
Defendants.

No. 93 Civ. 5182 (SS).

United States District Court, S.D. New York.

Jan. 26, 1995.

Saverio J. Senape, pro se.

Dennis C. Vacco, Atty. Gen. of State of N.Y.,  
New York City (Carol Schechter, of counsel), for  
defendants.

#### OPINION AND ORDER

SOTOMAYOR, District Judge.

\*1 Saverio J. Senape, M.D., appearing pro se, alleges in this 42 U.S.C. § 1983 action that officials of the New York State Department of Social Services ("NYSDSS"), under the auspices of the Medical Assistance Program (the "Medicaid Program"), have sanctioned him, have informed others regarding his sanctions, and have attempted to collect \$335,205 plus interest in overpayment, without first providing him with an opportunity for a full evidentiary hearing. Thereby, plaintiff contends, defendants have deprived him of a protected liberty interest without due process of law in violation of the Fourteenth Amendment and several other provisions of the United States Constitution and of federal regulations. Plaintiff seeks from this Court: 1) injunctive relief enjoining defendants from enforcing any sanctions or commencing any collection efforts against him until he receives a full administrative hearing; 2) a declaratory judgment that publishing plaintiff's name on a list of persons excluded from

participation in the Medicaid Program is a deprivation of plaintiff's protected liberty interest and violates his constitutional rights; 3) an order that NYSDSS issue written retractions to clear plaintiff's name; and 4) an award of punitive and special damages.

Defendants, officials of NYSDSS, Deputy Commissioner Jo Ann Constantino, Chief of Audit and Quality Control John Wrafter, Commissioner Michael Dowling, and Current Chief of Audit and Quality Control James White (collectively "the defendants"), move for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). For the reasons discussed below, defendants' motion is granted.

#### Background

This action is the culmination of a long series of related disputes between the parties that have previously come before this Court and the Court of Appeals. Familiarity with *Senape v. Constantino*, 740 F.Supp. 249 (S.D.N.Y.1990); *aff'd*, 936 F.2d 687 (2d Cir.1991), is presumed. A brief recounting of some of the prior events, however, is useful for an understanding of this action and the motion before the Court.

Plaintiff is a medical doctor who enrolled as a qualified provider under the Medicaid Program in 1979. The Medicaid Program is a joint federal and state initiative implemented to ensure that high quality medical care and services are made available to people who are indigent. NYSDSS is the sole state agency authorized to administer the Medicaid Program in New York, see 42 U.S.C. §§ 1396-1396v (1988 & Supp.V 1993), N.Y.Soc.Serv.Law §§ 363 - 363-a (McKinney 1992 & Supp.1995), and to establish regulations governing the maintenance and selection of medical service providers under the program. N.Y.Soc.Serv.Law §§ 363-a(1) and -a(2); N.Y.Comp.Codes R. & Regs. tit. 18, §§ 500-542.4 (1988) [hereinafter NYCRR].

NYSDSS screens and evaluates physician-applicants for enrollment as providers of medical services in the Medicaid Program. Prior to January 1987, NYSDSS could terminate the participation of a physician who had been accepted into the Medicaid Program only upon a specific finding that the physician had failed to comply with the

department's regulation. See 18 NYCRR § 515.2. In 1987, in order to improve its oversight functions, NYSDSS modified its procedures by implementing a requirement that all currently enrolled providers re-enroll periodically in the program. See 18 NYCRR § 504.10. NYSDSS retains the authority to terminate a provider for cause under Part 515; it may also require all providers to re-enroll and then choose only those whom it wishes to renew under Part 504.

\*2 In October 1987, plaintiff was informed, pursuant to Part 504, that he was required to submit an application for re-enrollment in the Medicaid Program within sixty days. Thereafter, on March 8, 1988, NYSDSS notified plaintiff of its intention "immediately" to terminate his participation in the program pursuant to Part 515 because of various violations of NYSDSS regulations, based on NYSDSS's review of certain of plaintiff's patient charts. One week later, on March 15, 1988, NYSDSS also notified plaintiff that based on its review of plaintiff's patient charts, it had decided not to re-enroll him in the Program pursuant to the re-enrollment procedures set forth under Part 504.

Plaintiff appealed both the Part 515 and Part 504 determinations through the NYSDSS administrative process. On April 18, 1988, NYSDSS advised plaintiff that it had determined to affirm its decision to terminate him under Part 515, but indicated that the appeal of his re-enrollment denial under Part 504 was still pending. On July 29, 1988, NYSDSS informed plaintiff that his Part 504 re-enrollment appeal had also been denied and that his participation in the Program would be terminated effective August 12, 1988.

Plaintiff then initiated a suit contesting NYSDSS's actions which the District Court subsequently dismissed. *Senape v. Constantino*, 740 F.Supp. 249 (S.D.N.Y.1990), *aff'd*, 936 F.2d 687, 689 (2d Cir.1991). The Second Circuit Court of Appeals thereafter affirmed the dismissal, holding that plaintiff lacked a sufficient property right in his continued classification as an approved provider for the Medicaid Program to sustain a § 1983 action alleging a denial of due process in his termination. *Id.*

In this action, plaintiff challenges subsequent actions of NYSDSS. On or about November 20,

1989, NYSDSS completed a review of plaintiff's Medicaid records and determined that plaintiff had overbilled Medicaid and had received overpayments on claims in the amount of approximately of \$334,000. *Mem.Law Supp.Defs.' Mot.J.Pleadings*, pp. 4-5. In a "Notice of Proposed Agency Action" dated May 8, 1991, issued pursuant to the requirements of 18 NYCRR § 515.6(a), NYSDSS informed plaintiff that it intended to exclude plaintiff from the Medicaid Program for five years and to collect restitution from him in the amount of \$334,205 plus interest. See 18 NYCRR 515.3, 518.3. The notice further advised plaintiff that he had committed the following acts in violation of 18 NYCRR § 515.2: submitted false claims; made false statements; intentionally failed to disclose or concealed information concerning unauthorized Medicaid payments; kept unacceptable records; provided excessive services; and failed to meet recognized standards. Finally, the May 8 notice advised plaintiff that he had thirty days to submit a written challenge to the agency's determination and that he had the right to appeal NYSDSS's final decision by requesting an administrative hearing. See 18 NYCRR § 515.6(a)(1). Plaintiff thereafter appears to have submitted a written challenge to the Notice. [FN1]

\*3 On August 26, 1991, NYSDSS issued its final determination entitled "Notice of Agency Action," which was effective fifteen days thereafter, informing plaintiff of his exclusion from the Medicaid Program for five years and of NYSDSS's authority to proceed with the collection of the overpayment plus interest. The August 26 notice again set forth the specific grounds upon which the NYSDSS had based its determination and informed plaintiff that he would be denied payment "for any care, services or supplies furnished during the period from the effective date of this final action until he is reinstated into the program." The notice further advised that, pursuant to 18 NYCRR § 515.5(b), plaintiff's name would appear on a list, issued monthly, of persons not allowed to "order or prescribe" services reimbursed by Medicaid (the "PVR 292 list"). See 42 C.F.R. § 1002.206 (1990), revised at 57 Fed.Reg. 3345 (1992). [FN2] Finally, the notice advised plaintiff of his right to challenge this action by requesting, within sixty days, an administrative hearing, as well as plaintiff's right to request reinstatement into the Program at the end of a five-year period of exclusion.

In July 1993, almost two years after the final Notice of Agency Action, plaintiff instituted the instant law suit seeking a temporary restraining order and preliminary injunction enjoining defendants from executing the action set forth in its final, August 26, 1991 notice. At a hearing held on December 17, 1993, I denied plaintiff's request for injunctive relief. By Mandate issued September 23, 1994, the Second Circuit affirmed the denial of plaintiff's motion.

Plaintiff's administrative hearing was initially scheduled shortly after the NYSDSS notice was issued in August 1991; however, it has been adjourned several times at plaintiff's request. Plaintiff has yet to exhaust his administrative or state law remedies and has stalled completion of the NYSDSS administrative process.

#### Standard for Judgment on the Pleadings

Defendants' instant motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is treated the same as a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994). A court is not to dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss the pleadings, "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir.1993). The factual allegations of the complaint must be presumed to be true and any inference drawn from the facts must be construed in favor of the plaintiff. *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir.1989). Moreover, courts must liberally construe a pro se litigant's complaint. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

#### DISCUSSION

##### Plaintiff's Claim Against the Process Mandated by the State Code of Rules and Regulations

\*4 Under the New York State Code of Rules and Regulations, NYSDSS is required to provide written notice when proposing either to sanction a provider

or to collect overpayment. 18 NYCRR § 515.6(a)(1). The notice must specify the "legal authority for the action, [and] the nature and amount of any overpayment determined to have been made as a result of the unacceptable practices" and must inform the provider of the opportunity to submit documents and written argument to challenge the proposed action within thirty days. *Id.*

NYSDSS thereafter is required to review the provider's submissions and issue a second Notice of Agency Action before sanctioning a provider or collecting overpayment. 18 NYCRR §§ 515.6(a)(4), (b)(1). This second notice must also provide the factual grounds and the legal authority for the action, the date the action becomes effective, the amount of the overpayment to be collected, the effect of the action upon the person's participation in the Program, the requirements and procedures for subsequent reinstatement, and the procedures by which a person may pursue his or her right to appeal the determination including the requirements and procedures to request an administrative hearing. 18 NYCRR § 515.6(b)(2).

After NYSDSS determines that a person is excluded from participation in the Medicaid Program, other participating providers will not be reimbursed for medical care, services or supplies that the excluded person orders or prescribes. 18 NYCRR § 515.5. NYSDSS prepares and distributes to Medicaid providers a monthly list, the PVR 292 list, identifying persons who have been excluded from the program and are ineligible to prescribe or order medical care or services under the Program. See 18 NYCRR § 515.5; 42 C.F.R. § 1002.206 (1990), revised at 57 Fed.Reg. 3345 (1992). NYSDSS is authorized to collect interest on amounts which it determines to be overpayments. 18 NYCRR § 518.4.

