UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,

Plaintiff,

– against –

ALTITUDE EXPRESS, INC., d/b/a Skydive Long Island, and RAY MAYNARD,

Defendants.

Index No.: CV-10-4334 (JFB)(ARL)

DECLARATION OF SAUL D. ZABELL IN OPPOSITION OF MOTION TO COMPEL DISCOVERY RESPONSES

SAUL D. ZABELL, ESQ., an attorney duly admitted to practice before this Court, hereby affirms under penalty of perjury as follows:

1. I am a managing principal of Zabell & Associates, P.C., and attorney for Defendants in the above-captioned case. I submit this declaration in opposition of Plaintiff's Motion to Compel. For the reasons set forth in the accompanying affirmation and upon the documents attached hereto, this motion should be denied in its entirety.

EXHIBIT

2. Attached hereto as "Exhibit 1" is a true and accurate copy of excerpts from the deposition transcript of Raymond Maynard.

3. Attached hereto as "Exhibit 2" is a true and accurate copy of a decision in CA-POW! v. Town of Greece.

4. Attached hereto as "Exhibit 3" is a true and accurate copy of a decision in Coleman v. City of New York.

5. Attached hereto as "Exhibit 4" is a true and accurate copy of a decision in GFI Sec. LLC v. Labandeira.

6. Attached hereto as "Exhibit 5" is a true and accurate copy of a decision in Munoz v. The Manhattan Club Timeshare Association, Inc.

7. Attached hereto as "Exhibit 6" is a true and accurate copy of a decision in Weissman v. Fruchtman.

Dated: Bohemia, New York
April 23, 2012

By: _____

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EXHIBIT 1

MAYNARD

A. Yes.

MR. ZABELL: Objection. Okay.

Q. Do you want to listen to it again and read it a little bit more closely? And I see your counsel is making a speaking -- is coaching you to say yes. Would you like to read it again and look at it more closely?

MR. ZABELL: I have said nothing at all on the record.

MR. ANTOLLINO: You've nodded your head.

MR. ZABELL: It's not different than what you're doing right now, Counselor.

Q. Would you like to?

A. Sure, why not.

(Whereupon video is played.)

MR. ZABELL: The videographer should be taking it down.

MR. ANTOLLINO: Okay, that's fine. And we'll say tape being played in the record and get.

(Whereupon, tape is played.)

Q. Okay. You've had an opportunity to

anything in this video that is improper, inappropriate or unsafe.

Would you agree to answer those questions after you watch the video?

A. Yes.

Q. All right.

MR. ZABELL: Before the play the videotape -- are you all right?

MR. ANTOLLINO: I'm fine.

MR. ZABELL: Why don't you discuss with me on the record how you'd like the court reporter to handle --

MR. ANTOLLINO: There's no way she's going to be able to -- there's no way. It's just shouting and music.

MR. ZABELL: That's fine. So we should discuss it so we both have a clear understanding and she has clear direction as to what is going to proceed and how we're going to proceed.

MR. ANTOLLINO: Fair enough. There's no way to transcribe it, but we're now playing 1334.

(Whereupon video is played.)

out of an airplane; correct?

A. Correct.

Q. All right. I'm finished with this movie and we're going to go on to the next movie, 1335, and the same question applies inappropriate, improper or unsafe?

MR. ZABELL: Objection to the form.

(Whereupon video is played.)

Q. Okay, you've watched the entire video?

A. Yeah.

Q. And that's the video of the time when someone gave someone else the finger; correct?

A. Correct.

Q. And there was a -- and one part of that video someone feigned vomiting, would you agree with that characterization?

A. They what?

Q. They faked a vomit.

MR. ZABELL: Objection to the form of the question.

Q. Do you remember at one point --

MR. ZABELL: Are you withdrawing

MAYNARD

A. What you're asking me about this is with experienced jumpers having fun with each other and not a customer making a complaint about something that was not right.

Q. I'm just asking you if you think that that was improper in any way?

A. No.

Q. Did you see anything that was inappropriate or unsafe in that video?

A. I don't think so.

Q. Wasn't there, in fact, a tandem in that plane?

A. I'd have to see it again.

Q. All right. Let's watch it again.

(Whereupon video is played.)

A. It was a tandem?

Q. Were you able to see a tandem in there?

A. No.

Q. What about that young lady in the back?

A. Like I said, I didn't see it.

Q. You didn't see a tandem in there? Well, let me ask you this, if there had been a

tandem in there, would any of that comradery of experienced divers in front of the tandem passengers have been inappropriate?

MR. ZABELL: Objection to the form of the question.

You may answer.

A. I didn't see that tandem person near these other guys. They were pretty far a about in the airplane and these were experienced jumpers again just goofing with each other.

Q. It was pretty goofy, wasn't it?

A. Yeah.

Q. And if there were a tandem passenger in there, is anything improper about that goofiness?

A. No.

Q. Okay. So let's move on to 1337.

(Whereupon video is played.)

Q. All right, did you see anything that was inappropriate, unsafe or improper?

A. No.

Q. There were portions in there where people were touching each other on the

posterior; is that correct?

A. Yes.

Q. What is the reason for that?

A. They were getting their balance because they're standing outside the aircraft that has no step.

Q. It was necessary for them to do that?

A. Yes.

Q. It was necessary for them to touch each other's posterior; correct?

A. Yes.

Q. Okay. Now we're looking at 1339.

(Whereupon video is played.)

Q. Did you see anything in there that was inappropriate or unsafe?

A. No.

Q. Now we're going to look at 1340.

(Whereupon video is played.)

Q. Did you see anything in there that was inappropriate or unsafe?

A. No.

Q. There was some point -- did you recognize the instructor in that video?

MAYNARD

A. I think it was Super John.

Q. Super John. What's Super John's last name? Well, I'll tell you what, since you have asked to review a copy of the record, I'll leave a blank space in there. Would you look it up and write it into the space?

+ TO BE FURNISHED:_____

A. Yeah.

Q. There was a point in there where the instructor was sticking his finger into the tandem passenger's ears and making what I believe was moose ears?

MR. ZABELL: Objection to the form of the question --

A. I didn't see it.

MR. ZABELL: -- and the representations made therein.

MR. ANTOLLINO: Counsel, you were the one last week who said that that was moose ears. All right, let's look at it again.

(Whereupon video is played.)

Q. Did you just see that?

A. He was tapping her on the head.

were being goofy; correct?

A. Yes.

Q. Okay. And if someone -- if an instructor did put his fingers in a passenger's ear and make a little moose ear for the video, would that have been improper?

A. I don't know, but that's not what I saw.

Q. Okay. But, you know, you're an experienced skydiver and I just want to know what your opinion is if that happened and someone did make moose ears, would that have been inappropriate or is that just typical?

A. If I saw a video of somebody sticking their fingers in someone's ear that would be inappropriate. That is not what I saw.

Q. Okay. We're looking at 1341 now.

(Whereupon video is played.)

Q. Did you see anything in there that was inappropriate, unsafe or improper?

A. No. Could I watch it one more time?

Q. Sure.

MAYNARD

(Whereupon video is played.)

A. No, I believe that they did either a front flip or a back flip and then they came out of it.

Q. The instructor has his arms around the passenger until the drove went up; is that true?

A. No.

Q. You see the instructor having his arms around the passenger at any time?

A. Yeah.

Q. Why?

A. Because they would have to do the flip one way or the other, that's the position you have to get into.

Q. That something if they wanted to do the flip he had to put his arms around her; correct?

A. Yes.

Q. And he was basically hugging her; correct?

A. He had his arms around her. I wouldn't characterize it as hugging her.

Q. All right. So if she complained

passenger and you're jumping out of the plane if -- are there any dangers to pulling the drogue too quickly?

A. No.

Q. We're going to look now at the main event, the video of Mr. Zarda and Ms. Kengle and this is the video that you've provided to me which has the screen name skydiveavi.avi; correct?

(Whereupon video is played.)

Q. For some reason the video is stopping so we're going to have to go back to a point where before it stopped and play more.

(Whereupon video is played.)

MR. ANTOLLINO: Something is wrong with this video.

MR. ZABELL: Counselor, I have a copy a my computer.

MR. ANTOLLINO: Would you mind? Thanks a lot.

(Whereupon video is played.)

Q. Okay. You've now watched the entire video. You can take that counselor.

Okay. So you've watched that video

MAYNARD

Q. Some people throw up; correct.

A. Correct.

Q. But they still might have had a good time; correct?

A. Correct.

Q. She said "That was awesome"; is that correct?

A. I don't know.

Q. All right. Let's watch the video again then.

(Whereupon video is played.)

Q. Now that you've seen it again she said "Yeah, that was awesome"; isn't that right?

A. Yeah, she said it.

Q. And she smiled; correct?

A. She smiled when she kissed her boyfriend.

Q. She smiled next to Don. She posed with Don after she kissed her boyfriend; correct?

MR. ZABELL: Objection to the multiple questions.

Q. You may answer.

MAYNARD

The guy's last name is Sherman. John Sherman. It just came to me.

Q. All right. I'm going to show you my computer and ask you if you recognize this -- well, you never met with Mr. Kengle with -- in respect to this complaint did you?

MR. ZABELL: Wait, wait. Objection to the form of the multiple questions.

MR. ANTOLLINO: Okay, withdrawn, and I'll ask it again.

Q. You never met with Mr. Kengle after his complaint, did you?

A. No, I did not.

Q. So you wouldn't necessarily be able to pick him out of a lineup, would you?

A. No.

Q. All right. Well, let's just play the video.

(Whereupon video is played.)

Q. Did you see anything in there that was inappropriate or unsafe?

A. No.

Q. All right. And I believe that Mr. Kengle said twice after he landed that it

EXHIBIT 2

*2012 U.S. Dist. LEXIS 36099, **

CA-POW! (Citizens Alert: Protect our Waters!), by Donn Rice, as Co-Chairman, Plaintiff, -v- THE TOWN OF GREECE, NEW YORK, Defendant.

10-CV-6035-CJS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 36099

March 9, 2012, Decided
March 16, 2012, Filed

PRIOR HISTORY: Citizens Alert Prot. our Waters! v. Town of Greece, 2010 U.S. Dist. LEXIS 95561 (W.D.N.Y., Sept. 14, 2010)

CORE TERMS: attorney's fees, oral argument, amend, bad faith, prevailing, wait, personally, frivolous, notice, waited, defense counsel's, local rules, leave to file, leave to amend, standing to sue, summary judgment, hourly rate, preparation, responding, opposing, litigate, drafted, times, Reply Mem of Law, Clean Water Act, Federal Rules, Mem of Law, failed to comply, counsel's argument, counsel's actions

COUNSEL: **[*1]** For Plaintiff: David J. Seeger, Esq., Law Office of David J. Seeger, Buffalo, NY.

For Defendant: Robert B. Koegel, Esq., Remington, Gifford, Williams & Colicchio, Rochester, NY.

JUDGES: CHARLES J. SIRAGUSA, United States District Judge.

OPINION BY: CHARLES J. SIRAGUSA

OPINION

DECISION AND ORDER

INTRODUCTION

Siragusa, J. In a written Decision and Order, the Court denied Plaintiff's motion for leave to

file an amended complaint and granted Defendant's motion to strike Plaintiff's June 24, 2010, amended complaint, as well as Defendant's motion to dismiss the original complaint. Decision and Order, *Citizens Alert Prot. our Waters! v. Town of Greece*, No. 10-CV-6035-CJS, 2010 U.S. Dist. LEXIS 95561 (W.D.N.Y. 2010).

Now before the Court is Defendant's motion seeking an award of attorney's fees pursuant to 33 U.S.C. § 1365(d), 28 U.S.C. § 1927, Fed. R. Civ. P. 54(d)(2), and Rule 11(b) of the W.D.N.Y. Local Rules of Civil Procedure. Notice of Motion, Sept. 29, 2010, ECF No. 31. For the reasons stated below, Defendant's application for attorney's fees is granted in part and denied in part.

PROCEDURAL HISTORY

On March 1, 2010, Defendant filed a motion, ECF No. 2, to dismiss the original complaint pursuant to Fed. R. Civ. P. 12(b)(1) **[*2]** and 12(b)(6). The Court scheduled oral argument on the motion for June 24, 2010, at 3:00 p.m. On that same day, Plaintiff filed what he titled "Plaintiff's First Amended Complaint," ECF No. 20, without leave of the Court and without consent by Defendant. Subsequently, on July 1, 2010, Defendant moved to strike the amended complaint and to dismiss the original complaint, ECF No. 22. On July 23, 2010, ECF No. 25, Plaintiff cross-moved for leave to file his amended complaint.

In its motion to dismiss Plaintiff's complaint, Defendant argued that Plaintiff lacked capacity and standing to sue, had sent a defective "notice of intent" letter to sue, and that the complaint failed to state a claim upon which relief could be granted. On March 2, 2010, the Court issued a motion scheduling order, ECF No. 15, ordering, *inter alia*, responding papers to be filed and served on or before April 6, 2010, reply papers to be filed and served on or before May 11, 2010, and for all papers to comply with the then current Local Rule of Civil Procedure 7.1.[1] In its responding papers, Apr. 6, 2010, ECF No. 16, Plaintiff failed to include a memorandum of law as required.[2] Plaintiff filed only the cover page of **[*3]** a memorandum. In its reply papers, filed May 10, 2010, ECF No. 17, Defendant alerted Plaintiff and the Court to the fact that Plaintiff had not filed a memorandum of law and further informed the Court that Plaintiff's attorney had a history of not filing memoranda of law.

FOOTNOTES

1 The Court's local rules were amended, effective Jan. 1, 2012, and 7.1 was renumbered as 7. However, the overall substance of the rule is unchanged.

2 The requirement is now located in W.D.N.Y. Loc. R. Civ. P. 7(a)(2)(A) (2012).

Although it was on notice, as of May 10, 2010, that its responding papers only included the memorandum cover sheet, instead of a complete memorandum of law, Plaintiff waited until June 24, 2010, merely seventy-six minutes before oral argument was to be heard on the motion to dismiss the original complaint, to file an amended complaint. Amended Compl., Jun. 24, 2010, ECF No. 20. As indicated above, Defendant then moved to strike the amended complaint and to dismiss the original complaint, Jul. 1, 2010, ECF No. 22, and Plaintiff cross-moved for leave to file the amended complaint. First Mot. for Leave to File Amed. Compl., Jul. 23, 2010, ECF No. 25.