Plaintiff contends that the process provided by NYSDSS under its regulations was inadequate and not the "due process" that is required and guaranteed by federal law, particularly §§ 554 and 556(d) of the Administrative Procedure Act. 5 U.S.C. §§ 551-559 (1988 & Supp.V 1993). Plaintiff has incorrectly assumed, however, that § 554 mandates the right to a formal hearing in every administrative matter. The right to a formal hearing arises under § 554 only "in every case of adjudication required by statute to be determined on the record after

opportunity for an agency hearing ..., " 5 U.S.C. § 554 (emphasis added); in other words, only when an independent statute supplies that right. Section 556(d), in turn, is applicable if a formal hearing is required by § 554, that is, if an independent statute requires there to be a formal hearing.

The federal statute governing this matter provides that if a Medicaid provider is terminated, suspended or sanctioned from participating in the state plan, the state agency is required to notify the Secretary of the Department of Health and Human Services. 42 U.S.C. § 1396(a)(41) (1988 & Supp.V 1993); see 42 C.F.R. §§ 455.17, 1002.212 (1993). Prior to a state's exclusion of a provider, federal regulations also mandate that NYSDSS afford the provider the opportunity to submit documentation and written arguments challenging the exclusion. 42 C.F.R. § 1002.213 (1993). The federal statute governing the Medicaid Program, 42 U.S.C. §§ 1396-1396v, however, does not mandate that the adjudications "be determined on the record after opportunity for agency hearing" as required in 5 U.S.C. 554(a). Thus, the procedures detailed in §§ 554 and 556(d) of the Administrative Procedure Act are not applicable to the decisions NYSDSS took with respect to plaintiff's enrollment in the Medicaid Program.

\*5 New York State, in its discretion, has established a procedure for additional appeals. Providers are entitled to notice and an opportunity for an administrative hearing to challenge final NYSDSS determinations. See 18 NYCRR § 515.6. The New York regulations do not mandate, however, that a formal hearing occur prior to the imposition of sanctions. NYSDSS provided plaintiff with complete, detailed and timely notice of its proposed action. Plaintiff was afforded the opportunity to be heard through the submission of documents and written arguments. Plaintiff received a second notice. To the extent plaintiff has not been heard on his subsequent appeal, the delay has been requested by the plaintiff.

Plaintiff has not alleged in his pleading, nor can he point to, any procedural safeguards mandated under the federal statutory and regulatory scheme which he has been denied. See 42 U.S.C. § 1396(a)(41) (1988 & Supp.V 1993); 42 C.F.R. § 455.17 (1993). All plaintiff does in his pleading is claim procedural rights he does not have. As I

indicated in my decision denying plaintiff's temporary injunctive relief, the plaintiff has not pled any facts, and cannot show that the process he received, in its entirety, is tainted to such an extent that he will not receive a fair hearing during his NYSDSS appeal. Tr. dated Dec. 17, 1993, p. 13. Thus, plaintiff has no valid claim that he was or will be denied any process mandated by federal law.

#### Plaintiff's Property Interest Claim

Plaintiff alleges that defendants' exclusion of his participation in the Medicaid Program and collection of the \$334,205 in overpayment plus interest prior to a full evidentiary hearing unconstitutionally deprives him of his right to property without due process of the law. The Second Circuit has stated that "[i]n order to sustain an action for deprivation of property without due process of law, a plaintiff must 'first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process.' " Local 342, Long Island Pub. Serv. Employees v. Town Board, 31 F.3d 1191, 1194 (2d Cir.1994) (quoting *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir.1990) (per curiam)). Plaintiff fails to meet his burden under this standard.

The Second Circuit in *Senape v. Constantino*, 936 F.2d at 689, has already held that plaintiff has no protected property right in continued participation in the Medicaid Program. See also *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 176 (2d Cir.) (qualified provider has no property interest in continued participation in Medicaid Program), cert. denied, 112 S.Ct. 300 (1991); *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 581-82 (2d Cir.1989) (structure of New York Medicaid laws suggests that a provider does not have a property interest in continued participation). *Senape's* interest in the overpayments, however, stands on a different footing.

\*6 While plaintiff was enrolled as a qualified provider in the Medicaid Program, he received payment in exchange for the various medical services he performed. New York has recognized a property right in money paid for services that are performed under the Medicaid Program. *Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir.1984). Thus, plaintiff has a property interest in the money he was paid for the services he performed

while a qualified provider in the Medicaid Program. Moreover, as set forth in its agency action notices, NYSDSS determined that a portion of the money that plaintiff had received for his services was an overpayment and it has authorized the collection of said money plus interest. Thus, the state proposes to deprive plaintiff of a portion of monies he claims to have earned. Plaintiff, therefore, has sufficiently alleged the first two elements required to establish a deprivation of a property interest without due process.

The third component of the due process test examines whether the process plaintiff received satisfies constitutional standards. One requirement of due process is adequate notice, that is, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Here, plaintiff received several notices pursuant to 18 NYCRR § 515 detailing the factual grounds and legal authority for the NYSDSS recoupment action, the date the action became effective, the amount of the overpayment to be collected, the effect of the action upon plaintiff's participation in the program, the requirements and procedures for subsequent reinstatement, and the procedures by which plaintiff could pursue an appeal of the determination including the requirements and procedures to request an administrative hearing. Plaintiff cannot, and does not, claim that he was unaware of the action against him or that he was deprived of a full opportunity to present his written objections to the agency's actions.

To evaluate the process that must be afforded to an individual prior to a deprivation of a property interest, a court, must also consider

three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiff's interest is obviously economic. Although \$334,205 is a significant sum of money, defendants have not deprived plaintiff of his livelihood and plaintiff is not rendered destitute without any means of support because of defendants' actions. [FN3] Plaintiff, moreover, has proffered no facts establishing that there is a serious risk of an erroneous deprivation in the process provided here. Defendants performed an extensive audit and review of plaintiff's records and reviewed his written submissions challenging their determination. Plaintiff was also afforded a post-deprivation hearing to appeal the determination which is an additional procedural safeguard against an erroneous deprivation.

\*7 The Supreme Court has clearly stated that a pre-deprivation hearing "need not be elaborate ... [and, i]n general, 'something less' than a full evidentiary hearing is sufficient..." *Loudermill*, 470 U.S. at 545 (citing *Mathews*, 424 U.S. at 343). Plaintiff here had the opportunity to be heard through the submission of documents and written argument challenging the proposed action. Moreover, plaintiff has the right to appeal the determination as well as a right to a post-deprivation administrative hearing.

I find that defendants' interest in maintaining the financial integrity of the Medicaid Program and devoting the optimum amount of resources to the primary objective of providing health services to indigent people outweighs the financial harm to plaintiff in not having a full evidentiary hearing prior to defendants' collection of the overpayment. I further conclude that, under the process admitted by plaintiff in his pleadings, plaintiff has been afforded adequate notice and opportunity to be heard before the deprivation. Accordingly, plaintiff's due process claim against NYSDSS's procedure for collection of the overpayment cannot be sustained.

The Liberty Interest and Defamation Claims Based on the PVR 292 List

Plaintiff alleges that defendants, by publishing the PVR 292 list and informing others of his exclusion from the Medicaid Program, have portrayed his personal and professional reputation in a "false light" which has made him "unemployable." Prelim.Stmt., Am.Compl. (dated Aug. 12, 1993). He contends that the defendants have thereby

deprived him of a constitutionally protected liberty interest and defamed him. *Id.*

In several cases, the Supreme Court has considered the issue of whether a person's interest in maintaining a good name, standing and reputation in the community constitute a protected liberty interest. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), for example, the Supreme Court addressed the constitutionality of a state statute, which authorized, without prior warning or a hearing of any kind, the posting of a notice prohibiting persons, known for their propensity for violence when drinking, from purchasing or receiving gifts of liquor for one year. The Supreme Court found the statute unconstitutional and held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him [or her], notice and an opportunity to be heard are essential." *Id.* at 437. Thus, the *Constantineau* decision indicated that under some circumstances a person's reputation constituted a liberty interest requiring due process protection.

Several years later, the Supreme Court expressed concern that the Fourteenth Amendment not be construed to extend constitutional coverage to every state-law tort committed by a state official, and in *Paul v. Davis*, 424 U.S. 693 (1976), it held that defamation of a person's "reputation alone, apart from some more tangible interests such as employment" does not in every case suffice to invoke the procedural safeguards of the Fourteenth Amendment. *Id.* at 701-02.

\*8 The Second Circuit has interpreted *Paul* to require "stigma plus" in order to establish a constitutional deprivation of a liberty interest in defamation-based claims. See, e.g., *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir.) (state official who defamed a private citizen alleging a deprivation of a liberty interest granted qualified immunity), cert. denied, 493 U.S. 816 (1989). The Court in *Neu* acknowledged the ambiguous meaning of the "plus" element in its decisions and explained that "we do not think our cases have ... clearly established that defamation occurring other than in the course of dismissal from a government job or termination of some other legal right of status will suffice to constitute a deprivation of a liberty interest." *Id.*

The only defamation by defendants identified in plaintiff's complaint is the NYSDSS publication of the PVR 292 list of persons who have been excluded as providers from the Medicaid Program and for whose services pursuant to federal and state regulations, other providers will not be entitled to Medicaid reimbursement. 42 C.F.R. § 1002.207 (1990), revised at 57 Fed.Reg. 3345 (1992); 18 NYCRR § 515.5(c). The PVR 292 list does not identify the reasons a provider has been excluded from the Program. Moreover, defendants made no statement concerning plaintiff's ability as a medical doctor on either the list or in the letter which transmitted the list. Therefore, NYSDSS has not portrayed plaintiff in a "false light" through its publication and distribution of the list. Rather, as required by federal regulation, 42 C.F.R. § 1002.206(c) (1990), revised at 57 Fed.Reg. 3345 (1992), NYSDSS fulfilled its obligations under law by notifying the state licensing board and other groups that plaintiff was excluded from participation in the Medicaid Program. Thus, plaintiff's allegations concerning the defendants' statements do not as a matter of law constitute defamation.

Moreover, the Supreme Court has emphasized that "it would stretch the [liberty interest] concept too far 'to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.'" *Bishop v. Wood*, 426 U.S. 341, 348 (1976) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972)). See also, *Baden v. Koch*, 799 F.2d 825, 830 (2d Cir.1986) (demotion of Chief Medical Examiner of the City of New York to a lower supervisory position did not give rise to a liberty interest). While plaintiff's opportunities for employment by providers or other organizations which are reimbursed by Medicaid may be hindered by his exclusion from the Program, he has not been dismissed from a government job to which he had an entitlement, and he still retains his license to practice medicine. Unlike the plaintiff in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir.1994), plaintiff herein cannot point to any specific deprivation of his opportunity to seek employment with others caused by state action. In *Valmonte*, the Court of Appeals held that a deprivation of a liberty interest existed where a New York statute mandated that individuals accused of child abuse or neglect be identified on a list that was disseminated to potential child care employers. The employers were required to consult

the list and advise the state in writing if they hired an individual named on the list. The Court held that the burden the statute placed upon employers who desired to employ an individual on the list significantly altered the individual's status and therefore, the statute violated a liberty interest under the "stigma plus" test. *Id.* at 1002.

\*9 Unlike the statute in *Valmonte*, the statutory provisions in this case do not place a burden upon a potential employer who desires to hire plaintiff. The NYSDSS letter which transmits the PVR 292 list does not prohibit facilities from hiring persons named on the list, nor does it require employers to notify the state if they hire an individual named on the list. It simply states that facilities will not be reimbursed by Medicaid for activities performed by the excluded person and that documents submitted to the Program should be examined to determine whether the person's salary may be included in the facility's base costs for reimbursement. Furthermore, NYSDSS does not specifically target plaintiff's potential employers to receive the list. Although plaintiff may seek employment at a facility which participates in the Medicaid Program, and thus the facility may indeed receive a copy of the list and consider that information in deciding whether to hire the plaintiff, the list in no way forbids a facility from hiring an excluded Medicaid Program person, and no statutory burden is placed upon employers who hire plaintiff. Therefore, there is no burden on plaintiff's property interest by his placement on the PVR 292 list, particularly when plaintiff's legal status has not been altered due to NYSDSS's actions in that plaintiff has no property interest in continuing as a Medicaid provider. *Senape v. Constantino*, 936 F.2d at 689; see also, *Plaza Health Lab.*, 878 F.2d at 581-82.

For all of the reasons stated above, I find that publication and dissemination of plaintiff's name on the PVR 292 list does not establish a constitutional deprivation of a liberty interest or state a claim for defamation.

#### Plaintiff's Equal Protection Claim

Plaintiff further alleges that defendants' actions have denied him equal protection of the law in violation of the Fourteenth Amendment. However, plaintiff has not alleged, nor could he prove, that he received disparate treatment by virtue of his

membership in a class. Instead, plaintiff confusingly assumes that an equal protection violation can occur merely because a termination from the Medicaid Program "without cause" can preclude NYSDSS from sanctioning a provider, like him, for cause under 18 NYCRR § 515. Defendants correctly point out, however, that even though plaintiff was denied re-enrollment under Part 504, which does not apply a "for cause" standard, that denial of enrollment does not serve to exonerate him under Part 515. The state regulation governing the imposition of sanctions, 18 NYCRR § 515, does not limit the imposition of sanctions to those enrolled as providers in the Program. Pursuant to § 515.3, sanctions are authorized "upon a determination that a person has engaged in an unacceptable practice." 18 NYCRR § 515.3.

Plaintiff's conclusory allegations that he has been denied equal protection of the law without a showing that he has been treated differently than those similarly situated by virtue of his membership in a specified class is, therefore, insufficient to sustain an equal protection claim.

#### Plaintiff's Bills of Attainder and Ex Post Facto Law

\*10 Plaintiff also alleges that the imposition of sanctions by defendants without affording him a full evidentiary hearing violates the constitutional prohibition against Bills of Attainder. This prohibition, however, applies only to legislation which imposes criminal punishment without a trial. *United States v. Lovett*, 328 U.S. 303, 315 (1946). To ascertain whether the NYSDSS sanctions are civil or criminal in nature, the intent of Congress must be considered and, where Congress has indicated an intention to establish a civil penalty, the statutory scheme must be assessed to ensure it is "not so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (citing *Flemming v. Nestor*, 363 U.S. 603, 617-621 (1960)).

I find that Congress intended the sanctions imposed on plaintiff under Section 515 to be civil penalties and that neither the purpose nor the effect of the statutory scheme is punitive. The sanctions of Part 515--exclusion, suspension, collection and underpayment--are rationally and reasonably related to the losses or potential losses the Program incurs

by violation of Program regulations. The purpose of the sanctions are obvious and include, inter alia, preserving the integrity of the program and safeguarding the public interest and its resources. The purpose of the PVR 292 list is also self-evident; it ensures that qualified providers do not contract with excluded providers. Furthermore, even though the information may reach parties with the power to take other measures, the NYSDSS is mandated to provide the information pursuant to federal regulations. 42 U.S.C. § 1002.206 (1990), revised at 57 Fed.Reg. 3345 (1992). Thus, plaintiff has no viable Bills of Attainder claim for the conduct alleged in his pleading. Similarly, because sanctions under Section 515 are civil penalties, the prohibition against ex post facto laws is inapposite. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952).

#### The Defendants' Qualified Immunity Defense

Although their conduct may be subject to injunctive relief, public officials performing discretionary functions are generally protected by qualified, or good-faith immunity from liability for civil damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity shields public officials to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*; see also *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (absolute immunity for police officers applying for warrants rejected in favor of qualified immunity of the "Harlow standard"); *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (absolute immunity for Attorney General in national security context rejected in favor of qualified immunity). A public official is also subject to liability only if the contours of the right which was allegedly violated is "sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

\*11 The success of the defendants' immunity defense in this action depends upon whether it was sufficiently clear that their actions would deprive plaintiff of a protected liberty interest or equal protection in violation of a constitutional right. See *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir.1992) (state officials enforcing minority set-aside program were

granted qualified immunity where the law was unclear that their actions would be inconsistent with equal protection). For the reasons discussed previously, I have found that defendants have not violated any of plaintiff's constitutional or statutory rights. In any event, assuming that defendants had deprived plaintiff of a constitutional right, defendants were not objectively unreasonable in believing that their actions in enforcing federal and state regulations governing the Medicaid Program were legal. The defendants, therefore, in their personal capacities, are entitled to qualified immunity for damages as a matter of law.

#### Conclusion

After careful consideration of each of plaintiff's claims and affording his complaint the close and sympathetic reading required by *Haines v. Kerner*, 404 U.S. 519, 520 (1972), defendants have amply demonstrated that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Therefore, defendants are entitled to judgment as a matter of law. For the foregoing reasons, defendants' motion for judgment on the pleadings is granted. The Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety against the defendants.

#### SO ORDERED.

FN1. Neither plaintiff nor defendants annexed plaintiff's challenge to the record. However, plaintiff alludes to a letter from his attorney to defendants: "On April 17, 1991 a letter confirming this intent with Errors of Fact demonstrated, strong objection to breaches of Procedural Due Process went from Senape Attorney Agee [sic] to Defendants." Pl.'s Am.Compl. (Aug. 12, 1993), pp. 8-9. Plaintiff goes on to state, "[w]ith no response to any objections, Defendants went ahead with sending Senape on August 26, 1991 an unchanged Notice of Final Agency Action...." *Id.* at 9. In their papers to the court, defendants acknowledge also that "[t]he Department advised plaintiff of his right to challenge its determination by submitting documentation and written arguments and by requesting an administrative hearing. After reviewing the entire record, including plaintiff's submissions, the Department notified plaintiff on August 26, 1991 of its final decision to exclude him...." Mem.Law Supp.Defs.' Mot.J.Pleadings,

p. 5 (emphasis added). Hence, I proceed on the assumption that plaintiff did submit a formal challenge.

FN2. Because several relevant regulations have been revised, this opinion will cite to the Code of Federal Regulations in effect at the time of the NYSDSS actions, as well as to the Federal Register for revised regulations.

FN3. In the Notice of Agency Action dated August 26, 1991, NYSDSS advised plaintiff of his "repayment options": either to pay the entire amount of \$334,205 by certified check or money order, or to enter into a repayment agreement.

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# MANDATE

Doc #18  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

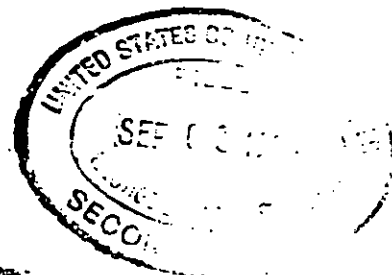
SDNY  
92-cv-2491  
Sotomayor, D

Nov 20 1996  
S U M M A R Y   O R D E R

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of September one thousand nine hundred and ninety-six.

Present: HONORABLE THOMAS J. MESKILL,  
HONORABLE AMALYA L. KEARSE,  
HONORABLE J. DANIEL MAHONEY,  
Circuit Judges.



WILLIAM ORTIZ,

Plaintiff-Appellant,

- v. -

No. 95-2584

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appearing for Appellant: William Ortiz pro se, Bradford, Pa.

Appearing for Appellee: Nicole A. LaBarbera, Ass't U.S. Att'y, SDNY,  
N.Y., N.Y.

Appeal from the United States District Court for the Southern  
District of New York.

Issued as Mandate: Nov. 14, 1996

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted by plaintiff pro se and by counsel for defendant.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

Petitioner William Ortiz appeals from a judgment of the United States District Court for the Southern District of New York, Sonia Sotomayor, Judge, denying his petition pursuant to 28 U.S.C. § 2255 to vacate his sentence principally on the ground that his trial counsel provided ineffective assistance. For the reasons that follow, we affirm.