In its papers, as indicated above, Defendant alleged **[*4]** that opposing counsel frequently omitted memoranda of law, and so, at oral argument, the Court read the allegations:

> CA-POW's attorney has repeatedly failed to comply with Rule 7.1(e) in other civil actions. In *Lester vs. M&M Knopf Auto Parts*, the Western District of New York found that Mr. Seeger's submissions failed to comply with local Rule 7.1(e) because they did not include an answering memorandum. In *Allens Creek/Corbetts Glen*

> *Preservation Group vs. Caldera*, 88 F. Supp 2d 77 at 81, affirmed by the Circuit, this district court found that Mr. Seeger had not filed any memorandum of law as required by rule 7.1(e) until well after six months after the opposing parties filed summary judgment motions. *In Neighbors Organized to Save Amherst's Wetlands*, 2008 U.S. Dist. LEXIS 101376, another Western District of New York case, this court, citing Local Rule 7.1(e), admonished Mr. Seeger for filing a 29-page brief containing no case law or other pertinent legal authority. In *Lewis vs. FMC Corp.*, 2008 U.S. Dist. LEXIS 76274, the Court granted a motion to strike the summary judgment motion papers submitted by Seeger in part because his memorandum of law contained no meaningful factual or legal argument in violation of the **[*5]** spirit of Local Rule 7.1(e). So I know you're familiar with the rule because you've been told about it on numerous times. So explain to me why being familiar with the rule would you ignore the requirement of filing a memorandum of law.

Transcript at 3, *CA-POW! v. Town of Greece, NY*, 10-CV-6035 (Jun. 24, 2010), ECF No. 27. Plaintiff's counsel eventually responded by stating:

> MR. SEEGER: Okay, your Honor. I wish in May I had done one of those things that your Honor had just mentioned. I had drafted a memorandum of law, I haven't filed it. For some reason only the cover page was done. I did not realize that until Mr. Koegel submitted his affidavit. Frankly I took that as a very uncivil personal assault on me.

Id., at 4. Plaintiff's counsel admitted that he has been practicing law for twenty-nine years and has represented parties in roughly 100 cases in U.S. District Court over the last twelve years. *Id.*, 3-4, 10. Later, the Court questioned Plaintiff's counsel about his actions and omissions. The Court asked counsel three different times why he waited until an hour before oral argument to file an amended complaint, and received different answers:

> [THE COURT:] So I know you're familiar with **[*6]** the rule because you've been told about it on numerous times. So explain to me why being familiar with the rule would you ignore the requirement of filing a memorandum of law....
>
> MR. SEEGER: And that was my foolish mistake, your Honor. And I did, frankly, I wasn't sure what to do....
>
> THE COURT: Why would you wait? Because I don't have it, I'm obviously operating -- why would you wait until an hour before oral argument to file an amended complaint? Explain that to me.
>
> MR. SEEGER: My father died when that memorandum was due before Judge Larimer.
>
> THE COURT: I'm sorry about your loss.
>
> MR. SEEGER: And that is why that Allens Creek memo of law was not filed and I was upset. The other—
>
> THE COURT: When did your father pass away?
>
> MR. SEEGER: 1999, October, eleven years ago. And I'm being faulted now by Mr. Koegle for that.
>
> THE COURT: Wait a second. Your father died eleven years ago?
>
> MR. SEEGER: The Allens Creek litigation, it was from 1999.

> THE COURT: I'm not talking about the Allens Creek litigation, we're talking about this litigation. Why did you wait until an hour before this litigation to argue to file an amended complaint?
>
> MR. SEEGER: I was personally distressed and now Mr. Koegel had, in my view, **[*7]** attacked me. And believe me, I do have a thick skin, but I didn't know what to do. I resolved every single one of his concerns about my complaint through a well drafted thoroughly researched amended complaint that provides extensive details, including EPA studies, all admissible, even though this is not a summary judgment motion, I might add, to shore up and substantiate each and every concern that has been brought concerning whether or not Mr. Rice is president, whether or not—
>
> THE COURT: I understand that and I'm not suggesting—again, I'm not suggesting you couldn't do that. I want to hear you correctly, that you waited until an hour before because you were ticked off at counsel because he questioned your integrity, is that what I'm hearing?
>
> MR. SEEGER: No.
>
> THE COURT: Then you didn't answer my question. Why did you wait until an hour before argument to file this and waste my time and counsel's time?
>
> MR. SEEGER: I was toying with the decision whether to amend or whether to ask your Honor for permission. I opted to amend. I spent dozens of hours on doing the research to complete the amendment. I apologize it was done today, it was a big project.

Transcript, at 8:6-9:24, 3:11-14, 5:9-10.

In **[*8]** it's Decision and Order, the Court found that Plaintiff's counsel's contentions that he was unsure what to do, or that he was "toying with the decision" to seek leave to amend, or that his father's death eleven years ago affected his ability to file a memorandum of law in this case, did not contain the ring of truth. Furthermore, the Court found it unbelievable that an experienced attorney, realizing he inadvertently failed to file a memorandum of law as required by local rule, a rule about which he has been chastised on four other occasions for similar omissions, would make no effort to file his already drafted memorandum of law, or otherwise remedy the error prior to oral argument. Combined with the amended complaint's lack of support for the legal conclusion that a co-chairman is the equivalent of a president for the purposes of capacity to sue, the Court determined that Plaintiff's counsel acted in bad faith by moving to amend. Accordingly, as a result of futility and bad faith, the Court denied Plaintiff's motion to amend and granted Defendant's motion to dismiss.

STANDARDS OF LAW

Citizen Suits—33 U.S.C. § 1365

The Clean Water Act authorizes citizen law suits to enforce the Act and **[*9]** provides in pertinent part as follows:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

33 U.S.C.S. § 1365(d) (2012). Under this Act,

> a prevailing defendant must meet a stricter standard than a prevailing plaintiff to receive an award of fees. *See Atl. States Legal Found., Inc. v. Onondaga Dep't of Drainage & Sanitation*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995). "A prevailing defendant can recover fees only when the Court finds that the litigation was 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" *Id.* (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)).

Coon v. Willet Dairy, LP, No. 5:02-CV-1195 (FJS/GJD), 5:04-CV-917 (FJS/GJD), 2009 U.S. Dist. LEXIS 28922 (N.D.N.Y Mar. 31, 2009).

Counsel's [*10] liability for excessive costs

Section 1927 of title 28 provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C.S. § 1927 (2012). As the Second Circuit recognized in *Mone v. Comm'r*, 774 F.2d 570, 574 (2d Cir. 1985), "the statute should be construed narrowly and with great caution, so as not to 'stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.'" *Mone*, 774 F.2d at 574 (quoting *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985)). Additionally, this Court's local rules state the following:

> (a) Dismissal or Default. Failure of counsel for any party, or a party proceeding pro se, to appear before the Court at a conference, to complete the necessary preparations, or to be prepared to proceed to trial at the set time may be considered an abandonment of the case or a failure to prosecute or defend diligently. An appropriate order **[*11]** for sanctions may be entered against the defaulting party with respect to either a specific issue or the entire case.
>
> (b) Imposition of Costs on Attorneys. Upon finding that sanctions pursuant to section (a) would be inadequate or unjust to the defaulting party, the Judge may, in accordance with 28 U.S.C. § 1927, assess reasonable costs directly against counsel whose action has obstructed the effective administration of the Court's business.

W.D.N.Y. Loc. R. Civ. P. 11(a) & (b) (2012).

Procedure for imposition of attorney's fees

With regard to procedural issues for a party seeking the imposition of attorney's fees, Federal Rule of Civil Procedure 54 provides in pertinent part as follows:

> (2) Attorney's Fees.
>
> (A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.
>
> (B) Timing and Contents of the Motion. Unless a statute or a court order provides

otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state **[*12]** the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

Fed. R. Civ. P. 54(d)(2)(A)-(B) (2009).

Reasonable Rate

Once a decision is made to award attorney's fees, the Court must to determine the "reasonable hourly rate that a paying client would be willing to pay." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 190 (2d Cir. 2008). The court should also consider the *Johnson* factors[3] as well as the following: that a paying client wishes to spend "the minimum necessary to litigate the case effectively" and the benefits to the attorney's reputation for being associated with the case. *Id*. Finally, "the district court should use that reasonable hourly rate to calculate what can properly be termed the 'presumptively reasonable fee.'" *Id*.

FOOTNOTES

3 *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In *Arbor Hill*, the Second Circuit wrote: "The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the **[*13]** preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Arbor Hill*, 522 F.3d at 187 n.3 (citing *Johnson*, 488 F.2d at 717-19).

ANALYSIS

Defendant seeks an award of attorney's fees in the amount of $79,395.00. Koegel Aff. ¶ 9, Sept. 29, 2010, ECF No. 31-1. In the alternative, it seeks $13,382.50, representing fees generated for work performed from June 24, 2010, through July 29, 2010.[4] Def.'s Reply Mem. of Law at 6, Nov. 5, 2010, ECF No. 35. Plaintiff opposes the imposition of any attorney's fees, but in the alternative argues that at most, the Court could award a maximum of $7,095.00. Pl.'s Mem. of Law at 8, Oct. 22, 2010, ECF No. 34.

FOOTNOTES

4 It was on June 24, 2010, minutes before oral argument on Defendant's motion to dismiss the original complaint, that **[*14]** Plaintiff attempted to file, without leave of the Court, an amended complaint, which the Court determined was futile. July 29, 2010, was the day Plaintiff's counsel filed a motion to amend, seeking leave of the Court.

Plaintiff's counsel defends against the imposition of any attorney's fees on him personally, or on Plaintiff, by raising again the arguments the Court rejected—that Co-Chairman Donn Rice did not need to qualify under New York law to have standing to sue in Federal court on behalf of the unincorporated association CA-POW!. The Court determined that Plaintiff's counsel's argument that Federal Rule of Civil Procedure 17 permitted Donn Rice to sue on behalf of CA-POW!, since the "clear language" of that rule plainly relies on state law to determine an unincorporated association's standing to sue, lacked merit. *See, Arbor Hill v. City of Albany, New York*, 250 F. Supp. 2d 48, 60-61 (N.D.N.Y. 2003). The Court, again, rejects counsel's argument. It also rejects counsel's contention that the Court could have permitted counsel a third attempt to re-plead the issue of standing. This was not a *pro se* proceeding in which the Court was required to allow leeway to a non-lawyer party. **[*15]** By his own words, Plaintiff's counsel was an experienced practitioner who had been put on notice about the issue and, contrary to the Federal Rules of Civil Procedure, elected to file a futile amended complaint.

Plaintiff's counsel also argues that under the Court's Local Rule 11 and 28 U.S.C. § 1927, any attorney's fees imposed can only reflect the extent to which "Plaintiff's claims [are] 'so completely without merit as to require the conclusion they must have been undertaken for some improper purpose such as delay.'" Pl.'s Mem. of Law at 7, Oct. 22, 2010, ECF No. 34 (citations omitted). Defendant counters that

> the Town is not seeking to recover its attorney's fees on the grounds that CA-POW!'s s motion to amend its complaint was frivolous, but rather on the grounds that CA-POW! acted in bad faith when its attorney failed to file a brief opposing the Town's motion to dismiss and deliberately waited 45 days and one hour before oral argument on that motion to file an amended complaint without leave. Thus, it is irrelevant whether CA-POW!'s motion for leave to amend was frivolous or not.

Def.'s Reply Mem. of Law at 8.

Plaintiff's counsel's actions in this case, failing to comply with the **[*16]** W.D.N.Y. Local Rule of Civil Procedure 7.1 (requiring a memorandum of law in opposition) and filing an amended complaint without leave of the Court in violation of Federal Rule of Civil Procedure 15(a)(2), were in bad faith and unreasonably and vexatiously multiplied the proceedings. Accordingly, the Court determines that an award of Attorney's Fees under Local Rule 11 and § 1927 is warranted. The Court finds that the period involved is measured at least from the date Plaintiff filed an amended complaint without leave, June 24, 2010, through the date of the Court's scheduling order on Plaintiff's motion for leave to amend the complaint, July 29, 2010. Because the Court has never made a determination on whether the litigation was frivolous, unreasonable, or groundless, or that Plaintiff continued to litigate after it clearly became so, it declines Defendant's invitation to award attorney's fees pursuant to the Clean Water Act, 33 U.S.C. § 1365.

The Court finds that an hourly rate of $250.00 for an attorney of defense counsel's experience in this market is reasonable. Further, the Court has reviewed the time sheets submitted by defense counsel, Sept. 29, 2010, ECF No. 31-2, and has determined **[*17]** that the following entries constitute a reasonable attorney's resulting from Plaintiff's counsel's bad faith:

Date	Hours	Charge
6/23/10	4.4	$1,100.
6/24/10	5.2	$1,300.
6/28/10	8.7	$2,175.
6/29/10	5.8	$1,450.
6/30/10	5.2	$1,300.
7/1/10	0.25	$62.
7/26/10	6.9	$1,725.
7/27/10	7.1	$1,775.

7/28/10	5.9	$1,475.
7/29/10	5.9	$1,475.
TOTAL	53.55	$13,837.

As a result of Plaintiff's counsel's filing on the day of oral argument, defense counsel's preparation was for naught—Defendant ended up withdrawing its motion to dismiss the original complaint as a result of Plaintiff's late filing. Therefore, the Court has included defense counsel's preparation time for the oral argument on June 23, 2010, which Plaintiff's counsel should have known was wasted, since an hour before the argument, Plaintiff attempted to amend the complaint.

The purpose of § 1927,

> is "to deter unnecessary delays in litigation." H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Cong. & Admin. News 2716, 2782. *See Oliveri* [*v. Thompson*, 803 F.2d 1265] at 1274 [1986]. Bad faith is the touchstone of an award under this statute. *See McMahon*, 896 F.2d at 23. We have held that "an award under § 1927 is proper when the attorney's **[*18]** actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Oliveri*, 803 F.2d at 1273. In contrast with sanctions under Rule 11, awards pursuant to § 1927 may be imposed only against the offending attorney; clients may not be saddled with such awards. *Id*.

United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1345 (2d Cir. N.Y. 1991). The words from *Oliveri* describe Plaintiff's counsel's actions and, therefore, it is appropriate to make the award under § 1927 personally against counsel.

CONCLUSION

Defendant's motion for attorney's fees, Sept. 29, 2010, ECF No. 31, is granted in part. The Court awards the amount of $13,837.50 in attorney's fees to Defendant, pursuant to W.D.N.Y. Loc. R. Civ. P. 11 and 28 U.S.C. § 1927. This award is against Plaintiff's counsel only, David J. Seeger, Esq.

IT IS SO ORDERED.