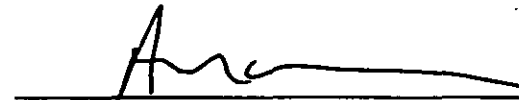
Preliminarily we address the question of appellate jurisdiction. The district court's opinion and order denying Ortiz's petition on its merits was issued in March 1995 and was entered on the docket on April 4, 1995. That order ended with the statement that "the Clerk of the Court is directed to enter judgment dismissing the petition." On August 7, 1995, Ortiz filed a notice of appeal, stating that a final judgment had been entered on July 13, 1995. If the time of appeal ran from the July 13 date (the district court docket entries do not reflect a judgment entered on that date or any other date), the present appeal was timely filed. However, in Williams v. United States, 984 F.2d 28, 31 (2d Cir. 1993), this Court held that there is no requirement that a judgment be entered in a § 2255 proceeding and that the time to appeal begins on the date of entry of the final § 2255 order. Thus, if Williams is to be applied here, Ortiz's time to appeal commenced on April 4, 1995, and the present appeal is untimely. We question whether Williams should be applied here because the district court's order stated explicitly that the clerk of the court was to enter a judgment, and Ortiz may thereby have been misled to believe that his time to appeal did not begin to run prior to entry of the judgment. In light of the court's mistaken indication in its order that a judgment should be entered, we decline to dismiss this appeal for failure to file the notice of appeal within a period measured from the entry of the order. Cf. Thompson v. INS, 375 U.S. 384 (1964) (per curiam) (reinstating appeal, which had been dismissed as untimely, because appellant had relied on district court's explicit, but erroneous, statement that appellant's motion pursuant to Fed. R. Civ. P. 52 and 59 was timely, with result that appellant delayed filing notice of appeal until beyond the period allowed from entry of judgment).

As to the merits of the appeal, we find no basis for reversal. Ortiz's petition was properly dismissed substantially for the reasons stated in Judge Sotomayor's Opinion and Order dated March 22, 1995.

We have considered all of Ortiz's arguments on this appeal and have found them to be without merit.

The order and judgment of the district court are affirmed.

  
THOMAS J. MESKILL, U.S.C.J.

  
AMALYA L. KEARSE, U.S.C.J.

  
J. DANIEL MAHONEY, U.S.C.J.

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**William ORTIZ, Petitioner,**  
**v.**  
**UNITED STATES of America, Respondent.**

**92 Civ. 2491 (SS).**

United States District Court, S.D. New York

March 24, 1995.

Barry C. Scheck, Cardozo Law School, New York City, for petitioner; Lawrence A. Vogelmann, Ellen Yaroshefsky, Mira Gur-Arie, of counsel.

Mary Jo White, U.S. Atty., S.D. of N.Y., for respondent; Rose A. Gill, of counsel.

**OPINION AND ORDER**

SOTOMAYOR, District Judge.

\*1 William Ortiz ("Ortiz") petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Ortiz seeks to vacate a judgment of conviction for conspiracy to possess with intent to distribute 2.1 kilograms of heroin in violation of 21 U.S.C. § 846 following a jury trial before the Hon. Nicholas Tsoucalas of the Court of International Trade, then sitting by designation in the United States District Court of the Southern District of New York.

In his Memorandum of Law in Support of His Habeas Petition, Ortiz maintained that habeas relief was proper because (1) he was the victim of Government entrapment as a matter of law; (2) he received ineffective assistance of trial counsel; and (3) he was denied his Sixth Amendment right to a fair trial. Ortiz requested an evidentiary hearing to review his claim of ineffective assistance of counsel and his release from prison pending the evidentiary hearing. I denied this latter request at a conference.

The Government initially opposed Ortiz's petition on two grounds. First, the Government maintained that Ortiz was procedurally barred by this Circuit's then decision in *Billy-Eko v. United States*, 968 F.2d 281 (2d Cir.1992), vacated, 113 S.Ct. 2989 (1993), from seeking collateral habeas review of his ineffective assistance of counsel claim because he had failed to assert it on direct appeal. Second, the Government argued that the evidence at trial established beyond a reasonable doubt that Ortiz was

predisposed to commit the crime charged, rendering Ortiz's claim of entrapment as a matter of law meritless and his claim of ineffective assistance of counsel irrelevant.

After the Government filed its Memorandum in Response to Ortiz's Petition, the Supreme Court vacated and remanded *Billy-Eko* with instructions to the Second Circuit to reconsider its holding in light of the position of the Acting Solicitor General before the Supreme Court that ineffective assistance of counsel claims should not be collaterally barred from habeas review. *Billy-Eko*, 113 S.Ct. 2989 (1993). A review of the Acting Solicitor General's brief and the Supreme Court's action led me to believe that a change in the Second Circuit's position was eminent; however, the parameters of the change were unclear. After reviewing Ortiz's petition, I concluded that he had made sufficiently serious allegations to call into question the competence of his trial counsel and that the allegations, in light of the Acting Solicitor General's position, warranted an evidentiary hearing. I thereafter appointed counsel for Ortiz.

Subsequent to my decision to hold a hearing, the Second Circuit in *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir.1993), held that most claims of ineffective assistance of counsel were not collaterally barred from review in a habeas petition except where "(1) the petitioner was represented by new appellate counsel at direct appeal, and (2) the claim is based solely on the record developed at trial." (emphasis added). The Government concedes that Ortiz's claim was not self-evident from the trial record because it involved an alleged private fee arrangement between trial counsel and a co-defendant and the interview of witnesses who were not mentioned during the trial. See Government's Post-Hearing Memorandum of Law in Response to William Ortiz's Habeas Petition (hereinafter the "Government's Post-Hearing Brief"), page 3, fn. 2. Nevertheless, relying on the principle explained in *Billy-Eko*, 8 F.3d at 115, that if a claim is known to be viable it has to be brought on direct appeal without undue delay, the Government maintains in its Post-Hearing Brief, pages 2-5, that Ortiz is nevertheless collaterally barred because he knew before his direct appeal of most of the facts that formed the basis for his ineffective assistance of trial counsel claim.

\*2 As noted, at the time I decided to hold an evidentiary hearing in this matter, the Second Circuit had not reviewed its original Billy-Eko decision, 968 F.2d 281. Unsure of the direction the Second Circuit would take, I limited the evidentiary hearing to trial counsel's performance and indicated I would address Ortiz's then newly raised claim of ineffective assistance of appellate counsel if I found any substance to Ortiz's claim of ineffective assistance of trial counsel. Neither before nor at the evidentiary hearing did the Government seek to emphasize that the court's inquiry should be focused on Ortiz's appellate conduct. Only in its Post-Hearing Brief did the Government fully articulate its reasoning under the final Billy-Eko decision, 8 F.3d 111. Because Ortiz's appellate conduct was not the focus of the evidentiary hearing and because the Second Circuit's final decision in Billy-Eko was not available to Ortiz or his appellate counsel at the time of Ortiz's direct appeal, I consider the merits of Ortiz's Sixth Amendment claim as it applies to the conduct of his trial counsel but conclude, after the evidentiary hearing, that Ortiz's petition should nevertheless be denied.

#### BACKGROUND

The following facts are taken from the trial record and are essentially undisputed. On October 6, 1989, as part of a sting operation, agents of the Drug Enforcement Agency ("DEA") recorded a series of four telephone calls made by Ortiz to a confidential informant ("informant") in which Ortiz negotiated the purchase of three 700-gram units of heroin. Ortiz and the informant agreed to meet that evening at a McDonald's restaurant in Manhattan to complete the transaction.

Ortiz arrived at the McDonald's unaccompanied in a white Buick. Once inside the McDonald's, Ortiz met with the informant and an undercover DEA agent posing as a heroin supplier. The three men moved back outside to the parking lot where they were joined by Angel Perez ("Perez"), one of Ortiz's co-conspirators. Perez placed what appeared to be a shopping bag inside the white Buick. Ortiz and the purported heroin supplier, the DEA agent, entered the car. Ortiz opened the bag and revealed a large amount of United States currency. He told the DEA agent that the bag contained \$90,000 in cash. The agent complained to Ortiz that he was expecting \$270,000 for the three units of heroin and Ortiz then

explained that the "main guy" was going to bring the remainder of the money. Ortiz stepped out of the car, walked to a nearby pay-phone and placed a call.

Twenty minutes later, Hector Ramos ("Ramos") arrived at the parking lot and was introduced by Ortiz to the agent as the person who was purchasing the heroin. The agent then showed Ramos a package purportedly containing the three 700-gram units of heroin. Ramos stepped out of the car, placed a telephone call, returned to the car and informed the agent that the rest of the money was on its way and would arrive shortly. Ramos left the parking lot and returned with two more shopping bags full of money. Ramos and Ortiz entered the Buick with the two bags, which the agent inspected. The agent then stepped out of the car and gave a pre-arranged signal to surveillance agents, who converged on the car and arrested Ramos and Perez. Ortiz ran from the car and was arrested across the street. Three shopping bags, containing a total of \$268,790, were seized.

#### THE TRIAL AND APPELLATE PROCEEDINGS

\*3 At trial, Ortiz maintained unsuccessfully that he had been the victim of Government entrapment. Ortiz testified that upon his release from prison, the informant had called him continuously in an effort to sell him heroin or to obtain through him someone interested in buying heroin. Ortiz claimed to have initially rejected the informant's overtures.

Eventually, however, Ortiz agreed to serve as the middleman for a heroin transaction between the informant and Perez, not because of an interest in dealing drugs, but because, Ortiz testified, of a sense of indebtedness to the informant who had provided him with protection from other inmates while Ortiz was incarcerated on a parole violation. Ortiz also claimed that he was enticed into the heroin transaction because the informant had promised to buy him a car if the deal was completed which car Ortiz needed for work.

The Government did not dispute at trial that the informant had repeatedly contacted Ortiz about the heroin transaction. Instead, the Government maintained that Ortiz was predisposed to commit the crime and that the informant had only facilitated its

commission by furnishing Ortiz with the opportunity to do so. The Government relied upon the four recorded telephone conversations between Ortiz and the informant and testimony of the events that transpired at the McDonald's parking lot to demonstrate that Ortiz, Perez and Ramos were experienced drug dealers with a substantial and well-organized drug trafficking operation interested in purchasing up to ten units of heroin if the heroin supplied by the informant turned out to be of sufficiently good quality. The Government also cross-examined Ortiz about his two prior drug convictions to establish that he was well-versed in the drug trade and that his involvement in the DEA sponsored heroin transaction was not an isolated event.