Dated: March 9, 2012

Rochester, New York

/s/ Charles J. Siragusa

CHARLES J. SIRAGUSA

United States District Judge

▲ - Caution: Possible negative treatment
◆ - Positive treatment is indicated
A - Citing Refs. With Analysis Available
I - Citation information available
* Click on any *Shepard's* signal to *Shepardize*® that case.

In

EXHIBIT 3

1999 WL 493388
Only the Westlaw citation is currently available.

Michael COLEMAN, Plaintiff,
v.
CITY OF NEW YORK, et al., Defendants.

No. 98Civ.8761(LMM)(AJP). July 8, 1999.

Opinion

OPINION AND ORDER

PECK, Magistrate J.

*1 The issue before the Court is whether conversations between an Assistant Corporation Counsel and three New York City employees concerning their depositions noticed by plaintiff's counsel are privileged in this action against the City. For the reasons set forth below, the Court holds that the conversations are privileged.

BACKGROUND

Plaintiff Michael Coleman has sued the City of New York and the New York City Department of Investigation ("DOI"), among others, under 42 U.S.C. § 1983, for false arrest, malicious prosecution and related charges. Plaintiff worked for the New York City Department of Health ("DOH") and was fired in May 1998 as a result of a criminal prosecution for taking bribes—a charge plaintiff denies —initiated through a DOI investigation.

Plaintiff's counsel issued deposition subpoenas for two DOH employees and a former DOI employee, now a City police officer. The Assistant Corporation Counsel representing the City defendants in this action also represented these three witnesses at their depositions.

The privilege issues concern communications between the Assistant Corporation Counsel and/or counsel for the DOH and the three witnesses. As plaintiff's counsel has framed the issue:

> During these depositions two distinct issues arose. The first concerns witness Michael Lacerenza. Mr. Lacerenza testified at his deposition on June 18 that he first came into contact with defense counsel after receiving a telephone call from an attorney at the Office of the Corporation Counsel. I therefore sought to inquire into that telephone conversation—*because the call was initiated by defense counsel at a time when there was no attorney-client relationship*—to determine if and at what point the attorney-client relationship began. Defense counsel objected to any questions regarding not only the substance but the existence of any conversations that may have been had on the basis of the attorney-client privilege. Your Honor was not in Court that day to receive our call so we put aside that issue and continued the deposition, which was otherwise concluded later that day.
>
> The second issue concerns witnesses Darlene Booth and Richard Brathwaite who were deposed on June 21 and 22 respectively. According to their testimony, the deposition subpoenas were served on another individual or department at the Department of Health and routed through the agency's legal

department. The legal department then forwarded the subpoena to each witness—who was previously unaware of its existence—along with a memorandum that apparently advised the witness to call Ms. Youngclaus to obtain representation. Again, defense counsel asserted the attorney-client privilege and instructed each witness not to answer questions about the memorandum or to produce it, even though Ms. Booth had the memorandum with her at the deposition.

(6/24/99 letter to Court from plaintiff's counsel, Michael Lumer, emphasis added.)[1]

ANALYSIS

The flaw in plaintiff's argument is demonstrated by the underlined phrase above, where he states that the call from Corporation Counsel to one of the witnesses "was initiated by defense counsel at a time when there was no attorney-client relationship." (*Id.*) Plaintiff's counsel would be correct if the deposition witness were not a City employee; in such a case, there would not be an attorney-client relationship until the witness retained the attorney. *See generally Ames v. Black Entertainment Television*, 98 Civ. 0226, 1998 WL 812051 at *7 (S.D.N.Y. Nov. 18, 1998) (Peck, M.J.); *EEOC v. Johnson & Higgins, Inc.*, 93 Civ. 5481, 1998 WL 778369 at *3–4 (S.D.N.Y. Nov. 6, 1998) (Peck, M.J.). Here, however, it does not matter when the deposition witness asked Corporation Counsel to represent him, or even whether the witness asked Corporation Counsel to represent him.

*2 What plaintiff's counsel has overlooked is that the Corporation Counsel's Office is the legal counsel for the City and City agencies like the DOI. As such, the Corporation Counsel's discussion with non-adverse City employees about their deposition in a case in which the City (or City agency) is a defendant is protected by the *City's* attorney-client and/or work-product privilege, regardless of whether the employee also asks for representation in connection with the deposition. For example, in *Radovic v. City of New York*, 168 Misc.2d 58, 59–60, 642 N.Y.S.2d 1015, 1016–17 (Sup.Ct.N.Y.Co.1996), the court upheld the City's privilege to object to plaintiff's questions to witnesses as to "whether they met with attorneys for defendant City [prior to testifying] to discuss this action, and, if so, ... what was discussed." *Id.* at 59, 642 N.Y .S.2d at 1016. The court explained:

> The attorney-client privilege applies to confidential communications between a corporation and its attorneys. The attorney-client privilege even attaches for a corporation to communications between the corporation's attorney and low-level corporate employees. Just like a corporation, Defendant City is a legal creation which acts through its employees, at all levels. Just as do counsels for corporations and for individual clients, attorneys for Defendant City must have the same opportunity for a privileged "open dialogue" in preparing their City employee witnesses for trial. Otherwise, Defendant City would be at a disadvantage in preparing for trial as compared to other types of parties.

Id. at 59–60, 642 N.Y.S.2d at 1016–17 (citations omitted).[2]

While plaintiff's counsel was entitled to inquire whether the witness had spoken to Corporation Counsel about the action before the deposition, he cannot obtain the substance of the communications. *See, e.g., Radovic v. City of New York*, 168 Misc.2d at 61, 642 N.Y.S.2d at 1017. To the extent the Assistant Corporation Counsel precluded even these predicate questions, she is to submit an affidavit from Mr. Lacerenza (or interrogatory answer) to provide this predicate

information.

Plaintiff's counsel contends that the inquiry into the formation of the attorney-client relationship between the witness and Corporation Counsel "is a relevant area of inquiry for several reasons, not least of which is the troubling nature of defense counsel's solicitation of these witnesses, the consequences of which include possible conflicts of interest, the limitations it places on plaintiff's ability to communicate with non-party witnesses, [3] and the possible tainting of their subsequent testimony." (7/2/99 Letter to Court from plaintiff's counsel, Michael Lumer.)

It is true, of course, that in representing the City (or any corporation), counsel has the opportunity in preparing employees for their depositions to go beyond permissible witness preparation and "taint" or otherwise "change" a witness's testimony. The Court has no reason here to assume that the Assistant Corporation Counsel has violated the Canons of Ethics in preparing these witnesses. If the danger of witness "taint" were sufficient without more to overcome the privilege, however, no lawyer could prepare a City (or corporate) employee for deposition or trial without losing the privilege. Even plaintiff's counsel does not claim that the Court should go that far. It certainly is not the law. If attorneys cannot be relied upon to honor the Canons of Ethics, our legal system is in serious trouble. The Court will not hold that the City, and its Corporation Counsel, cannot engage in normal deposition preparation without losing its privilege.

CONCLUSION

*3 For the reasons set forth above, the telephone conversation between the Assistant Corporation Counsel and the City employee is privileged based on the *City's* privilege, regardless of when in that conversation the employee himself retained Corporation Counsel as his counsel.

SO ORDERED.

Footnotes

1 The issue of the DOH memorandum can be quickly disposed of. Plaintiff's counsel already is aware that the DOH memoranda advised the DOH employee witnesses to contact the Assistant Corporation Counsel. (*See* 6/24/98 Lumer letter at p. 2.) The Court has reviewed the DOH memorandum and it has no substance beyond what plaintiff's counsel already knows. Thus, whether or not it is privileged, it is irrelevant and need not be produced.

2 *See also, e.g., Carter v. Cornell Univ.*, 173 F.R.D. 92, 95 (S.D.N.Y.1997) ("Communications made between an attorney and a corporate client's employees are privileged so long as they are made to attorneys ... for the purpose of securing legal advice and concern matters within the scope of the employees' corporate duties."); *New York City Managerial Employee Ass'n v. Dinkins*, 807 F.Supp. 955, 958 (S.D.N.Y.1992) (documents that "contain a discussion of legal advice given by the New York City Corporation Counsel to City officials and/or agencies ... are protected by the attorney-client privilege"); *Weissman v. Fruchtman*, 83 Civ. 8958, 1986 WL 15669 at *15, 21 (S.D.N.Y. Oct. 31, 1986) ("The relationship between the Corporation Counsel and the City agencies is that of attorney-client." While there might not be an attorney-client privilege between Corporation Counsel and a particular City agency employee,

Corporation Counsel's directions to the employee not to answer questions at deposition on privilege grounds upheld because of Corporation Counsel's role as attorney for City agencies.).

3 This Opinion does not address restrictions on an attorney's ability to contact an adverse party's employees or ex-employees, since that issue is not directly involved in the matter presently before the Court.

End of Document

EXHIBIT 4

2002 WL 460059
Only the Westlaw citation is currently available.

GFI SECURITIES LLC, Petitioner,

v.

Marcos LABANDEIRA, Respondent.

No. 01 CIV. 00793(JFK). March 26, **2002**.

Attorneys and Law Firms

Epstein Becker & Green, P.C., New York, Of Counsel: Frances M. Maloney, for Petitioner.

Shiff & Tisman, New York, Of Counsel: Stephen E. Tisman, for Respondent.

Opinion

OPINION AND ORDER

KEENAN, District J.

INTRODUCTION

*1 Before the Court is the motion of Petitioner **GFI** Securities **LLC** ("**GFI**") to vacate an arbitration award (the "Award") entered against it on December 1, 2000. Respondent, Marcos Labandeira ("Labandeira"), opposes **GFI's** motion and cross-moves to have the Court confirm the arbitration award and to sanction **GFI**. **GFI** asserts two grounds for vacatur: (1) manifest disregard of the law and evidence; and (2) misconduct by the arbitrators under 9 U.S.C. § 10(a)(3). For the reasons set forth below, **GFI's** motion to vacate the Award is denied. Labandeira's cross-motion to confirm the Award is granted and Labandeira's motion for sanctions is denied.

Petitions to vacate arbitration awards, like petitions to compel arbitration, must be brought in state court unless some other basis for federal jurisdiction exists, such as diversity of citizenship. *See Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 26 (2d Cir.2000). This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds $75,000 exclusive of interest and costs, and is between citizens of different states. Petitioner is an inter-dealer brokerage registered with the National Association of Securities Dealers ("NASD"), whose principal place of business is located in the state of New York. Respondent is an Associated Person of the NASD who now resides in Madrid, Spain.

Venue is proper in this Court under 9 U.S.C. § 9 and 28 U.S.C. § 1391. The claim arose and the arbitration award was rendered within the Southern District of New York.

Background

GFI, an inter-dealer brokerage, functions primarily as an intermediary to link the complicated trading needs of U.S. and foreign-owned banks and other financial institutions. (Tr. 1622)[1] The brokers at **GFI** primarily work with the "traders" who are their contacts at the dealer institutions. Labandeira worked as an emerging markets credit derivatives broker at Cantor Fitzgerald Securities before he was hired by **GFI**. Labandeira was hired by Donald Fewer, who at the

time was the Manager of **GFI's** Emerging Markets ("EM") Credit Derivatives Desk. (Tr. 77). Labandeira began working at **GFI** on June 8, 1998 as an inter-dealer broker on **GFI's** EM Credit Derivatives Desk. (Tr. 95). Labandeira demanded a written contract of employment (the "Agreement") lasting for at least two years and providing a base salary of $200,000.00. (Tr. 110). Pursuant to the Agreement, his employment could be terminated at any time and without notice for certain reasons including: "[the] engagement in conduct injurious to the Company or any Related entity or to the reputation of either." (**GFI's** Notice of Pet. Exh. H ¶ 4(B)(ii)). On March 18, 1999 **GFI** terminated Labandeira's employment. (Tr. 908, 1121).

On March 31, 1999, Labandeira commenced an action in New York State Supreme Court, New York County, alleging breach of the Agreement. **GFI** filed a motion to compel arbitration and to stay the court action pending arbitration. Labandeira later withdrew his state action and submitted to arbitration before the NASD. On April 30, 1999, Labandeira filed a Statement of Claim to the NASD alleging that he was terminated in breach of his contract. (**GFI's** Notice of Pet. Exh. C.) On July 16, 1999, **GFI** filed its Statement of Answer responding that Labandeira was terminated for cause as that term is defined in the Agreement and asserting affirmative defenses. (**GFI's** Notice of Pet. Exh. B.).

*2 Hearings were held before the Panel of three arbitrators (the "Panel") beginning May 22, 2000 and ending October 20, 2000 for a total of ten days. On December 1, 2000, the Panel issued an award granting contractual damages to Labandeira, dismissing **GFI's** counterclaims, and assessing **GFI** solely responsible for forum fees. **GFI** was found liable for $208,282.78 in damages.

Discussion

This Court is empowered to confirm and enter judgment upon arbitration awards pursuant to the United States Arbitration Act (the "Arbitration Act"). *See* 9 U.S.C §§ 1–14. In particular, 9 U.S.C. § 9 provides that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made....

The Supreme Court has reminded lower courts that the Arbitration Act establishes a strong federal policy favoring arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). "Undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution." *McDaniel v. Bear Stearns & Co., Inc*, No. 01 Civ. 7054, **2002 WL** 72938, at *1 (S.D.N.Y. Jan. 25, **2002**) (quoting *Tempo Shane Corp. v. Bertek Inc.*, 120 F.3d 16, 19 (2d Cir.1997)). For these reasons, arbitration decisions are accorded "great deference." *Id.* Given that arbitration is meant "to permit a relatively quick and inexpensive resolution of contractual disputes," *Andros Compania Maritima, S.A. v. Marc Rich & Co. A.G.*, 579 F.2d 691, 701 (2d Cir.1978), a court's review of an arbitration award is limited. *Local 1199, Drug, Hosp. and Health Care Employees Union v. Brooks*

Drug Co., 956 F.2d 22, 25 (2d Cir.1992); *Maze v. Prudential* **Secs.**, *Inc.*, No. 93 Civ. 4887, 1993 **WL** 515375, at *2 (S.D.N.Y. Dec. 8, 1993). Arbitration awards are subject to very limited review to avoid undermining the twin goals of arbitration —settling disputes efficiently and avoiding long and expensive litigation. *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir.1993); *Campbell v. Cantor Fitzgerald & Co., Inc.*, 21 F.Supp.2d 341, 344 (S.D.N.Y.1998).

GFI moves on the grounds that (1) the Award was rendered in manifest disregard of the law and of the evidence; and (2) the Panel committed misconduct by not hearing critical evidence. Mindful of the limited nature of this Court's review, the Court turns to **GFI's** specific bases for vacatur.