The jury returned a guilty verdict on the conspiracy charge and Ortiz was sentenced to a term of imprisonment of fifty (50) years and to a ten (10) year term of supervised release, and was assessed a fifty (50) dollar special fee.

After the trial, Ortiz moved to have his trial counsel, Raymond Aab ("Aab"), relieved. Aab joined in the motion. The trial court granted the motion and appointed new appellate counsel.

On appeal, Ortiz challenged only the propriety of the Government's cross-examination of him concerning his prior drug convictions. The Second Circuit rejected Ortiz's claim by summary order and affirmed his conviction.

#### THE HABEAS CORPUS PROCEEDING

Ortiz filed the present petition on March 23, 1992. On August 28, 1992, the Government responded including in its arguments the position that Ortiz's petition was collaterally barred under the 1992 Billy-Eko decision, 968 F.2d 281. On September 29, 1992, Ortiz filed a reply in which he claimed, for the first time, that he had been denied effective assistance of appellate counsel. Ortiz also moved this Court for leave to amend his habeas petition pursuant to Fed.R.Civ.P. 15(a) to include his newly asserted claim of ineffective assistance of appellate counsel. Thereafter and for the reasons previously discussed, I agreed to hold an evidentiary hearing on trial counsel's performance and appointed habeas counsel for Ortiz. I also gave counsel substantial time to familiarize himself with

the petition. On April 1, 1994, Ortiz's trial counsel, Raymond Aab, and Ortiz testified at the first day of the evidentiary hearing. On May 17, 1994, Aab gave additional testimony. Post-hearing briefs from the parties followed and were fully submitted as of October 6, 1994, when Ortiz's counsel indicated that no reply brief would be submitted to the Government's Post-Hearing Brief.

#### THE CLAIMS IN THE PETITION AND AT THE EVIDENTIARY HEARING

\*4 The following is a distillation of the facts pertinent to Ortiz's habeas petition from his Memorandum of Law and Exhibits submitted pro se in support of his petition and from the testimony given at the evidentiary hearing.

Ortiz claims that the Government's informant improperly induced him to engage in the heroin transaction by promising to help him obtain the connections necessary to complete a tire recycling deal worth \$4 1/2 million in commissions. Ortiz maintains that even before he was released from prison, the informant started to call his mother's apartment. Following Ortiz's prison release, the informant contacted Ortiz and inquired whether he was interested in selling or buying drugs or weapons. Ortiz purportedly told the informant that he was not, but instead expressed his interest in the "marketing deal" for the recycling of rubber tires worth \$4 1/2 million in commissions. Ortiz asked the informant whether he knew anything about China, which Ortiz had heard permitted tire recycling. The informant responded in the negative and the conversation ended.

Ortiz maintains that in the days that followed, the informant intensified his efforts to convince Ortiz to agree to a drug deal. Eventually, the informant told him about Kenny, a wealthy businessman from China, who could help with the rubber deal. A meeting was arranged in which Kenny advised Ortiz that he had business associates in China in the recycling business but that he needed to get 50 kilograms of heroin for his associates so that they would "in turn give him all their work and the best account in town. A favor for a favor, that's the way it works." Ortiz claims to have told Kenny he was not interested in dealing drugs.

After this meeting, the informant's calls

nevertheless continued and finally the informant reported that Kenny would help Ortiz with the tire-recycling deal. Angel Perez and an individual identified at the evidentiary hearing as his friend, Jose Arces, accompanied Ortiz to a second meeting with Kenny. At the meeting, however, Ortiz admits that little was said about the rubber deal because the informant immediately asked Perez if he was interested in selling drugs. Perez hesitated and Ortiz again told the informant that he was not interested in drug deals.

Yet, according to Ortiz, in the days that followed, the informant called Ortiz to ask whether Perez had found someone interested in purchasing heroin. The informant advised Ortiz that he had pressured Kenny to "go through with the rubber deal" and he therefore expected Ortiz to "push" Perez to go ahead with the heroin deal. Ortiz responded that he was not interested in the drug deal and that there was nothing he could do to push Perez.

Subsequently, Kenny called Ortiz directly and asked him to meet him at a bar. At that meeting, Kenny announced that he was waiting for his associates and requested that Ortiz wait with him. A few minutes later "two American Men with Western boots and cardaroy [sic] jackets walked to us and Kenny introduced them to me as his business associates." After the two men walked away, Ortiz asked Kenny "what was going on, you told me your associates were from China?"; to which Kenny responded that they were "company representatives in New York." Ortiz also inquired about the purpose of the meeting and Kenny told him that it was a meeting to discuss the cocaine deal. At that point, Ortiz advised the two men that there had been a misunderstanding and that he was not there to talk about a drug deal. The two men told Ortiz that they had nothing to talk about and left.

\*5 According to Ortiz, Perez then called him that night to tell him that Kenny was upset with him but that Kenny would still go through with the tire-recycling deal so long as Perez was willing to buy the heroin. A few minutes later, the informant called Ortiz and told him that Kenny would go through with the tire deal if Perez found someone to buy the heroin from the informant. The informant asked Ortiz to contact Perez to set up the heroin deal with Perez and requested that Ortiz call him back the following day. Ortiz claims that the informant

repeatedly directed him not to mention the tire deal during the next day's conversation. [FN1] Thereafter, the four recorded conversations between the informant and Ortiz occurred and the meeting at the McDonald's restaurant followed. Kenny was not a part of that last meeting.

After his arrest, Ortiz was represented at his arraignment by an attorney from the Federal Defender's Office. Three weeks later, Ortiz claims to have been called into a joint defense meeting at the prison with his two co-defendants, Perez and Ramos, in which three attorneys were present. Aab introduced himself as Ortiz's lawyer and Ortiz assumed, without asking, that Aab was a CJA attorney appointed to represent him. After the meeting and outside the presence of the attorneys, Ramos, who Ortiz claims he had never met before their arrest, told Ortiz that he was "taking care" of, i.e., retaining, the attorneys. Ortiz assumed Ramos was doing him a favor.

Between Ortiz's arrest in October 1989 and December 1989, he and Aab discussed Ortiz's entrapment defense and Ortiz claims to have told Aab in great detail about the informant's and Kenny's conduct. Ortiz also asserts that he directed Aab before and during the trial to speak to Ortiz's mother, sister and nephew as witnesses of the informant's repeated calls. Moreover, during the trial, Ortiz claims to have identified to Aab his friend, Jose Arces, as the individual in a surveillance photograph admitted at trial who was present at a meeting with Kenny. Arces has submitted an affirmation attached to Ortiz's Memorandum of Law in Support of his Petition, in which Arces describes a meeting with "two chinese men" and Ortiz in which Ortiz sought to discuss a marketing deal for rubber, cosmetics and chemicals but the businessmen tried to speak about drugs. Aab never interviewed Ortiz's family members and never sought out Arces who lived in the same building as Ortiz's mother.

Further, Aab never interviewed Ortiz's parole officer whose personal notes of interviews with Ortiz reflect Ortiz's expression of interest in pursuing various marketing deals. Finally, Ortiz's fiancée was apparently present while Ortiz spoke to the informant in a telephone call. Ortiz maintains that his fiancée would have explained that Ortiz's expressed lack of interest in meeting with the

informant was not a ruse to convince the informant that Ortiz had other suppliers ready to deal with him as the prosecution claimed at trial, but a genuine desire not to meet with the informant because Ortiz and his fiancée had plans to go out. Aab did not question the fiancée about the call even though she attended the trial.

\*6 In or about December 1989, Ramos died and Ortiz claims that Aab told him that Ramos had only paid Aab \$14,000 and that Aab sought from Ortiz the remainder of his \$35,000 fee. Ortiz could not pay the fee and the two agreed to have Aab move to be relieved from the case. Then District Court Judge Pierre N. Leval on or about April 4, 1990, and again on or about April 23, 1990, denied the motion. Judge Leval, however, did approve the payment of expenses from Criminal Justice Act ("CJA") funds for an expert and investigator and Aab retained a psychologist to evaluate Ortiz for purposes of presenting an entrapment defense. Ultimately, the psychologist's report did not prove helpful to the defense and was not used at trial.

With respect to his testimony at trial, Ortiz maintains that Aab directed him not to testify about the tire deal until he was asked about it and to emphasize a story Aab made up about a jailhouse debt Ortiz owed to the informant for saving him from a prison attack. In short, the trial testimony concerning the genesis of his relationship with the informant was a fabrication which Ortiz agreed to tell because Aab told him it was a more believable story than the one relating to the tire deal. Because Aab at trial did not pose any questions of him concerning the tire deal and meetings with Kenny, Ortiz claims he did not volunteer those events himself. Moreover, after he finished testifying without disclosing the tire deal, Ortiz maintains that Aab assured him that he would get to the tire deal through other witnesses but never did.

Ortiz, however, did not relate Aab's failure to fully present his entrapment defense at trial in his post-trial motion to relieve Aab. (Government Ex. 3). [FN2] In that motion, Ortiz complained only about Aab's failure to transmit trial transcripts to him and to return his and his family's telephone calls. At the evidentiary hearing, Ortiz explained that he did not include Aab's failure in his post-trial motion because he was unaware of the need to do so.

At the evidentiary hearing, Aab denied ever receiving payment from Ramos. He claimed instead to have received about seven to eight hundred dollars in money orders of a twenty-five hundred retainer. At the first evidentiary hearing of April 1, 1994, Aab testified that he thought Ortiz had contacted him after getting his name from a co-defendant. At the May 17, 1994 hearing, Aab, when presented with a docket sheet in the trial case, recalled that he had first put in a notice of appearance on behalf of Ramos. Aab explained that someone had called him on behalf of Ramos and that he put in a notice of appearance, consistent with state practice, before receiving a retainer or meeting with Ramos. Another attorney was also contacted on behalf of Ramos and that attorney appeared on behalf of Ramos the next day and thereafter. In the interim, Ortiz called Aab and interviewed him. Ortiz told Aab that he had gotten the names of a number of attorneys and had met with them. Ortiz showed Aab a "writing sample" from one of those attorneys. Only three weeks later after speaking to other attorneys did Ortiz agree to have Aab represent him for a \$2500 retainer. Aab claims to have received about \$700-\$800 of the retainer in money orders. Aab kept no records of the payments.