I. Manifest Disregard of the Law and of the Evidence

*3 **GFI** argues that the Award should be set aside because the Panel manifestly disregarded the law and evidence in rendering its decision. In the arbitration proceeding, Labandeira alleged that **GFI** breached his employment agreement by terminating him without "cause" as that term is defined in the Agreement. **GFI** argues that the evidence established that **GFI** was justified in terminating Labandeira's employment for cause because Labandeira breached the express terms of the Agreement by injuring **GFI** and its reputation in the industry. The Agreement states that **GFI** may terminate Labandeira's employment "for cause at any time forthwith and without any notice or liability to Labandeira. Cause shall mean ... (ii) engagement in conduct injurious to the Company or any Related Entity or to the reputation of either." (**GFI's** Notice of Pet. Exh. H ¶ 4(B)).

GFI claims that Labandeira was terminated after making two errors in his early months of employment. First, **GFI** claims that Labandeira botched a deal with Goldman Sachs. Labandeira responded that the transaction was not as harmful as **GFI** contends and that **GFI's** testimony was contradicted. Labandeira argues that the testimony of his supervisor Fewer and Carl Dou of Deutsche Bank, a trader involved in this transaction, confirmed his version of events. Second, **GFI** claims that Labandeira botched a trade with J.P. Morgan. Labandeira responded that the events of this transaction were not uncommon and were attributable to the volatility of the market. (Tr. 149).

GFI claims that incidents such as these were injuring **GFI's** reputation and constituted a cause basis for them to terminate Labandeira. After these two mistakes, **GFI** claims Labandeira was put on notice of his deficient performance when he was asked to accept a fifty percent (50%) reduction in salary and was offered a position on the EM Repo Desk which brokered less complex products. (Tr. 678–79, 729, 1628). In contrast, Labandeira claims he was terminated because of **GFI's** financial problems caused by the Russian Debt Event that occurred in August 1998. (Tr. 1582). This Event made his Agreement financially burdensome for **GFI**. Additionally, Labandeira claims that other employees were also being asked to take a salary reduction and that the request was not linked to performance. **GFI** responds that there is no causal connection between the Event and Labandeira's termination.

GFI argues that the issue presented to the Panel was whether an employer could terminate an employee for cause under a provision of an employment contract. **GFI** argues that while the Panel indicated to the parties that "they were well aware of the governing legal principles of contract law in New York," their decision shows that they "either refused to apply these legal principles or ignored them altogether." (**GFI's** Mem. Supp. at 17). **GFI** claims that the evidence overwhelmingly showed that Labandeira was terminated for cause and "given Labandeira's lack of any evidence to the contrary, the Panel manifestly disregarded the law and evidence when they awarded contractual damages to

Labandeira." (**GFI's** Mem. Supp. at 20). **GFI** claims that this disregard is further evidenced by the lack of an explanation of the Panel's decision in the Award.

A. *Manifest Disregard of the Law*

*4 Section 10 of the Arbitration Act lists four grounds on which courts may vacate an arbitration award. *See* 9 U.S.C. § 10(a). In addition, an arbitration award may be vacated upon a clear showing that the arbitrators manifestly disregarded the law. *Carte Blanche (Singapore) PTE, Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir.1989); *Maze*, 1993 **WL** 515375, at *2. To advance the goals of arbitration, courts may vacate awards only for "an overt disregard of the law and not merely for an erroneous interpretation." *Folkways*, 989 F.2d at 111. Judicial inquiry is extremely limited under this standard. *See New York Stock Exch. Arbitration between Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir.1991). Manifest disregard means more than error or misunderstanding. To find manifest disregard:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir.1986). In addition, "[t]he governing law alleged to have been ignored by the arbitrators must be well-defined, explicit, and clearly applicable." *Id.* at 934. The Court is "not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of law urged upon it." *Id.* "Neither the erroneous application of rules of law, nor the arbitrator's erroneous decision of the facts is ground for vacating the award." *Burka v. New York City Transit Auth.*, No. 85 Civ. 5751, 1992 **WL** 251445, at *6 (S.D.N.Y. Sept. 18, 1992) (citing *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892–93 (2d Cir.1985).

GFI bears the burden of proof as the party moving to vacate the Award and must make a highly convincing showing. *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir.1993) (citing *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir.1987)); *McDaniel*, **2002 WL** 72938, at *6; *Campbell*, 21 F.Supp.2d at 343–44.

B. *Manifest Disregard of the Evidence*

Review of an arbitration award on the basis of manifest disregard of the facts is "severely limited." *Beth Israel Med. Ctr. v. Local 814*, No. 99 Civ. 9828, 2000 **WL** 1364367, at *6 (S.D.N.Y. Sept. 20, 2000) (citing *Halligan v. Piper Jaffray*, 148 F.3d 197, at 202 (2d Cir.1998); *Greenberg*, 220 F.3d at 22); *see McDaniel*, **2002 WL** 72938, at *5. While judicial review on this basis is limited, a court may modify or vacate an arbitrator's award for manifest disregard of the evidence if there is "strong evidence" contrary to the findings of the arbitrator *and* the arbitrator has not provided an explanation of his decision. *Beth Israel*, 2000 **WL** 1364367, at *6 (emphasis added). However, the court may not re-weigh the evidence or question the credibility findings of the arbitrator. *McDaniel*, **2002 WL** 72938, at *5; *Beth Israel*, 2000 **WL** 1364367, at *6.

C. *Explanation of the Panel's Decision*

*5 Arbitrators need not give reasons for their determinations. *Folkways*, 989 F.2d at 112. A lack of accompanying justification will not render the award in manifest disregard of the law. *Id.* Any ambiguity in the award must be resolved, if possible, in a manner supporting the award's confirmation. *Maze*, 1993 **WL** 515375, at *2; *see United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363

U.S. 593, 598 (1960); *Sobel v. Hertz, Warner & Co .*, 469 F.2d 1211, 1214–16 (2d Cir.1972).

The Second Circuit has held that "if a ground for the arbitrator's decision can be inferred from the case, the award should be confirmed." *Sobel*, 469 F.2d at 1216; *see also Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 13 (2d Cir.1997); *McDaniel*, **2002 WL** 72938 **2002**, at *6; *Coppola v. Charles Schwab & Co.*, No. 90 Civ. 6248, 1991 **WL** 180345, at *5 (S.D.N.Y. Sept. 4, 1991). If there is "even a barely colorable justification for the outcome reached," the court must confirm the arbitration award. *Areca, Inc. v. Oppenheimer & Co., Inc.*, 960 F.Supp. 52, 57 (S.D.N.Y.1997) (citing *Andros Compania Maritima, S.A.*, 579 F.2d at 704; *Siegel*, 779 F.2d at 894). When a court is inclined to hold that an arbitration panel manifestly disregarded the *law*, the panel's failure to explain the award *can* be taken into account. *Halligan*, 148 F.3d at 204 (emphasis added) (noting that the court did not hold that arbitrators should "write opinions in every case or even in most cases"). While it is difficult to apply this standard of review where the panel gives no explanation for their decision, a reviewing court must still evaluate the conduct and conclusions of the arbitrators to determine whether the allegedly disregarded law was applicable and ignored. *Willemijn*, 103 F.3d at 12; *Areca*, 960 F.Supp. at 57.

In the present case, the Panel gave a brief, five page decision that did not articulate their reasoning but did summarize the evidence presented. Their decision was obviously not intended to portray all of the evidence and arguments that were before them. In support of its claim of manifest disregard of the law, **GFI** relies on the facts surrounding its termination of Labandeira and what it maintains it proved during the hearings. Given that the Panel weighed the pleadings, testimony and evidence in reaching its award, it can and should be assumed that it considered the evidence in light of the relevant contract law. Although the Panel did not fully explain its decision, this Court does not find that the applicable law was ignored.

GFI's approach is more factual than law based. The bulk of **GFI's** claim goes to disregard of the evidence. This was a fact intensive breach of contract case. Both parties presented witnesses to the Panel to support their version of the events. Similarly, both parties recapped the evidence in detail on this petition. The Court will not re-weigh the evidence presented to the Panel or question its credibility findings. **GFI's** burden is high and the Court is constrained in its review of the Award.

***6** The Court has reviewed the arguments of the parties and finds that **GFI** has failed to carry its burden of demonstrating that the Panel knew of a governing legal principle yet refused to apply it or ignored it altogether. **GFI's** arguments amount to disagreements with the Panel's view of the evidence. The Panel as trier of fact was entitled to make factual findings and credibility determinations and this Court is not empowered to disregard those findings.

GFI's motion on this ground is denied.

II. Panel Misconduct

GFI argues that the Award must be set aside because of the Panel's misconduct. Labandeira claimed he did not know that he was terminated for cause until he received a letter that his attorney Mr. Tisman ("Tisman") wrote to **GFI's** counsel at the time of the termination. (**GFI's** Notice of Pet. Exh. K). During the Arbitration hearing, Labandeira, on direct examination, responded to Tisman's questions about the content of the letter and his conversations with Tisman. (Tr. 911–12; 915–16). During cross-examination, **GFI** attempted to elicit more

information concerning these communications. Labandeira asserted the attorney-client privilege. **GFI** objected to Labandeira's claim of privilege and argued that Labandeira had already waived the privilege by testifying to his communications. **GFI** argues now that it did not have a fair hearing because it was not allowed to cross-examine Labandeira about communications with Tisman, or to call Tisman as a witness and such refusal constitutes misconduct. Labandeira argues that the privilege ruling was correct, and even if it were not, the excluded evidence was collateral to the issue of **GFI's** alleged cause for terminating Labandeira and in any case was cumulative.

Both sides submitted briefs and presented oral arguments on this issue for the Panel. (Tr. 1003–21). The Panel sustained the privilege objection and also ruled that Tisman did not have to testify. The Panel stated in the Award:

> During the hearings in this matter, Respondent [**GFI**] made a motion requesting permission to question Claimant [Labandeira] and pierce attorney-client privilege, since Claimant had made reference to conversations with counsel during direct testimony. Both parties submitted briefs on the issue. The Panel decided not to permit questioning that would break attorney-client privilege. In addition, the Panel determined that it would not honor a subpoena requesting that Claimant's counsel appear as a witness for Respondent.

(**GFI's** Notice of Pet. Exh. A at 3).

Section 10(a)(3) of the Arbitration Act provides that the court may issue an order vacating an arbitration award "[w]here the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). This provision has been narrowly construed so as "not to impinge on the broad discretion afforded arbitrators to decide what evidence should be presented." *Ripa v. Cathy Parker Mgmt., Inc.*, No. 98 Civ. 0577, 1998 **WL** 241631, at *3 (S.D.N.Y. May 13, 1998) (citations omitted); *see also Pompano–Windy City Partners v. Bear Stearns & Co.*, 794 F.Supp. 1265, 1277 (S.D.N.Y.1992) (explaining that "the arbitrator is the judge of the admissibility and relevancy of evidence submitted in an arbitration proceeding") (citations omitted). If the arbitrator's refusal to hear pertinent and material evidence prejudices of one of the parties, the court may set aside the award. *Areca*, 960 F.Supp. at 54; *Mallory Factor Inc. v. West Coast Entm't Corp.*, No. 99 Civ. 4819, 1999 **WL** 1021076, at *3 (S.D.N.Y. Nov. 9, 1999); *Aferiat v. Grossman*, No. 96 Civ. 1744, 1998 **WL** 99797, at *5 (S.D.N.Y. Mar. 4, 1998). The misconduct of the arbitrator must amount to a denial of fundamental fairness to warrant vacating the award. *Areca*, 960 F.Supp. at 54–55 (citations omitted); *Aferiat*, 1998 **WL** 99797, at *5; *see also Tempo*, 120 F.3d at 20 (stating that "except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review"). However, although not required to hear all the evidence proffered by a party, an arbitrator "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument." *Tempo*, 120 F.3d at 20. "Only the most egregious error which resulted in adversely affecting the rights of a party would justify ... and require vacatur of an award." *Pompano–Windy City Partners*, 794 F.Supp. at 1277 (quoting *Hunt v. Mobil Oil Corp.*, 654 F.Supp. 1487, 1512 (S.D.N.Y.1987)). An award cannot be set aside because of an arbitrator's refusal to hear cumulative or irrelevant evidence. *Areca*, 960 F.Supp. at 55; *Ripa*, 1998 **WL** 241631, at *3.

*7 Arbitration proceedings are not constrained by formal rules of evidence or procedure. *Areca*, 960 F.Supp. at 56 (citations omitted). Moreover, "[i]n

handling evidence an arbitrator need not follow all the niceties observed by the federal courts." *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516*, 500 F.2d 921, 923 (2d Cir.1974); *see also Tempo*, 120 F.3d at 20; *Bates v. Long Island R. Co.*, 997 F.2d 1028, 1035 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993); *Coppinger v. Metro–North Commuter R .R.*, 861 F.2d 33, 39 (2d Cir.1988); *Aferiat*, 1998 **WL** 99797, at *5 (citation omitted). A fundamentally fair hearing requires that the parties be permitted to present evidence and cross-examine adverse witnesses. *Aferiat*, 1998 **WL** 99797, at *5. However, an arbitrator's refusal to hear evidence does not automatically require the vacatur of an award. Arbitrators must have enough evidence to make an informed decision, but "they need not compromise the speed and efficiency that are the goals of arbitration by allowing the parties to present *every piece* of relevant evidence." *Areca*, 960 F.Supp. at 55 (quoting *Brandt v. Brown & Co. Securities Corp.*, No. 94 Civ. 6640, 1995 **WL** 334381, at *5 (S.D.N.Y. June 5, 1995) (emphasis in original).

The Panel here was not bound to follow the Federal Rules of Evidence. Nonetheless, even if it had, their decisions to not allow the cross-examination of Labandeira or to force Tisman to testify did not violate the Rules of Evidence. The attorney-client privilege is not waived if merely the fact of the communication is disclosed, the substance of the communication is not at issue, and there is no prejudice to the opposing party. The substance of privileged communications is protected while the fact that they may have occurred is not. *Church of Scientology of Cal. v. Cooper*, 90 F.R .D. 442, 443 (S.D.N.Y.1981). The Second Circuit recognizes a " 'subject matter waiver' that allows an opposing party 'to reach all privileged conversations regarding a particular subject once one privileged conversation on that topic has been disclosed." ' *In re Von Bulow*, 828 F.2d 94, 102–03 (2d Cir.1987). Labandeira's testimony regarding communications with his attorney does not constitute such a waiver. Labandeira did not testify to the substance of the conversation but only that he had conversations and what they were generally about.

GFI was not denied a fundamentally fair hearing. The issue before the Panel was whether **GFI** had cause to terminate Labandeira. Labandeira's knowledge or belief as to this alleged cause is not relevant to the determination to be made by the Panel under contract law. Several witnesses testified regarding the two botched transactions **GFI** claims formed the basis for cause. Labandeira also testified to his recollection of the events. The Panel had sufficient testimony on which to base its decision. Learning more about the substance of the conversations between Tisman and Labandeira that occurred on the eve of his termination would not affect their decision on whether **GFI** had cause for terminating Labandeira. That determination was based on the testimony and the Panel's evaluation of whether these incidents constituted harm or injury to **GFI's** reputation as required under the Agreement. The Panel indicated its consideration of the issue. Both sides were given the opportunity to present arguments on the issue which the Panel considered.

***8 GFI's** motion is denied; accordingly, confirmation of the arbitration award is appropriate. *See* 9 U.S.C. § 9. The Court directs that a judgment be entered upon the December 1, 2000 arbitration award.

III. Labandeira's Motion for Sanctions

Labandeira moves for an award of attorney's fees incurred in defending this motion and prejudgment interest on the Award at an annual rate of nine percent (9%).

A. Attorney's Fees

Labandeira moves for attorney's fees, not as a prevailing party, but as a sanction

against **GFI** for Labandeira having to oppose this motion. Sanctions under Rule 11 are generally imposed when a pleading is filed for improper purposes, not well grounded in fact, or not warranted by existing law. Fed.R.Civ.P. 11. Liberally construed, **GFI's** pleading satisfies the test of reasonableness. *McMahon v. Shearson/Am. Express, Inc.*, 896 F.2d 17, 22 (2d Cir.1990). Although the Court finds **GFI's** position unpersuasive, it is not so wholly frivolous to justify awarding fees. *See Duferco Int'l Steel Trading v. Shipping A/S*, 184 F.Supp.2d 271, 276 (S.D .N.Y.**2002**); *Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co., Inc.*, No. 87 Civ. 6369, 1991 **WL** 123962, at *4 (S.D.N.Y. July 3, 1991) (awarding attorney's fees against a party whose challenge was "wholly devoid of merit"). Therefore, Labandeira's motion for sanctions is denied.

B. *Post–Judgment Interest*

Labandeira requests an award of post-judgment interest calculated at an annual rate of nine percent (9%). The award of post-judgment interest is in the discretion of the trial judge and there is a presumption in favor of awarding such interest. *Waterside Ocean Navigation Co. v. Int'l Navigation, Ltd.*, 737 F.2d 150, 154 (2d Cir.1984); *In Matter of Arbitration between Soft Drink and Brewery Workers Union Local 812, IBT, AFL–CIO*, No. 95 Civ. 8081, 1996 **WL** 420209, at *2–3 (S.D.N.Y. July 25, 1996). Interest on an arbitration award is payable from the date of the award rather than from the date the award is confirmed. *Aferiat*, 1998 **WL** 99797, at *12. Accordingly, the Court grants Labandeira interest calculated at an annual rate of 9% from December 1, 2000.

CONCLUSION

Having denied **GFI's** motion to vacate, confirmation of the arbitration award is appropriate. *See* 9 U.S.C. § 9. The Court directs that a judgment be entered upon the December 1, 2000 arbitration award. Interest on the award shall be paid at an annual rate of 9% from December 1, 2000. Labandeira's motion for sanctions is denied. The Court orders this case closed and directs the Clerk of the Court to remove the case from the Court's active docket.

SO ORDERED.

Footnotes

1 "Tr." refers to the page number of the hearing transcript.

End of Document

EXHIBIT 5

*2012 U.S. Dist. LEXIS 17284, **

ANTONIO MUNOZ, Plaintiff, -against- THE MANHATTAN CLUB TIMESHARE ASSOCIATION, INC., Defendant.

11-CV-7037(JPO)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 17284

February 8, 2012, Decided
February 8, 2012, Filed

CORE TERMS: customer, discovery, net worth, reasonably calculated to lead, punitive damages, admissible, time period, disciplinary actions, compel discovery, pertaining, mentioning, discovery of admissible evidence, burdensome, unduly, admissible evidence, employee's conduct, documentation, electronic, discipline, hotel, citation omitted, overrule, demanded, waived, period of time, disciplinary records, similarly situated, overbroad

COUNSEL: **[*1]** For Antonio Munoz, Plaintiff: Gregory S. Antollino, LEAD ATTORNEY, Grey Antollino, New York, NY.

For The Manhattan Club Timeshare Association, Inc., Defendant: Gerard Schiano-Strain, LEAD ATTORNEY, Judith A. Stoll, Kane Kessler, P.C., New York, NY.

JUDGES: J. PAUL OETKEN, United States District Judge.

OPINION BY: J. PAUL OETKEN

OPINION

MEMORANDUM AND ORDER

J. PAUL OETKEN, District Judge:

Plaintiff Antonio Mufioz suffers from HIV infection and alleges that his former employer, Defendant Manhattan Club Timeshare Association, Inc. ("MCTA"), denied him intermittent leave as required by the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, and accommodations under the New York City Human Rights Law. (Dkt. No. 1.) He further alleges that Defendant

retaliated against him for asserting these rights. *Id.* In a letter motion dated January 27, 2012, Plaintiff requested court intervention to compel Defendant to produce certain documents and information despite objections from Defendant. Plaintiff argued first that, by failing to respond in a timely manner to Plaintiff's discovery demands, Defendant had waived all objections. Plaintiff then set forth opposition to each of Defendant's objections. For the reasons set forth below, **[*2]** Plaintiff's request to compel is granted in part and denied in part.

I. Timeliness of Objections

Plaintiff asks the Court to compel discovery without regard to Defendant's objectives because Defendant was late in raising them. Plaintiff asserts and Defendant does not dispute that Plaintiff served his discovery demand by hand on Defendant on November 15, 2011. A response was therefore due thirty days later on December 15, 2011. *See* Fed. R. Civ. P. 34(b)(2)(A). Plaintiff states that Defendant's response was actually dated December 23, 2011.

Plaintiff quotes Magistrate Judge Henry Pitman for the proposition that, "[i]f a party fails to File timely objections to document requests, such a failure constitutes a waiver of any objections which a party might have to the requests." *Eldaghar v. City of N.Y. Dep't of Citywide Admin. Servs.*, 2003 U.S. Dist. LEXIS 19247 (S.D.N.Y. Oct. 20, 2003) (citation omitted). Defendant points to more recent cases in this District which do not overrule late objections when there is some explanation for the lateness. *E.g., Callaway Golf Co. v. Corporate Trade Inc.*, 2011 U.S. Dist. LEXIS 44756, 2011 WL 1642377 (S.D.N.Y. April 25, 2011) (rejecting waiver arguments where responses were twenty-two **[*3]** days late and counsel explained the delay with reference to construction at his office).

Defendant here explains that it was late in responding because it was hopeful that a mediation of this matter would be successful. The Court did order in its case management plan, agreed to by the parties, that "[t]he use of any alternative dispute resolution mechanism does not stay or modify any date in this Order." (Dkt. No. 9 at 3.) However, in light of this District's recent reticence to overrule objections for untimeliness and Defendant's explanation for its relatively minor delay, Defendant's objections are not deemed to be waived.

II. Defendant's Objections

Defendant has raised five objections to Plaintiff's demand for discovery, relating specifically to Plaintiff's requests for (1) paper and electronic documents pertaining to or mentioning Plaintiff in any manner; (2) a statement of Defendant's net worth; (3) all customer complaints at MCTA for the period of time that Plaintiff worked there; (4) customer evaluations during the time Plaintiff was employed at the hotel; and (5) all disciplinary actions at the hotel during the period Plaintiff was employed there.

A. Standard of Review

Federal Rule of Civil Procedure 26(b) **[*4]** authorizes discovery that is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "[R]elevant information need not be admissible at trial"; it need only be "reasonably calculated to lead to the discovery of admissible evidence." *Grynberg v. BP, P.L.C.*, No. 08 Civ. 6494 (RJH) (RLE), 2008 U.S. Dist. LEXIS 76872, 2008 WL 4450277, at *2 (S.D.N.Y. Oct. 1, 2008) (quoting *Ferguson v. Lion Holding, Inc.*, 2005 U.S. Dist. LEXIS 9789, 2004 WL 1216300, at *2 (S.D.N.Y. Mar. 23, 2005)).

B. Documents Pertaining to or Mentioning Plaintiff

Plaintiff demanded discovery of paper and electronic documents pertaining to or mentioning Plaintiff in any manner. Defendant objects that this demand is "overbroad, unduly burdensome and/or seeks information which may be subject to the attorney-client and/or attorney work product privileges." This demand is, however, reasonably calculated to lead to admissible

evidence and will therefore be granted. Defendant may of course follow normal procedures for protection of privileged materials.

C. Statement of Defendant's Net Worth

Plaintiff also demanded a statement of Defendant's net worth, prompting Defendant to object that the **[*5]** demand is "(i) not reasonably likely to lead to the discovery of admissible evidence and (ii) premature at this stage in the litigation." Defendant's net worth is only relevant here if there is a finding that punitive damages should be awarded. *See Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 266 (2d Cir. 1999) ("Evidence of wealth . . . is generally inadmissible in trials not involving punitive damages." (citation omitted)). Again, though, relevance for discovery is broader than admissibility, and some courts have concluded that financial information is discoverable before a finding of liability giving rise to punitive damages. *See, e.g., Wade v. Sharinn & Lipshie, P.C.*, 2009 U.S. Dist. LEXIS 60665 (E.D.N.Y. Jan. 7, 2009); *Tillery v. Lynn*, 607 F. Supp. 399, 402-03 (S.D.N.Y. 1985) ("It would be unduly burdensome to plaintiff, and most particularly a jury and the court, to delay resolution of the issue as to the amount of punitive damages, if any, which should be awarded until discovery as to defendant's personal assets had been completed.")

Plaintiff's request to compel production of a statement of Defendant's net worth is granted, but the decision to compel this production does **[*6]** not in any way predetermine whether punitive damages would be considered at trial, whether consideration of punitive damages would be bifurcated at trial, or whether a statement of net worth would be admissible at trial.

D. Customer Complaints

Defendant next objects to Plaintiff's demand for "all customer complaints at MCTA for the period of time that Plaintiff worked there." Plaintiff argues these materials are necessary for comparison of any complaints against Plaintiff to complaints against other MCTA employees in order to show discrimination against Plaintiff. Defendant characterizes Plaintiff's argument as "nonsensical" and argues that many customer complaints (for example, those relating to the view from a guest room or the functioning of an air conditioning) will be irrelevant to Plaintiff's claims.

Plaintiff's demand for discovery into customer complaints at MCTA is reasonably calculated to lead to admissible evidence to the extent it covers customer complaints comparable to those against Plaintiff. Therefore, the request to compel discovery into customer complaints is granted as to all customer complaints relating to any employee's conduct for the time period of Plaintiffs employment **[*7]** by Defendant; the request is denied as to all other customer complaints.

E. Customer Evaluations

Plaintiff made a similar demand for all customer evaluations for the time period of his employment. Defendant argues that its production of customer evaluations relating directly to the plaintiff should be sufficient. Plaintiff again argues that customer evaluations relating to other employees are necessary to compare Plaintiff's situation to that of others and to establish discrimination against Plaintiff. Plaintiff's demand for customer evaluations at MCTA is reasonably calculated to lead to admissible evidence to the extent it covers customer evaluations that can be compared to those relating directly to Plaintiff. Accordingly, Plaintiff's request to compel discovery into customer evaluations is granted as to all customer evaluations relating to any employee's conduct for the time period of Plaintiff's employment by Defendant; the request is denied as to all other customer evaluations.

F. Disciplinary Actions

Plaintiff further demands discovery into "[a]ll [disciplinary actions at the hotel during the period

Plaintiff was employed there and the documentation of the basis for discipline." **[*8]** Again, Plaintiff argues that these materials are necessary for a comparison of Defendant's treatment of Plaintiff with its treatment of other employees. Plaintiff also argues that this information is necessary to rebut an argument from Defendant that Plaintiff was fired for being too strict a supervisor—Plaintiff argues that disciplinary records may show that Plaintiff's subordinates made Plaintiff's strictness necessary. Defendant argues that this demand is overbroad and unduly burdensome. Defendant suggests that Plaintiff should receive discovery only relating to discipline against employees similarly situated to Plaintiff and those who were under his supervision.

Evidence of Defendant's discipline of other employees may be admissible to show that Defendant singled out Plaintiff for severe treatment. Such evidence could potentially be admissible even where Defendant views the disciplined employee as not similarly situated to Plaintiff. Plaintiff's demand for disciplinary records is reasonably calculated to lead to admissible evidence, and the request is granted as to discovery of all disciplinary actions for the period of Plaintiff s employment and documentation of the bases for those **[*9]** actions.

III. Conclusion

For the foregoing reasons, Plaintiff's request to compel discovery is hereby GRANTED as to all paper and electronic documents pertaining to or mentioning Plaintiff in any manner; a statement of Defendant's net worth; all customer complaints relating to any employee's conduct for the time period of Plaintiff's employment by Defendant; all customer evaluations relating to any employee's conduct for the time period of Plaintiff's employment by Defendant; and all disciplinary actions for the period of Plaintiff's employment and documentation of the bases for those actions. Plaintiff's request is DENIED in all other respects.

Given the sensitivity of the materials Defendant is to produce, the parties shall confer and attempt to agree on appropriate language for a protective order.

The parties are reminded that they must adhere to all applicable procedural rules, including Federal Rule of Civil Procedure 34(b)(2)(E)(i).

SO ORDERED.

Dated: New York, New York

February 8, 2012

/s/ J. Paul Oetken

J. PAUL OETKEN

United States District Judge

EXHIBIT 6

Distinguished by Madanes v. Madanes, S.D.N.Y., March 8, 2001

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

ALAN B. WEISSMAN and VIVIEN K. WEISSMAN, Plaintiffs,

v.