\*7 After Ortiz retained him, Aab claims to have discussed the case and potential defenses with Ortiz at length, particularly the entrapment defense. The psychologist retained by Aab, however, reported that Ortiz was a highly intelligent and assertive personality not likely to be susceptible to entrapment. Hence, the psychologist was not called at trial. With respect to the informant, Aab interviewed him and found he contradicted almost all of Ortiz's claims. After consultation with Ortiz, they decided that Ortiz's uncontroverted description of the frequent contacts by the informant was better than calling the informant as a witness. Aab had no memory of discussions with Ortiz concerning the use of his relatives as factual witnesses but did remember discussing with him the disadvantages of using them as character witnesses.

Early in his representation of Ortiz, Aab had taken notes concerning a tire deal but at the evidentiary hearing, he had no memory of the tire deal or of the deal playing any significant part in the events relayed to him by Ortiz or in the defense they developed. Aab denied counseling Ortiz to fabricate

his prison debt to the informant. Aab claimed that Ortiz generally was an active and vocal participant in his defense and called and wrote to him incessantly. In fact, Ortiz did substantial legal research and sent it on to Aab on an almost weekly basis. I note that after Aab testified on April 1 about Ortiz's penchant for legal research, Ortiz, despite being then represented by counsel, sent me on April 12 a letter containing his research on the "failure to call witnesses" portion of his claim.

Prior to representing Ortiz, Aab had appeared in only one federal criminal case. Nevertheless, he had handled hundreds of state criminal cases. He agreed to a twenty-five hundred dollar retainer because he expected the case to result in a guilty plea or cooperation. Finally, Aab was not approved for CJA payment for his fees until the conclusion of the trial. By letter declarations dated April 28, 1994, the attorneys for Perez and Hector Ramos denied ever being told that Ramos had paid Aab to represent Ortiz.

#### DISCUSSION

At the evidentiary hearing, Ortiz's counsel abandoned Ortiz's pro se arguments relating to the insufficiency of the evidence at trial. (Tr. April 1, 1994 Hr'g at 11). [FN3] Hence, the question remaining before me is whether Ortiz was denied effective assistance by his trial counsel Aab based on 1) Aab's actual conflict of interest arising from co-defendant Hector Ramos's alleged payment of a portion of Ortiz's retainer and from omissions made to Judge Leval in Aab's application to be relieved as counsel; 2) Aab's failure to pursue at trial Ortiz's entrapment defense based on the tire marketing deal; and 3) Aab's failure to interview or call witnesses at trial.

In order to make out a claim for ineffective assistance of counsel, a habeas petitioner must affirmatively establish both unreasonable representation by his attorney and prejudice sufficient to call into question the reliability of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984). Claimant bears the burden affirmatively to show that his attorney's representation was objectively unreasonable and that but for his attorney's errors, the result would have been different. See, e.g., *Bellamy v. Cogdell*, 974 F.2d 302, 306 (2d

Cir.1992) (en banc) (citing *Strickland*, 466 U.S. at 694), cert. denied 113 S.Ct. 1383 (1993).

\*8 Where an actual, as opposed to a potential, conflict of interest exists between a defendant and trial counsel, however, the defendant need not prove the prejudice required by the *Strickland* standard but must establish that the actual conflict "adversely affected [the] lawyer's performance" or caused a "lapse in representation." *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980); *United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir.1986).

I find no actual conflict of interest in the record before me under the *Cuyler* standard. Moreover, Aab's conduct does not support a conclusion that "but for" counsel's error, defendant would have fared better at trial. *Strickland*, 466 U.S. at 687-88.

#### THE ACTUAL CONFLICT OF INTEREST CLAIM

With respect to the first prong of Ortiz's actual conflict argument, I do not credit Ortiz's allegation that his co-defendant Hector Ramos paid Aab a retainer. Ortiz's story was simply not credible. It is difficult to believe that Ortiz, who had been represented by another attorney at his arraignment, would have first met Aab at a joint defense meeting and not asked Aab how he had come to represent him. It is also difficult to believe that Ortiz never met or dealt with Hector Ramos prior to their arrest, but Ortiz then accepted, without question, Ramos' unsolicited generosity in retaining Aab.

After Ramos died on February 28, 1990, and even after Aab moved to be relieved on April 4, 1990, not once did Ortiz raise or mention to the trial court the alleged conflict of interest. After trial, when Ortiz sought to have Aab replaced, he complained of Aab's inaccessibility after the trial but not of the alleged Ramos retainer payment. In fact, in his affirmation in support of his motion to relieve Aab (Government Ex. 3), Ortiz wrote: "When I could afford to retain Mr. Aab he kept all his appointments and promises, however, since Mr. Aab has been appointed by the Court he pays no attention to me." (emphasis added). Not in his appeal but only in his Memorandum of Law in Support of His Habeas Petition, and then only in one paragraph, at pages 63-64, of a twenty-five page section dealing with his ineffective assistance of

counsel claim, did Ortiz make reference to the Ramos retainer payment. There, Ortiz claimed that Ramos never told him that he had paid Aab. At the evidentiary hearing before me, however, Ortiz testified that Ramos told him of the payment on the very day he met Aab. I do not find this to be an inadvertent error in his Memorandum of Law as Ortiz claimed at the hearing, but instead I find it reflective of Ortiz's somewhat strained creation of a story.

Ortiz is a highly articulate, intelligent man. I credit Aab's testimony that Ramos never paid him and that he was interviewed and retained for the position by Ortiz and that Ortiz simply failed to pay him the full retainer promised.

The second prong of Ortiz's actual conflict of interest claim is more amorphous because it attempts to create an actual conflict by postulating about the motivations for counsel's alleged failure to perform adequately at trial. This is not the type of proof demonstrating that an attorney "actively represented conflicting interests" recognized in *Cuyler*, 446 U.S. at 350. See *United States v. Lovano*, 420 F.2d 769, 774 (2d Cir.), cert. denied, 397 U.S. 1071 (1970) (more than a "theoretical conflict of interest" or "argument based on mere speculation" is necessary; defendant must prove that his attorney actually represented a conflicting interest).

\*9 In essence, Ortiz argues that Aab created an actual conflict of interest by agreeing to a low retainer in order to gain federal experience and by adopting the erroneous presumption that the case would end in a plea and then thereafter failing to advise the trial judge of his inexperience and of his financial miscalculation. Ortiz's argument is without merit.

First, although Aab was an inexperienced federal practitioner, he did have extensive state criminal experience. There was nothing in the factual or legal underpinnings of the charges against Ortiz that were so unique to federal practice as to have rendered an inexperienced federal practitioner even arguably negligent for continuing in Ortiz's representation at trial. Therefore, there was no need or obligation on Aab's part to inform Judge Leval of his federal inexperience. [FN4] Similarly, neither was Aab's representation to Judge Leval that the case was "not a complicated case" and "unusually

straightforward" misleading. (Government Ex. 2, Aab's letter dated April 23, 1990 to Judge Leval, at page 2). The trial, including jury selection to jury verdict, took only three-and-one-half days, and even further interview of and presentation of defense witnesses at trial would not have required significantly more time.

Second, Aab fully disclosed to Judge Leval that he would not be paid for his trial work. Whatever the motivations for setting the amount of his initial retainer, the issue in the applications to be relieved was not the retainer amount owed but the defendant's inability to pay his attorney for trial work. Hence, there was no conflict created by Aab's alleged failure to disclose the presumptions underlying the original retainer amount. [FN5]

Third, Judge Leval approved the payment of expenses for a trial expert or an investigator for Ortiz from CJA funds and Aab retained a psychologist to investigate the entrapment defense. The witnesses Ortiz claims Aab failed to interview or call at trial were essentially relatives or friends present during the trial or readily available. [FN6] Thus, no conflict of interest between Aab and his client existed with respect to expenses relating to the pre-trial investigation of the case.

Fourth, neither Judge Leval nor Judge Tsoucalas ever promised Aab payment from CJA funds and never led Aab to believe that his trial performance affected the possibility of such a payment. To the extent Aab may have had a personal hope that he could later apply for such funds, that hope did not amount to a conflict between himself and his client, because Aab's performance was not contingent on any judge's response to that hope.

In short, the only potential factor supporting a finding of actual conflict was Aab's representation of Ortiz without payment. This standing alone does not create an actual conflict of interest, particularly where counsel was aware of and fully understood his ethical obligations to his client, and where the lack of payment did not influence the alleged trial errors. [FN7] Aab, as his CJA time sheets reflect (Government Ex. 3), spent significant time, including a weekend, researching and preparing for trial. Most of what Ortiz claims Aab did not do, which was interview witnesses readily available to him, was not attributable to the failure of payment

but to some other motivation. Aab claims none of the now proffered witnesses were material to the defense. Ortiz himself postulates that what he perceived from Aab was not a lack of willingness to pursue an investigation because of a lack of funds, but a disbelief by Aab of Ortiz's story:

\*10 Q. I know you have been living with his case for a longtime and have thought about it a great deal. Is there anything else that you feel the judge should know that we haven't covered.

A. Yes. I basically would like to emphasize the fact that I think Mr. Aab never believed a word of the car tire deal. He just never believed it....

(Tr. April 1, 1994 Hr'g at 45, lines 14-20.)

At best, Ortiz's claim amounts to an argument that counsel made an error in judgment but not an error attributable to counsel representing an interest different from his client's. In summary, I find no actual conflict of interest in this case and hence invoke the standard set forth by Strickland in reviewing Ortiz's ineffective assistance of counsel claim.

#### THE TRIAL OMISSIONS

In addressing this portion of Ortiz's claim, there are certain factual determinations I must make. First, I do not credit Ortiz's claim that Aab directed him to lie about the prison favor he owed the informant or that Aab misled Ortiz into believing that he would present the tire marketing defense before the end of trial. The focus of Ortiz's testimony at trial was not the favor he owed the informant but the informant's promise of a car to aid Ortiz in his work pursuits. The promise of that car was not the lie Ortiz claims Aab directed him to tell. I see no purpose to or reason for Aab counseling Ortiz to tell the lie about a prison favor when it was not the linchpin of the defense the two were presenting.