IRWIN FRUCHTMAN, ROBERT ESNARD, IRVING E. MINKIN, HERBERT STURZ, CORNELIUS F. DENNIS, RONALD SILVER, MAURICE BEANE, JOSEPH AGUIRRE, GEORGE C. SAKONA, JEROME DE CANIO, BETSY HAGGARTY, JUDITH SPEKTOR, WILLIAM VALLETTA, JEFFREY GLEN, LEO WEINBERGER, LOUIS MUNOZ, MELVIN SOKAL, JOSEPH THOMAS, CHARLES KAROLY, DANIEL HASKELL, MICHAEL TSITIRIS, ALI MURTAZA, LASCELLE WRIGHT, DUANE WOOD, DENNIS NEVILLE, HERMAN GREENBERG, PATRICK COONEY, MANUAL TENORIO, PETER KAZINS, JOHN HIRSCHAUER, MATILDA DUGAN, WILLIE SHEPARD, JOHN L. SOTOS, ANTONIO REYES, OLGA SHANAHAN, ANTHONY CARPENTIER, PAUL CHARLTON, JUDITH FINKELSTEIN, COLISEUM VACUUM CLEANER & SERVICE COMPANY, INC., DAMUS, INC., FRANK HERNANDEZ and KATHY HERNANDEZ, Defendants.

No. 83 Civ. 8958 (PKL). | October 31, 1986.

Attorneys and Law Firms

Alan S. Liebman, Alan S. Liebman & Associates, P.C., New York City, for plaintiffs.

Nora Freeman, Ass. Corp. Counsel, Law Dep., New York City, Wayne Saitta, Brooklyn Legal Services Corp. 'A', Brooklyn, N. Y., Deborah Rand, Rutgers School of Law, Newark, N. J., for defendants.

Opinion

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, UNITED STATES MAGISTRATE.

*1 The matter before this Court stems from a five year long conflict between the City of New York and the plaintiffs, Alan and Vivian Weissman. Until recently the Weissmans were the owners, as tenants by the entirety, of a building or buildings [1] located at 400–404, 406 West 57th Street, New York, New York. In part, this building is used for Single Room Occupancy ('SRO') housing. SRO housing is generally availed of by lower income people. Often the use of property as SRO housing does not maximize the economic return of that property and thus there is an inherent conflict between the City who seeks housing for the poor and the owners of SRO Housing who seek to maximize their earnings. See New York Times, August 13, 1982, at B2, col.1; Id., July 25, 1982, § 4 at 6, col.4. This conflict has created a long and bitter history between the parties, which we briefly summarize here. [2]

Plaintiffs, having tried but failed to obtain certificates of eviction in order to

demolish or alter their building, filed an application with the Department of Buildings ('DOB') for a permit to perform alterations. The DOB approved the application, issued the alteration permit on December 23, 1981, and plaintiffs began work on the alterations. After gutting the building, plaintiffs discovered what they believed to be substantial structural defects. By letter dated April 16, 1982, plaintiffs notified the DOB that it was their opinion that the building was unsafe and in imminent danger of collapse, and requested demolition of the building. In response, DOB conducted an inspection on April 22, 1982. During that inspection substantial violations of the Building Code were discovered and three Notices of Violation were issued. The Notices required plaintiffs to make extensive repairs after obtaining the necessary permits and approvals.

On April 30, 1982, plaintiffs were notified that the alteration permit which had been issued the previous December was revoked. Defendant Sakona, Manhattan Superintendent of the DOB, wrote and explained that the original approval had been erroneously granted because the building was located in the 'Preservation Area of the Special Clinton District.' There was no hearing held by the DOB either before or after the permit was revoked.

Throughout the month of June, the DOB inspected the building and concluded that while immediate repair was needed, a vacate order was not warranted. Plaintiffs responded by initiating the first of several lawsuits in New York State Supreme Court.[3] In that proceeding, the Weissmans sought an order vacating the premises and staying the enforcement of the Notices of Violation. This order was granted by the trial court, but was later reversed by the Appellate Division for lack of jurisdiction over the subject matter of plaintiffs' claim since plaintiffs had failed to exhaust their administrative remedies by appealing the permit revocation to the New York Board of Standards and Appeals ('BSA').

Following the Appellate Division's order, the plaintiffs filed an appeal with the BSA which refused to hear the appeal from the revocation of the alteration permit as untimely. The State Supreme Court, in a separate action, upheld the determination of the BSA regarding the alteration permit and affirmed the decision, on the merits, of the DOB regarding the denial of the demolition permit. Moreover, the City sought sanctions for the safety violations, and criminal penalties for the plaintiffs' alleged harassment of tenants.

*2 Believing themselves to be in an administrative 'Catch-22,' the plaintiffs sought relief in this Court by filing a Civil Rights action under to 42 U.S.C. § 1983 for the refusal on the part of the defendants, various administrative officials of the City of New York, to permit the demolition and/or vacation of their building.

The Original and Amended Complaint alleged, in relevant part, that the

> defendants made determinations not within their jurisdiction, and in violation of established and lawful standards and procedures and in an arbitrary and capricious manner, that have deprived plaintiffs of a property right in violation of due process of law as afforded under the Fifth and Fourteenth Amendments of the Constitution of the United States.

(Amended Complaint ¶23). The factual allegations supporting this claim recount the efforts of the plaintiffs to obtain a demolition permit and the revocation of the previously issued alteration permit.

Judge Brieant, to whom this case was originally assigned, granted in part and denied in part defendants' motion for summary judgment. He found that the revocation of plaintiffs' alteration permit without a hearing stated a due process

claim. But Judge Brieant further found that the doctrine of res judicata barred relitigation of the issues related to the denial of a demolition permit because the State Supreme Court had upheld the DOB determination on the merits.

After Judge Brieant's decisions of June 24, 1985 and October 31, 1985, familiarity with which is assumed, plaintiffs proceeded with discovery. But despite the opportunity and the issuance by this Court of an order, dated November 26, 1985, scheduling depositions, plaintiffs have taken only one deposition during the past sixteen months. Plaintiffs now seek to amend their complaint for a second time in order to allege a new theory of conspiracy and to add additional defendants.

The essential difference between plaintiffs' proposed Second Amended Complaint and the First Amended Complaint is that plaintiffs have added a conspiracy claim. That conspiracy claim is based on a formal public policy of the City of New York which attempts to prohibit a reduction in SRO housing. See New York Times, Oct. 1, 1986, at 26, col.1. The conspiracy alleged is the formulation of this official policy and the acts in furtherance thereof are the effectuation of this policy by City officials.

17. In or about the Summer of 1981 the City of New York, acting through the Mayor's SRO Office, DOB, DCP, HPD, and the Office of Corporation Counsel, including defendants and other municipal officials who make policies for the foregoing, established an unconstitutional official policy known as the 'tenant protection plan' to protect single room occupancy tenants.

18. To carry out this policy, the defendants and other municipal officials who make policies for the Mayor's SRO office, DOB, DCP, HPD and the Office of Corporation Counsel, conspired to prevent plaintiffs and other owners of property in the City of New York that contained single room occupancy ('SRO') housing from lawfully using or developing their property in any manner that would interfere with the possession of tenants or reduce the availability of such housing, and in furtherance of this conspiracy made other unconstitutional official policies as described herein.

**3* (Second Amended Complaint ¶¶17–18). The factual allegations supporting this cause of action detail City officials implementing this official policy by performing various acts within the scope of their responsibility, such as inspecting buildings, denying permits, and issuing orders.

Specifically, plaintiffs' motion before this court seeks to:

(i) serve a second amended complaint:

(a) to allege the existence of a conspiracy by municipal officials and employees to deprive plaintiffs of their constitutional rights;

(b) to allege the formulation and implementation of unconstitutional official policies by municipal officials and employees to prevent plaintiffs from using or developing their property in order to protect single room occupancy tenants;

(c) to eliminate any request for injunctive relief compelling the City defendants to immediately vacate the buildings and permit demolition of same;

(ii) add as defendants the City of New York and two additional attorneys with the Office of Corporation Counsel;

(iii) drop the tenants as defendants and discontinue the action as to them;

(iv) correct the misspellings of two defendants' names from 'Silver' to 'Silvers' and 'Haggarty' to 'Haggerty', and

(v) disqualify Corporation Counsel from continuing its representation of the City defendants.

For the following reasons plaintiffs' motion is granted as to parts (i)(b) (which we treat as the taking claim) and (c), (ii) as to the City of New York only, (iii) and (iv). The motion is denied as to parts (i)(a), (ii) as to attorneys Taussig and Mohr only, and (v). A second separate motion involving discovery will be addressed in part IV of this opinion.

I.

PLAINTIFFS' MOTION FOR LEAVE TO AMEND

[1] Plaintiffs' motion for leave to amend is governed by Rule 15(a) of the Federal Rules of Civil Procedure which expressly provides that leave 'shall be freely given when justice so requires.' In this Circuit, 'if the plaintiff has at least colorable grounds for relief, justice does so require unless the plaintiff is guilty of undue delay or bad faith or unless permission to amend would unduly prejudice the opposing party.' S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 42 (2d Cir. 1979) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)).

Among the grounds upon which defendants oppose plaintiffs' motion to amend is that plaintiffs do not have 'colorable grounds' for relief. In interpreting the 'colorable grounds' requirement the courts have used an analysis comparable to that required by a Fed. R. Civ. P. 12(b)(6) motion to dismiss. CBS, Inc. v. Ahern, 108 F.R.D. 14, 18 (S.D.N.Y. 1985). See Silberblatt v. East Harlem Pilot Block, 608 F.2d at 42; Valdan Sportswear v. Montgomery Ward & Co., 591 F.Supp. 1188, 1190 (S.D.N.Y. 1984). In this Circuit to dismiss a complaint for failure to state a claim upon which relief can be granted

a court must accept plaintiff's allegations at face value, Heit v. Weitzen, 402 F.2d 909, 913 (2d Cir. 1968), cert. denied, 395 U.S. 903, 89 S.Ct. 1740, 23 L.Ed.2d 217 (1969), must construe the allegations in the complaint in plaintiff's favor, Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974), and must dismiss the complaint only if 'it appears beyond a 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, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). See generally Wade v. Johnson Controls, Inc., 693 F.2d 19 (2d Cir. 1982).

*4 Rapf v. Suffolk County of New York, 755 F.2d 282, 290 (2d Cir. 1985). Following this standard we have accepted, for the purposes of this motion, all of plaintiffs' allegations as true and have drawn all reasonable inferences in favor of the plaintiffs. We now apply the standards just discussed to each of the claims in plaintiffs' proposed amended complaint attacked by defendants as legally insufficient.

Count I: The Conspiracy Claim

[2–6] The case law with respect to pleading conspiracy charges under §§ 1983 and 1985 of Title 42 of the United States Code is well developed in this Circuit.[4] Those cases require that a civil rights complaint must contain more than conclusory, vague or general allegations. See, e.g., Angola v. Civiletti, 666 F.2d 1, 4 (2d Cir. 1981); Koch v. Yunich, 533 F.2d 80, 85 (2d Cir. 1976); Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975). In order to prove the element of combination the plaintiffs must show that the conspirators "had a meeting of the minds' and thus reached an understanding to achieve the conspiracy's objectives.'

Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd on other grounds, 446 U.S. 1301, 100 S.Ct. 1987, 64 L.Ed.2d 670, reh. den., 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed.2d 1176 (1980) (citing Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). The complaint, therefore, must allege facts which would lead to a reasonable inference that the parties in fact agreed to the illegal course of action. Morpurgo v. Board of Higher Education, 423 F.Supp. 704, 711 (S.D.N.Y. 1976). Although the plaintiffs need not provide direct evidence of conspiracy, they must allege that the 'acts [complained of] were reasonably related to the claimed conspiracy,' Seneca Constitutional Rights Organization v. George, 348 F.Supp. 51, 57 (W.D.N.Y. 1972), and that the actions of the defendant caused the unconstitutional deprivation. DiGiovanni v. City of Philadelphia, 531 F.Supp. 141 (E.D.Pa. 1982).

[7] Moreover, to survive a motion to dismiss, the complaint must also include some specific allegations of fact indicating a deprivation of civil rights. Plaintiffs may not merely allege an act which is not wrongful on its face and assert that the act was done in bad faith and for an ulterior motive. Landesman v. City of New York, 501 F.Supp. 837, 839 (E.D.N.Y. 1980). To illustrate, in Landesman, Mayor Koch was accused of conspiring to deprive plaintiff of his civil rights by causing plaintiff's false arrest. The complaint, however, alleged only that the mayor publicly denounced the underlying criminal event and initiated an investigation of the matter. Granting the motion to dismiss, the court there held that the complaint was based on pure surmise that the purpose of the mayor's action was for an ulterior motive. Id. at 841. Similarly, plaintiffs' complaint in the instant action merely alleges that defendants carried out their lawful duties with improper motives.

[8] As noted, the alleged conspiracy is the enactment of an official policy of the City of New York to maintain the current level of SRO housing and the acts alleged to be in furtherance of the conspiracy are those of City employees implementing this policy. For example, plaintiffs allege that defendants Silvers, Aguirre, DeCanio and Dennis, all employees of the DOB, inspected the building, issued housing code violations, refused in 1982 to issue a vacate order and then did so in 1983. (Proposed Second Amended Complaint ¶¶34, 35, 40, 41, 43 and 45). While plaintiffs quarrel with the substance of defendants' decisions, they do not allege that they acted outside the scope of their employment.

*5 [9] Plaintiffs' allegations against the supervisory level defendants are equally lacking: defendant Esnard, Commissioner of the DOB, is accused of attempting to enforce correction of the housing code violations (Id. at ¶¶ 54–58); [5] Fruchtman, former Commissioner of the DOB is accused of receiving a letter from plaintiffs explaining that 406 was unsafe (Id. at ¶33); Sturz, Director of City Planning, is accused of having made a determination that 406 was outside of the preservation area and then later reversing himself (Id. at ¶¶48–49); Sokal, Director of the Clinton Neighborhood Preservation District, is accused of advising the DOB of Sturz's determination (Id. at ¶59); Specktor [6] and Haggerty, Director and Assistant Director of the Mayor's SRO Office, are accused of informing the DOB that plaintiffs were convicted of criminal harassment and recommending revocation of the alteration permit (Id. at ¶¶60–61); and, Minkin, First Deputy Commissioner of the DOB, is accused of revoking that permit (Id. at ¶¶62–64). All of these allegations, taken as true, describe acts well within the scope of these officials' responsibilities.

The allegations against Glen, and proposed defendants Mohr and Taussig, all attorneys in the office of the Corporation Counsel, are limited to an assertion that each consulted with various municipal officials about revoking plaintiffs'

alteration permit. (Id. at ¶65). No specific allegation is made that any of these attorneys suggested, counseled or advocated violation of plaintiffs' constitutional rights.

Similarly, defendant Valletta, counsel to the Board of Standards and Appeals, is alleged to have 'refused' to let plaintiffs file an application with the Board to review the revocation of their alteration permit (Id. at ¶73). Presumably it is Munoz' legal advice to the Board which is being challenged, but, in any event, the Board's decision was upheld in state court as not being arbitrary or capricious. And, likewise, defendant Weinberger, Records Access Officer of the DOB, and defendant Munoz, General Counsel to the DOB and Records Appeal Officer, are alleged to have arbitrarily and capriciously denied plaintiffs' Freedom of Information Act request. (Id. at ¶¶76–77). Once again, plaintiffs had a right, which they exercised, to challenge this administrative decision in court. Apparently, the case was settled. Memorandum and Order, dated June 24, 1985, at 10.

In sum, the allegations against all the defendants describe actions taken by them within the scope of their official duties. Plaintiffs' attempt to color those actions with conclusory ulterior motives is simply insufficient to convert them to an actionable claim. The Second Circuit has specifically held that

> certain claims are so easily made and can precipitate such protracted proceedings with such disruption of governmental functions that, despite the general rule of Conley v. Gibson, 355 U.S. 41 [78 S.Ct. 99, 2 L.Ed.2d 80] (1957), detailed fact pleading is required to withstand a motion to dismiss. A claim of a conspiracy to violate civil rights is a clear example. Fine v. New York, 529 F.2d 70, 73 (2d Cir. 1975); Powell v. Workmen's Compensation Board, 327 F.2d 131, 133 (2d Cir. 1964). Nor have we permitted litigants to precipitate hearings into the motives of law enforcement agencies simply on an allegation that the motive was improper.

*6 Angola v. Civiletti, 666 F.2d at 4. See also Harlow v. Fitzgerald, 457 U.S. 800, 816–19, 102 S.Ct. 2727, 2737–39, 73 L.Ed.2d 396 (1982) ('bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery.')

For the reasons just discussed, plaintiffs' motion for leave to amend to assert a conspiracy claim is denied. However, plaintiffs may plead as predicate facts the establishment by the City of official policies to deal with SRO housing.

As to the remaining named defendants not discussed in this section, we assume that these are the tenant defendants and find no cause of action stated against any of them. Finding no claim stated against them, and agreement among the parties that they should be dismissed, plaintiffs' motion to amend and drop the following tenants should be granted: Joseph Thomas, Charles Karoly, Daniel Haskell, Michael Tsitiris, Ali Murtaza, Lascelle Wright, Duane Wood, Dennis Neville, Herman Greenberg, Patrick Cooney, Manual Tenorio, Peter Kazins, John Hirschauer, Matilda Dugan, Willie Shepard, John L. Sotos, Antonio Reyes, Olga Shanahan, Anthony Carpentier, Paul Charlton, Judith Finkelstein, Colisuem Vacuum Cleaner & Service Company, Inc., Damus, Inc., Frank Hernandez and Kathy Hernandez.

Count II: The 'Taking' and Due Process Claim

Apart from the conspiracy claim just discussed, the remainder of plaintiffs' complaint alleges a combination of due process violations and a taking of

plaintiffs' property without just compensation based upon the granting and subsequent revocation of the alteration permit and related actions by the City. Since the due process allegations in the Second Amended Complaint are similar to those sustained by Judge Brieant's earlier decisions, the City has only challenged plaintiffs' 'taking' claim.

[10] Plaintiffs assert that their property was taken without just compensation by actions of the defendants which 'prevented plaintiffs from using or developing their property in any manner that would interfere with the possession of tenants or reduce the availability of SRO Housing.' (Second Amended Complaint ¶47). The defendants object to this claim as not being ripe since plaintiffs failed to secure a final determination from the City as to what could be done with the property.[7] See Kohlasch v. New York State Thruway Authority, 460 F.Supp. 956, 960 (S.D.N.Y. 1978).

We are of the opinion that for the purpose of this motion plaintiffs have sufficiently exhausted all reasonable means of securing the necessary permits to repair their buildings. Judge Brieant's June 24, 1985 opinion and the complaint provide ample support for this conclusion. It will be recalled that plaintiffs brought an action in state court to compel the City to issue the alteration permit and that plaintiffs prevailed at the trial level. This order was later reversed by the Appellate Division for want of jurisdiction because plaintiffs had not exhausted their administrative remedies. Thereafter, upon applying to the proper administrative authorities plaintiffs' application for review was denied as untimely. While plaintiffs may well have been permitted to commence additional administrative and court proceedings, in the context of a motion for leave to amend, plaintiffs' taking claim is ripe for decision. We also find, based on Judge Brieant's earlier decisions, that the plaintiffs have alleged the three necessary elements of a 'taking' claim: '(1) a property interest (2) that has been taken under the color of state law (3) without due process or just compensation.' Port Chester Yacht Club, Inc. v. Iasillo, 614 F.Supp. 318, 321 (S.D.N.Y. 1985); Kohlasch, 460 F.Supp. at 960.

*7 [11] As noted earlier, Judge Brieant held that plaintiffs' demolition claim could not be relitigated in federal court. Thus, defendants object to the plaintiffs repleading a cause of action for the rejection of a demolition permit for 400 and 404. The Weissmans assert a right to replead because Judge Brieant referred only to 406 in his dismissal of the demolition claim. We reject the contention that in referring to 406 Judge Brieant was limiting his decision. In this connection, we are counselled by Judge Friendly's opinion in Fogel v. Chestnutt, 668 F.2d 100, 108 (2d Cir. 1981), cert. denied, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982), that law of the case 'applies as well to everything decided by necessary implication.'

Thus, we read 406 as a shorthand for the entire structure especially since Judge Brieant noted that there was some question as to whether the structure was one building or three. See Opinion, dated June 24, 1985. Judge Brieant's October 31, 1985 opinion clearly holds that no relief, constitutional or otherwise, may be sought for failure to issue a demolition permit. Judge Brieant's opinion is the law of the case and should be followed.[8] Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983); Zdanok v. Glidden Company, Dur kee Famous Foods Division, 327 F.2d 944, 953 (2d Cir. 1964), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964).

Additional Defendants

[12] We turn now to that aspect of plaintiffs' motion seeking to add as defendants Gabriel Taussig and Larraine Mohr, attorneys with the Corporation Counsel's

office during the relevant time period, and the City of New York. If the complaint as amended fails to state a cause of action against the proposed defendants, leave to amend need not be given. State Teachers Retirement Board v. Fluor Corporation, 654 F.2d 843, 855 (2d Cir. 1981).

[13] In order to state a cause of action against Taussig or Mohr the plaintiffs 'must demonstrate some 'affirmative link' between the misconduct complained of' and the actions of the proposed defendants. DiGiovanni v. City of Philadelphia, 531 F.Supp. at 144–45; see Rizzo v. Goode, 423 U.S. 362, 375–77, 96 S.Ct. 598, 606–07, 46 L.Ed.2d 561 (1976). Plaintiffs have failed to do so.

The Second Amended Complaint only mentions defendants Taussig and Mohr twice: once to identify them in paragraphs 15(b) and (c), respectively, and again in paragraph 65, which we quote:

> In furtherance of the conspiracy herein, defendants Glen, Taussig and Mohr consulted with defendants Sturz, Minkin, Fruchtman and the Mayor's SRO Office about revoking plaintiffs' alteration permit prior to its revocation.

Accepting the factual allegations as true, they amount to nothing more than city attorneys consulting with their statutorily authoritized clients about actions of those agencies within their statutory authority. See New York City Charter § 394(a) ('the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested.') Thus, we find the allegations against Taussig and Mohr totally insufficient to support a claim and we, therefore, deny the motion to amend as to these proposed defendants.

*8 This Court does find, however, the allegations against the proposed defendant, City of New York, sufficient to state a cause of action. The complaint against the original defendants, all city officials, involves actions within the scope of their employment for the benefit of the City. The City does not seriously contest this point. Rather, the City asserts that its addition as a defendant is barred by the statute of limitations and that the plaintiffs' claim is not preserved by relation back to the original complaint. They further argue that if the one year statute of limitations applies[9] the plaintiffs' original claim is time barred and thus any claim relating back is likewise time barred.

The interrelationship between the statute of limitations and relation back issues may be structured analytically as follows:

—If the claim against the City does not relate back, the plaintiffs' claim is time barred under either the one year or three year statute of limitations.

—If the claim against the City does relate back and the applicable statute of limitations is three years the plaintiffs' claim is not time barred.

—If the claim against the City does relate back and the applicable statute of limitations is one year and is retroactively applied, the plaintiffs' claim is time barred.

—If the claim against the City does relate back and the applicable statute of limitations is one year and is not retroactively applied, the plaintiffs' claim is not time barred.

Because of the pivotal significance of the relation back question, we discuss it first.

[14] The doctrine of relation back is governed by Fed. R. Civ. P. 15(c), which provides in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

See Morrison v. LeFevre, 592 F.Supp. 1052, 1057 (S.D.N.Y. 1984); Sounds Express International Limited v. American Themes and Tapes, Inc., 101 F.R.D. 694, 696 (S.D.N.Y. 1984). Rule 15(c) covers both a change or addition in parties. State Teachers Retirement Board v. Fluor Corporation, 500 F.Supp. 278, 187 (S.D.N.Y. 1980), aff'd in relevant part, 654 F.2d 843 (2d Cir. 1981).

Without the conspiracy claims, which we have found insufficient, the plaintiffs' Second Amended Complaint is essentially the same as the First Amended Complaint and the original Complaint. The one exception is that it adds a new legal theory of a taking without just compensation, a theory which we have found legally sufficient and which does not expand the scope of the litigation. Thus, it is clear to this Court that 'the claim . . . asserted in the [second] amended pleading arose out of the conduct . . . set forth . . . in the original pleading.' Rule 15(c); Holdridge v. Heyer-Schulte Corporation of Santa Barbara, 440 F.Supp. 1088, 1093 (N.D.N.Y. 1977).

*9 Since the Second Amended Complaint arises from the same facts alleged in the First Amended Complaint, the plaintiffs must next show that the City received notice of the institution of the action so that it will not be prejudiced in maintaining its defense on the merits. Morrison, 592 F.Supp. at 1057; Holdridge, 440 F.Supp. at 1093 ('The major consideration in deciding whether an amendment relates back is whether adequate notice is given to the opposing party . . ..'). Given that the Corporation Counsel, which represents the City, its agencies and its officials, knew of this lawsuit since its commencement and continuously provided representation to the other defendants, there can be no doubt that the City has had adequate notice and will be put to no extra expense, discovery or loss of substantive rights if it is added as a defendant. Strauss v. Douglas Aircraft, 404 F.2d 1152 (2d Cir. 1968). Finding no prejudice or surprise caused by adding the City of New York as a defendant, we find that the claim relates back to the original filing.[10] See Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 385 (2d Cir. 1968) ('if a meritorious claim is offered, and there will be little resultant prejudice to defendant, plaintiff is normally entitled to a hearing on the merits').

[15] The question of whether a three year statute of limitations, pursuant to C.P.L.R. § 214(5), or a one year statute of limitations, pursuant to C.P.L.R. § 215(3), is appropriate in a 42 U.S.C. § 1983 action is currently before the Second Circuit in Okure v. Owen, No. 86–7343 (2d Cir. filed May 6, 1986). Since the Second Circuit's decision will bind this court, it would not be appropriate or productive for us to decide this issue independently. Cf. United States of America v. Salerno and Cafaro, 794 F.2d 64 (2d Cir. 1986) (staying mandate until the

Supreme Court decides a similar case previously appealed). If the Second Circuit determines that a three year statute of limitations is applicable, the plaintiffs' claim would not be time barred. Alternatively, if the Second Circuit chooses the one year limitations period, we would need to address the issue of whether it should be retroactively applied. We therefore assume for discussion a one year limitation, realizing that the Second Circuit's selection of a three year limitations period would moot the following discussion although it would not change our conclusion.

The Supreme Court has set forth factors which must be considered in determining whether a new rule of law should be applied retroactively.

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra [392 U.S. 481], at 496 [88 S.Ct. 2224, at 2233, 20 L.Ed.2d 1231 (1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra [393 U.S. 544], at 572 [87 S.Ct. 817, at 835, 22 L.Ed.2d 1 (1969)]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v. Walker, supra [381 U.S. 618], at 629 [85 S.Ct. 1731, at 1738, 14 L.Ed.2d 601 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' Cipriano v. City of Houma, supra [395 U.S. 701], at 706 [89 S.Ct. 1897, at 1900, 23 L.Ed.2d 647 (1969].

***10** Chevron Oil Co. v. Huson, 404 U.S. 97, 106–107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971).

The Court in Chevron Oil refused to apply retroactively a decision rendered after the plaintiff filed suit which, inter alia, changed the limitation period in which to bring suit from a laches doctrine to a fixed state statute of limitations. The Supreme Court reasoned:

> It would also produce the most 'substantial inequitable results,' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him.

Id. at 108, 92 S.Ct. at 356 (citation omitted).

In Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that § 1983 actions are personal injury actions to which the appropriate state statute of limitations should apply. It is clear that prior to Wilson the statute of limitations in New York for actions brought under 42 U.S.C. § 1983 was three years, the limitation period applicable to actions created by statute. Pauk v. Board of Trustees, 654 F.2d 856, 866 (2d Cir. 1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982). The plaintiff had no way of foreseeing a change in the law when he filed his complaint prior to the Wilson decision. Even after Wilson, if the district courts were a barometer of what could be foreseen as a result of Wilson, the three year period would still be appropriate. See, e.g., Saunders v. State of New York, 629 F.Supp. 1067 (N.D.N.Y. 1986); Testa

v. Gallagher, 621 F.Supp. 476 (S.D.N.Y. 1985); Williams v. Allen, 616 F.Supp. 653 (E.D.N.Y. 1985); Ladson v. New York City Police Dept., 614 F.Supp. 878 (S.D.N.Y. 1985); Snell v. Suffolk County, 611 F.Supp. 521 (E.D.N.Y. 1985), aff'd, 782 F.2d 1094 (2d Cir. 1986). Therefore, applying the Chevron factors, any decision applying a one year statute of limitations would be a clear break in precedent.[11]

The Chevron factors lead us to conclude that a decision to utilize a one year statute should not be applied retroactively. Our decision not to apply retroactively a one year statute of limitations is supported by Nell v. Waring, Cv. 79–0177, slip op. at 9 (E.D.N.Y. June 11, 1986) (Sifton, J.). As one of the only courts to hold the one year statute of limitations applicable, Judge Sifton raised sua sponte the issue of retroactive application. Applying the Chevron Oil analysis he found that the purpose of Wilson would not be furthered by dismissing § 1983 actions which were 'brought by plaintiffs acting under the reasonable good faith understanding that the statute of limitations for § 1983 in New York is three years.' Nell, slip op. at 10.