With respect to the tire marketing deal, it is undisputable that Aab was aware of Ortiz's discussions with the informant and Kenny about the tire deal. Aab's notes dated 11/26/89 (Government Ex. 3506) set forth many of the details concerning the tire deal in Ortiz's habeas petition. It is somewhat surprising, although understandable given the passage of time, that Aab had no recollection at the evidentiary hearing of this discussion. On the other hand, Aab was certain that all decisions

concerning the defenses to be presented at trial were fully discussed with Ortiz and that Ortiz approved the strategies elected at trial.

I simply do not credit Ortiz's claim that he was unaware that the tire marketing deal would not be mentioned at trial. I find it more consistent with the events at trial and Ortiz's conduct post-trial to conclude that Ortiz knowingly and consciously accepted Aab's advice, which Ortiz admits Aab expressed, that the prison debt and car portions of the entrapment defense would be more credible to the jury:

Q. And you discussed this in advance of the trial with Mr. Aab, the story about a jailhouse incident?

A. He told me that it was very believable to say something like that, because it was typical of a jail type thing. He told me that what actually happened didn't sound right to him.

(Tr. April 1, 1994 Hr'g at 49-50).

Ortiz sat through the Government's and Aab's opening and the Government's case and knew that Aab had not mentioned the tire marketing deal. Yet, Ortiz himself in his own direct examination failed to mention the tire deal even though a multitude of responses clearly would have implicated the information. [FN8] It is simply incredible that a highly intelligent and actively involved defendant [FN9] would have believed Aab's assurances that the tire deal would be brought up on a direct question or would have left the stand, when the question was not asked, without volunteering the information. It is also difficult to believe that Ortiz would not have mentioned Aab's failure fully to pursue the entrapment defense in his post-trial motion to relieve Aab. In short, I find that the decision not to mention or develop the tire marketing deal at trial as part of the entrapment defense was a strategic choice, known and accepted by Ortiz.

\*11 The failure to pursue a defense or interview witnesses can constitute ineffective assistance of counsel only when the decision not to conduct further investigation was not supported by "reasonable professional judgment." *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir.1990) (quoting *Strickland*, 466 U.S. at 690-91); see also *United States v. Matos*, 905 F.2d 30, 33 (2d Cir.1990) (a failure to "make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary,' " constitutes ineffective assistance of counsel) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). Under the circumstances Ortiz claims Aab knew, however, failure to interview the witnesses proffered by Ortiz can not be said to have been unreasonable nor to have risen to the level of ineffective assistance of counsel. In addition to the inherent bias jurors would recognize in the testimony of family members and a fiancée, Aab was not told by Ortiz that any of his family members or fiancée had personal knowledge of the central issues raised by Ortiz in his papers or which were vigorously contested at trial. The available family members could only testify about the informant's repeated calls to Ortiz and not about their substance. The fiancée could only at best confirm a meeting she had scheduled with Ortiz and not that Ortiz's statements in a tape recording with the informant concerned that meeting. [FN10] Similarly, Ortiz's probation officer could have testified about Ortiz's professed interest in marketing deals but not about any of Ortiz's contacts with the informant or Kenny. To the extent Ortiz's friend, Jose Arces, was not interviewed by Aab, I note that Ortiz claims to have identified Arces to Aab only at trial and that Arces' only claimed relevant testimony would have been about the aborted tire deal meeting. [FN11]

With respect to the tire deal itself, I can not say that Aab's advice, as suggested by Ortiz, about the viability of emphasizing the tire marketing deal at trial would have been so misplaced as to exceed the reasonable bounds of professional behavior. Ortiz was a convicted felon who had just left prison, yet claimed to have had access to a tire recycling deal worth \$4 1/2 million in commissions. Ortiz proffered no witnesses concerning the availability or viability of the deal but merely offered his own testimony and that of others of his own talk of interest in the deal. Ortiz also does not credibly explain why he believed the informant would have been capable of assisting in such a venture or why after the aborted meeting with Kenny's associates, Ortiz would have continued in the heroin deal believing Kenny would deliver on his promise to assist in the tire deal. On the other hand, the promise of a car, which Ortiz admits the informant made, appears a more credible explanation of Ortiz's behavior. In summary, I find nothing in Aab's

behavior that suggests that his advice to Ortiz was outside the ken of strategic trial choice.

\*12 Finally, even assuming that Aab's performance fell below the Strickland standard, Ortiz has not demonstrated that he was prejudiced by Aab's alleged unprofessional conduct. The evidence against Ortiz at trial was overwhelming. The four taped recordings between Ortiz and the informant reflected both Ortiz's willingness and eagerness to participate in the drug transaction. Ortiz's access to Ramos and Perez and capability of executing the deal were also indicative of his predisposition to commit the crime. The jury received an entrapment defense charge. They considered Ortiz's claim that his will was overborne by the informant, and the jury rejected the defense. To the extent the tire deal was to have been raised at trial, it would not have added appreciably to the jury's assessment of Ortiz's predisposition to commit the crime charged. In summary, Ortiz has not proven that absent Aab's trial failures, the result of the trial would have been different. See *Strickland*, 466 U.S. at 696 ("a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support"); *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir.), cert. denied, 500 U.S. 919 (1991) (where evidence is overwhelming, there is "little reason to believe that alternative counsel would have fared any better").

## CONCLUSION

Because of my findings herein, I need not address Ortiz's ineffective assistance of appellate counsel claim arising from appellate counsel's failure to raise the trial claim on direct appeal. For the reasons discussed, petitioner Ortiz's writ for habeas relief is denied and the Clerk of the Court is directed to enter judgment dismissing the petition.

## SO ORDERED

FN1. Ortiz claims that he did attempt to bring the tire deal up during the first taped telephone conversation with the informant but that the informant diverted the topic. The relevant part of the exchange, according to Ortiz, was as follows: ORTIZ: Have you talked to this guy? C.I.: Who? ORTIZ: Did you ask him, he know Kenny? C.I.: Yeah, I asked him about it already. ORTIZ: Yeah,

what did he say? C.I.: (UI). ORTIZ: Don't worry we'll go. So everything is okay, alright? C.I.: Okay.

FN2. "Government Ex." refers to submissions at the evidentiary hearing before me.

FN3. Although generally a factual issue for a jury, see *Mathews v. United States*, 485 U.S. 58, 63 (1988), entrapment as a matter of law arises when no reasonable jury can find a defendant was predisposed to commit the crime charged, "prior to being approached by Government agents." *Jacobson v. United States*, 112 S.Ct. 1535, 1540 n. 2 (1992); *United States v. Williams*, 705 F.2d 603, 613 (2d Cir.), cert. denied, 464 U.S. 1007 (1983). Ortiz's argument that the evidence at trial proved entrapment as a matter of law failed woefully short of this standard. The four tape recordings between the informant and Ortiz, the testimony of the DEA agent, Valerie Dickerson, about her meetings with Ortiz and the informant and of Ortiz's actions at the McDonald's restaurant, and Ortiz's prior narcotics convictions provided ample proof, beyond a reasonable doubt, for the jury to have concluded that Ortiz was predisposed to commit the crime charged. Hence I commend Ortiz's counsel for not pursuing a factually specious argument.

FN4. I note that, albeit infrequently, attorneys with only state criminal practice experience are selected to serve as members of this Court's CJA panel.

FN5. Ortiz's argument in his post hearing brief, page 17 and fn. 7, that Judge Leval might have been misled into thinking that Aab's one-third retainer payment represented a more substantial sum because it should have included trial work is premised on sheer speculation. All judges know that retainer agreements vary depending on the lawyer and client involved. The only reasonable presumption I can draw is that if the amount of Aab's retainer fee was significant in his decision not to relieve Aab, Judge Leval would have asked Aab how much he received. In fact, I have no reason to discredit Aab's testimony that in at least one conference he disclosed how much he had received to Judge Leval.

FN6. In his Memorandum of Law in Support of His Habeas Petition, Ortiz claimed that Aab failed to interview the confidential informant or to call him at

trial. This allegation was not pressed at the evidentiary hearing or in petitioner's post-hearing brief. Aab testified at the evidentiary hearing that he in fact interviewed the informant and decided, after consultation with Ortiz, against having him testify because he contradicted Ortiz's testimony and Ortiz's testimony would then stand unchallenged at trial. I note that Aab's time records, submitted in support of his subsequent CJA application, reflect an entry on June 18, 1990 for interviewing the informant. (Government Ex. 1 at 3). I credit Aab's testimony that he met with the informant and accept that the decision not to call the informant was a strategic trial choice and not reflective of ineffective assistance of counsel. See *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir.), cert. denied, 484 U.S. 958 (1987) (whether or not to call witnesses is within the reasonable "ambit of trial strategy").

FN7. Ortiz's misplaces his reliance upon *Walberg v. Israel*, 766 F.2d 1071 (7th Cir.), cert. denied, 474 U.S. 1013 (1985), for the proposition that the need to curry favor with a trial judge to receive *nunc pro tunc* CJA payments constitutes an actual conflict. The Israel court was careful to underscore the significance of the trial judge's comments and veiled threats in creating the actual conflict in that case. No such conduct is implicated by this case.

FN8. The Government's Post-Hearing Brief, at pages 17-21, cites many examples of questions posed to Ortiz at trial which gave him a fair opportunity to mention the tire deal if he intended to do so.

FN9. Aab's notes and files contained many references to Ortiz's significant involvement in his defense including review of evidence, legal research sent to Aab and directions by Ortiz to Aab on the motions and other steps that had to be taken in the litigation. See, e.g., Government Exs. 3507, 3508, 3509, and 13-14.

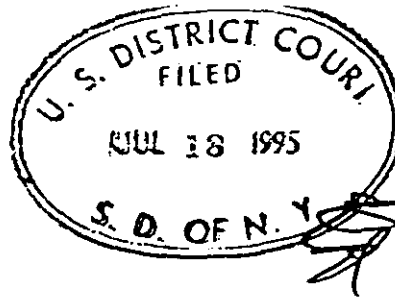
FN10. In its Post-Hearing Brief at 16, fn. 9, the Government also persuasively shows that the fiancée's proffered testimony was not relevant to the issue Ortiz asserts as significant.

FN11. I note that Arces' affirmation, attached to Ortiz's Memorandum of Law in Support of His Petition, suggests some credibility problems with

Arces' proposed testimony. Arces claims to have met with "two chinese men" and Ortiz. Yet, Ortiz claims that at the only meeting he had with Kenny and his associates, Kenny brought two non-Asian men to discuss a tire deal in China and that he became leery of Kenny bringing caucasian men to represent a purported Chinese company.

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- MANDATE



SDNY

93-cv-8084

SOTOMAYOR

JMW

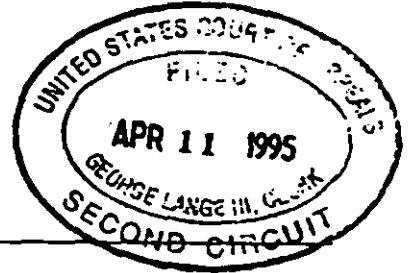
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of April, one thousand, nine hundred and ninety-five.

Present:

Honorable Wilfred Feinberg,  
Honorable John M. Walker, Jr.,  
Honorable José A. Cabranes,  
Circuit Judges.



ALISON E. CLAPP,

Plaintiff-Appellant,

v.

ORDER  
No. 94-9002

LeBOEUF, LAMB, LEIBY & MacRAE, DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE III, CAMERON F. MacRAE, III P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., collectively THE LeBOEUF, LAMB, LEIBY & MacRAE "ADMINISTRATIVE COMMITTEE", LeBOEUF, LAMB, LEIBY, & MacRAE, IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, JOHN C. RICHARDSON, JOHN C. RICHARDSON, P.C., HON. DIANE A. LEBEDEFF, INDIVIDUALLY AND IN HER PAST OR PRESENT OFFICIAL CAPACITY AS JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, HON. JOSEPH P. SULLIVAN, HON. RICHARD W. WALLACH, HON. THEODORE R. KUPFERMAN, HON. DAVID ROSS, HON. BETTY WEINBERG ELLERIN, HON. FRANCIS T. MURPHY, HON. JOHN CARRO, HON. BENTLY KASSAL, HON. GEORGE BUNDY SMITH AND HON. ERNST H. ROSENBERGER, EACH INDIVIDUALLY AND IN HIS/HER PAST OR PRESENT OFFICIAL CAPACITIES AS

ISSUED AS MANDATE. 7/11/95

Docket No. 94-9002

JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME  
COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT,  
(collectively THE "APPELLATE DIVISION", FIRST  
DEPARTMENT),

Defendants-Appellees.

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Appeal from the United States District Court for the Southern  
District of New York.

This cause came on to be heard on the transcript of record  
from the United States District Court for the Southern District of  
New York (Sonia Sotomayor, Judge), and was submitted after counsel  
for appellant in open court waived oral argument after he was  
notified that his Motion for Adjournment and Reassignment was  
denied.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged,  
and decreed that the judgment of said District Court be and it  
hereby is AFFIRMED.

Alison E. Clapp's appeal comes before us following protracted  
litigation in both state and federal court. Her numerous actions  
concern her exclusion from partnership in LeBoeuf, Lamb, Leiby &  
MacRae ("LLL&M") where she was a partner from 1986 until 1989, when  
the partnership dissolved and reconstituted on January 1, 1990.  
The newly formed partnership excluded Clapp and twenty-eight other  
attorneys.

Clapp's series of lawsuits began in federal court. After her  
federal claims were dismissed, Clapp v. Greene, 743 F. Supp. 273  
(S.D.N.Y. 1990), aff'd, 930 F.2d 912 (2d Cir. 1991), Clapp filed  
two separate state court actions in New York Supreme Court, New  
York County, alleging that the firm's 1989 dissolution and  
reformation violated New York's partnership laws. The consolidated  
lawsuits were dismissed by summary judgment, Clapp v. LeBoeuf,  
Lamb, Leiby & MacRae, No. 15586/91 (N.Y. Sup. Ct. Mar. 18, 1992)  
(Diane A. Lebedeff, Justice), and affirmed on appeal, Clapp v.  
LeBoeuf, Lamb, Leiby & MacRae, No. 46946 (N.Y. App. Div. Dec. 15,  
1992). The First Department denied Clapp's requests for leave to  
appeal to the Court of Appeals. Nevertheless, Clapp filed a Notice  
of Appeal as of right to the New York Court of Appeals, which was  
dismissed because "no substantial constitutional question [was]  
directly involved." Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No.  
493 SSD 23, (N.Y. May 6, 1993).

On November 23, 1993 Clapp commenced the action now on appeal  
against LLL&M, its partners, Justice Lebedeff, and the judges of  
the Appellate Division, First Department. She alleged that: 1)

the state courts' interpretation of New York's partnership laws was erroneous, 2) the partnership laws were constitutionally invalid as applied to her, 3) LLL&M was liable under 42 U.S.C. § 1983 for constitutionally depriving her of her property by divesting her of her partnership interest, 4) LLL&M and the State defendants conspired to deprive her of that interest without due process of law, and 5) the judicial procedure in state court deprived her of a full opportunity to present her claims. As a result, Clapp sought declaratory and injunctive relief.

Defendants argued in the district court that under the doctrine established by District of Columbia Court of Appeals v. Feldman, 460 U.S. 461 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the district court did not have jurisdiction over appellant's claims. Nevertheless, the district court retained jurisdiction and granted defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It held that Clapp had not demonstrated that the dissolution of the at-will partnership implicated a constitutionally protected liberty interest. The court added that even if such a property interest were at stake, LLL&M could not be construed as a state actor under the circumstances and the State defendants, who acted in their judicial capacities, were immune from suit by Clapp.

We assume, without deciding, that the district court did have jurisdiction. We have considered all of plaintiff-appellant's contentions advanced on this appeal, and we affirm substantially for the reasons given in Judge Sotomayor's comprehensive and well-reasoned opinion. See Clapp v. LeBoeuf, Lamb, Leiby & MacRae, No. 93 Civ. 8084 (SS) (S.D.N.Y. Aug. 19, 1994).

Hon. José A. Cabranes did not participate in the decision in this case. Pursuant to Local Rule § 0.14, the two remaining judges decided this appeal.

N.B. THIS SUMMARY ORDER WILL NOT BE  
PUBLISHED IN THE FEDERAL REPORTER  
AND SHOULD NOT BE CITED OR OTHERWISE  
RELIED UPON IN THE UNRELATED CASES  
BEFORE THIS OR ANY OTHER COURT.

  
Hon. Wilfred Feinberg, U.S.C.J.

  
Hon. John M. Walker, Jr., U.S.C.J.

A TRUE COPY  
GEORGE LANGE JIL CLERK



ITEMIZED AND VERIFIED BILL OF COSTS

United States Court of Appeals  
for the Second Circuit

STATEMENT OF COSTS

Taxed in the amount of \$ 126.00 in favor of  
Appellees, LeBoeuf, Lamb et al  
FOR THE COURT.  
5/5/95 (Date) GEORGE LANGE III, Clerk  
Arthur M. Heller  
Arthur M. Heller, Deputy Clerk

Alison E. Clapp,

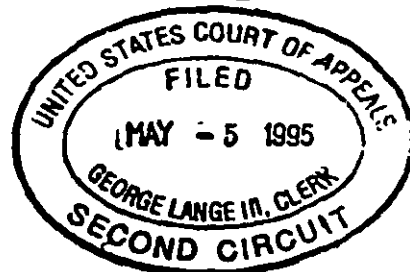
Plaintiff-Appellant,

- against -

LeBoeuf, Lamb, Leiby & MacRae, et al.

Defendants - Appellees.

Docket No. 94-9002



Counsel for the LeBoeuf defendants-appellees  
respectfully submits, pursuant to Rule 39 (c) of the Federal Rules  
of Appellate Procedure the within bill of costs and requests the  
Clerk to prepare an itemized statement of costs taxed against the  
plaintiff-appellant and in favor of the LeBoeuf defendants-appellees  
for insertion in the mandate.

Docketing Action

Costs of printing appendix (necessary copies \_\_\_\_\_) \_\_\_\_\_ 0

Costs of printing brief (necessary copies 15\*) \$126.00  
(\* 42 pages \* 15 copies \* \$.20 per page) = \$126.00

Costs of printing reply brief (necessary copies \_\_\_\_\_) \_\_\_\_\_ 0

TOTAL \$126.00

(VERIFICATION HERE)

Ellen Scheurer

ELLEN SCHEURER  
Notary Public, State of New York  
No. 31-4909859  
Qualified in New York County  
Commission Expires November, 9, 1995

Christy Woods  
(Signature)

4/28/95

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE**  
**PART TWO, QUESTION 4**

# Withdrawal/Redaction Marker

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                                                                        | DATE       | RESTRICTION |
|--------------------------|------------------------------------------------------------------------------------------------------|------------|-------------|
| 001a. letter             | Sonia Sotomayor to the Committee on Financial Disclosure re:<br>Financial Disclosure Report (1 page) | 04/21/1997 | P2, P6/b(6) |

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### FOLDER TITLE:

Update Senate Draft [3]

2009-1007-F  
jpl527

### RESTRICTION CODES

#### Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]  
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]  
P3 Release would violate a Federal statute [(a)(3) of the PRA]  
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]  
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]  
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

#### Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]  
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]  
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]  
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]  
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]  
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]  
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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| 001b. form               | Financial Disclosure Report (4 pages) | 04/18/1997 | P2, P6/b(6) |

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### RESTRICTION CODES

#### Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]  
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]  
P3 Release would violate a Federal statute [(a)(3) of the PRA]  
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]  
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]  
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

#### Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]  
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]  
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]  
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]  
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**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE**  
**PART TWO, QUESTION 5**

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| 002. form                | Financial Statement (2 pages) | n.d. | P6/b(6)     |

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### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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| 003. form                | Personal Data Questionnaire (18 pages) | 04/01/1997 | P2, P6/b(6) |

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