Having previously concluded that the plaintiffs' claim relates back to the original date of filing, we find that whether a three year or a one year statute of limitations period is decided upon by the Second Circuit, the claim against the City should not be time barred.[12] Therefore, the motion for leave to amend the complaint to add the City as a defendant is granted.

II.

PLAINTIFFS' MOTION TO DISQUALIFY DEFENDANTS' COUNSEL

***11** Plaintiffs move to disqualify the Corporation Counsel pursuant to Disciplinary Rule ('DR') 5–102(A) and (B) of the Code of Professional Responsibility, which governs when a lawyer must withdraw as counsel because he will be a witness in the case.[13]

[16, 17] Both parties agree, and we concur, that Bottaro v. Hatton Associates, 680 F.2d 895 (2d Cir. 1982), requires a restrained approach in deciding this motion.

> This Court has adopted 'a restrained approach,' Armstrong v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980), which calls for disqualification only upon a finding that the presence of a particular counsel will taint the trial by affecting his or her presentation of a case. Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); McAlpin, 625 F.2d at 444–446.

Id. at 896. Indeed, DR 5–102 is not to be literally applied in each instance, rather its application depends on the attending facts of each case and lies within the sound discretion of the trial court. See Freschi v. Grand Coal Venture, 564 F.Supp. 414, 417 (S.D.N.Y. 1983); Ross v. Great Atlantic & Pacific Tea Co., 447 F.Supp. 406, 409 (S.D.N.Y. 1978); see also International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1293 (2d Cir. 1975). Moreover, the moving party bears the heavy burden of showing that the continued representation would violate the Code of Professional Responsibility. Evans v. Artek Systems Corporation, 715 F.2d 788, 794 (2d Cir. 1983); MacArthur v. Bank of New York, 524 F.Supp. 1205, 1209 (S.D.N.Y. 1981).

[18] The threshold question is whether any member of the Office of the Corporation Counsel 'ought be called as a witness.' Whether that lawyer actually testifies is not controlling. J.P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975); MacArthur, 524 F.Supp. at 1208. We note at the outset that one of the three attorneys mentioned in the plaintiffs' Second Amended Complaint has not been affiliated with the Corporation Counsel's office since September, 1983,

and, thus, does not implicate the rule. Accordingly, we turn to the other named members of the Corporation Counsel, Glen and Taussig.

[19] Whether Glen or Taussig 'ought to be called as a witness' for their clients is governed by the following test: 'whether the attorney's testimony could be significantly useful to his client; if so, he ought to be called.' MacArthur v. Bank of New York, 524 F.Supp. 1205, 1208 (S.D.N.Y. 1981).

The allegations, which we have already found to be legally deficient, against Glen and Taussig involve consultations with various city officials. Therefore, defendants can obtain all the necessary testimony from those officials without having to call the attorneys as witnesses. While in some cases corroborative witnesses or cumulative testimony might be necessary, plaintiffs have not carried their burden of establishing that this is such a situation.

This rule, of course, requires a careful evaluation of the relevant issues in the case and of other available testimony. An additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus and does not require the attorney's disqualification. EC 5–10 ('It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue.')

***12** MacArthur, 524 F.Supp. 1208–09.

[20] Plaintiffs also seek disqualification of the Corporation Counsel under DR5–102(B) claiming that one or more of these attorneys will be called as witnesses for the plaintiffs. Motions made pursuant to DR 5–102(B) have been subjected to particularly strict judicial scrutiny to prevent an attorney from disqualifying his adversary merely by calling him to the witness stand. See Rice v. Baron, 456 F.Supp. 1361, 1370 (S.D.N.Y. 1978); see also Kroungold v. Triester, 521 F.2d 763, 766 (3d Cir. 1975). For testimony to be prejudicial within the meaning of the disciplinary rule, the 'projected testimony of a lawyer or firm member must be sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony.' Rice, 456 F.Supp. at 1371 (quoting Freeman v. Kulicke & Soffa Industries, Inc., 449 F.Supp. 974, 977 (E.D.Pa. 1978), aff'd, 591 F.2d 1334 (3d Cir. 1979)).

[21] In the instant case, plaintiffs have not met their burden of demonstrating prejudice. The only proffer made on this point is found on page 18 of plaintiffs' supporting brief.

> Since Corporation Counsel's staff members were intimately involved in formulating and implementing the policy for which plaintiff seeks redress, they ought to be and will be called by plaintiffs as witnesses at trial, they either will be able to confirm or to disavow the existence of the conspiracy.

Because plaintiffs have failed to state a claim for conspiracy, any need 'to confirm or to disavow the existence of the conspiracy' is obviated.[14]

[22] Finally, plaintiffs have argued at great length that the Corporation Counsel's 'duplicitous behavior' demands disqualification. In deciding this point, we are not unaware of judicial perception of a trend of using motions to disqualify counsel as a litigation strategy. See Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J.

concurring). Judicial concern is particularly acute where counsel is employed by the government and disqualification would substantially increase the cost of litigation. See Rubino v. City of Mount Vernon, et al., No. 82 Civ. 3101, slip op. at 4–5 (S.D.N.Y. April 25, 1984) (Sweet, J.) [Available on WESTLAW, DCTU database], aff'd on rehearing, slip op. (S.D.N.Y. June 18, 1984). We are also mindful of this Circuit's refusal to disqualify an entire government law department on the ground of one attorney's potential conflict.[15] Matter of Grand Jury Subpoena of Jean Ford v. United States, 756 F.2d 249, 254 (2d Cir. 1985).

As factual support plaintiffs cite the Corporation Counsel's office taking a litigation position in a related state case in contrast to that which was advocated in a letter to State Senator Manfred Ohrenstein. We find this argument neither well-founded nor relevant. First, it is neither uncommon nor improper to have a public attorney assert contrasting views as to what the law is in a litigation context as opposed to what the law ought to be in a legislative context. Second, the relevant inquiry on a disqualification motion, is one of fairness, i.e., if these attorneys testify, will the trial be 'tainted,' W.T. Grant Company v. Haines, 531 F.2d 671, 677 (2d Cir. 1976); Rubino, slip op. at 5, and can the litigation be conducted in fairness to all with all parties properly represented. Freschi v. Grand Coal Venture, 564 F.Supp. 414, 417 (S.D.N.Y. 1983); Rubino, slip op. at 5; Wolk v. Wolk, 70 Misc. 2d 620, 333 N.Y.S.2d 942 (N.Y. Sup. Ct. 1972). On the facts presented, we have concluded that a fair untainted trial can be held and, therefore, disqualification of the Corporation Counsel is not appropriate. See Committee on Ethics and Professional Responsibility of the American Bar Association, Formal Opinion No. 339 (Jan. 31, 1975); Ross v. Great Atlantic & Pacific Tea Co., Inc., 447 F.Supp. 406, 409 (S.D.N.Y. 1978). See also International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1293 (2d Cir. 1975).

III.

PLAINTIFFS' MOTION TO DROP TENANT DEFENDANTS AND CLAIM FOR INJUNCTIVE RELIEF

*13 The remaining issues in the original motion are not in controversy and therefore will not be dealt with in depth. Plaintiffs' motion to drop the tenants as defendants and to eliminate any request for injunctive relief is granted. See Morgan v. McDonough, 726 F.2d 11, 14–15 (1st Cir. 1984). Likewise, plaintiffs' motion to correct the spelling of two of the defendants' names is granted: 'Silver' to 'Silvers' and 'Haggarty' to 'Haggerty.'

IV.

PLAINTIFFS' DISCOVERY MOTIONS

Plaintiffs have filed an additional motion with this court seeking to compel certain discovery, appoint a Special Master and assess the costs of this motion against defendants.[16] We address these issues seriatim.

Document Production

The plaintiffs seek to compel the production of 46 documents withheld or redacted by the defendants. The defendants assert governmental privilege as to 44 of these documents, attorney-client privilege as to 14 of the documents (including one not claimed to be within the governmental privilege), and privilege under Rule 408 of the Federal Rules of Evidence as to one document. The defendants have provided this Court with all 46 documents for in camera review. We discuss here the law applicable to defendants' privilege claims. In this connection, we note that defendants need only prevail on a single claim of privilege for each document.

Predecisional Privilege

[23] The predecisional privilege is a subcategory of the governmental privilege. Mobil Oil Corporation v. Department of Energy, 102 F.R.D. 1, 4–5 (N.D.N.Y. 1983). This privilege 'protects from disclosure those agency documents which reflect 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Id. at 5 (citations omitted).

The purpose of this privilege is to create an atmosphere in which governmental officials can hold frank and open discussions in reaching decisions without fearing public disclosure of the process.

> Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not.

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151–52, 95 S.Ct. 1504, 1516–17, 44 L.Ed.2d 29 (1975) [citations and footnotes omitted].

***14** The most detailed discussion to date of the procedure to invoke the predecisional privilege is found in Mobil Oil Corp. v. Department of Energy, 102 F.R.D. 1 (N.D.N.Y. 1983). That court held that

To support its privilege claim, an agency must establish that '1) the materials were part of a deliberative process by which policies or decisions are formulated . . ., and 2) that the materials were truly of a predecisional, or advisory or recommendatory nature, or expressed an opinion on a legal or policy matter, or otherwise were reflective of a deliberative process.'

Id. at 5 [citations omitted].

Moreover, the claim of privilege must be made in a very specific manner.

> First, the claim of the privilege must be lodged by the head of the agency which has control over the matter, after personal consideration of the allegedly privileged nature of the information. This power to claim the privilege may be delegated by the head of the agency, but only to a subordinate with high authority . . .. The second procedural requirement is that a claim of privilege must specifically designate and describe the information that is purportedly privileged. And third, the agency must provide 'precise and certain' reasons for preserving the confidentiality of the requested information.

Mobil Oil Corp. v. Department of Energy, 520 F.Supp. 414, 416 (N.D.N.Y. 1981), rev'd on other grounds, 659 F.2d 150 (TECA), cert. denied, 454 U.S. 1110, 102

S.Ct. 687, 70 L.Ed.2d 651 (1981) [citations omitted].

[24] Despite plaintiffs' strong protest, we hold that the defendants have properly invoked this privilege. Affidavits were submitted by the head of each agency claiming the privilege.[17] While each of these affidavits is very similar in nature, that does not change the facts sworn to under oath, which include the affirmation of personal knowledge and familiarity with the withheld documents. We also reject plaintiffs' claim that these affidavits were filed untimely because they were not furnished before the motion to compel was made. See Fed. R. Civ. P. 37(a). Finally, any arguable substantive deficiency is eliminated by the submission of the documents for in camera review. See Mobil Oil, 102 F.R.D. at 7.

In fact, our in camera inspection of each of the documents for which defendants have claimed deliberative privilege confirmed our initial determination, made without the benefit of such a review, that the protection of the deliberative privilege has been properly invoked. Indeed, the withheld documents fall well within the most traditional parameters of governmental privilege.

Attorney-Client Privilege

The rules governing attorney-client privilege are summed up in Judge Friendly's oft cited opinion in United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). The privilege attaches:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived . . ..

*15 Id. at 921; In re Grand Jury Subpoena Duces Tecum (Marc Rich), 731 F.2d 1032, 1036 (2d Cir. 1984); United States v. Bein, 728 F.2d 107, 112 (2d Cir. 1984),cert. denied, 469 U.S. 837, 105 S.Ct. 135, 83 L.Ed.2d 75 (1984).

[25] Applying these standards, we find the defendants have properly invoked the attorney-client privilege. The relationship between the Corporation Counsel and the City agencies is that of attorney-client. See New York City Charter § 394(a); Smith v. City of New York, 611 F.Supp. 1080, 1084 (S.D.N.Y. 1985). An in camera review of the documents in question reveals communications between City agencies and the Corporation Counsel's office seeking legal advice on pending legislation. The challenge that these communications were not made in confidence is pure surmise. In any event, communication of legal advice between City agencies would not waive the privilege. See Hodges, Grant & Kaufmann v. United States, 768 F.2d 719, 721 (5th Cir. 1985).

Having found that both the predecisional privilege and the attorney-client privilege have been properly raised, we now must decide whether defendants have waived those privileges or whether the documents come within any recognized exception to those privileges.

[26] First, plaintiffs assert that defendants have impliedly waived any applicable privilege by having pled the affirmative defense of good faith. In support of their implied waiver argument, plaintiff cites Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975), where the court held that the assertion of an affirmative defense of good faith immunity constituted an implied waiver of the attorney-client privilege. In arriving at that conclusion the Hearn court relied on the Supreme Court's definition of good faith in Wood v. Stickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The test of good faith enunciated in Wood v. Strickland

included subjective and objective elements. Subsequently, however, the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), reacting to the proliferation and burdens of suits against governmental officials, replaced the subjective/objective test of Wood v. Strickland with an essentially objective test.

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Id. at 818, 102 S.Ct. at 2738.

Thus, utilizing the Harlow v. Fitzgerald definition of good faith, subjective intent or knowledge is not relevant to the assertion of a good faith immunity defense. Therefore, its assertion does not constitute an implied waiver of the attorney-client privilege.[18]

[27] Plaintiffs also rely on the crime or fraud exception to the attorney-client privilege asserting that the exception extends to intentional torts as well.[19] Having decided that the plaintiffs failed to state a claim for civil conspiracy, we reject outright their claim that a prima facie criminal conspiracy has been established. And since fraud has not been alleged, we address the only possible exception, that of intentional tort.

***16** The genesis of the assertion that there is a tort exception to the attorney-client privilege for torts is the oft quoted case of United States v. United Shoe Machinery Corporation, 89 F.Supp. 357 (D.Mass. 1950). In setting out the elements of the attorney-client privilege the Court added 'and not (d) for the purpose of committing a crime or tort . . ..' Id. at 358. While courts in many jurisdictions have quoted this passage, most of those courts, as the United Shoe court itself, did not have before them an issue of a tort exception. In short, the references to a tort exception were dicta.

It is clear, however, that the Second Circuit has not added torts to the crime or fraud exception. Only recently the Second Circuit had the occasion to review the crime or fraud exception and formulated it as follows:

> It is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.

In re Grand Jury Subpoena (Marc Rich & Co.), 731 F.2d 1032, 1038 (2d Cir. 1984) and cases cited therein; United States v. Bob, 106 F.2d 37, 40 (2d Cir. 1939), cert. denied, 308 U.S. 589, 60 S.Ct. 115, 84 L.Ed. 493 (1939).

Further evidence of judicial unwillingness to extend the crime or fraud exception to torts may be found in the rejection, by the Advisory Committee to the Federal Rules of Evidence, of the Uniform Rule of Evidence 26(2)(a) which included 'tort' in the formulation of its crime or fraud exception to the attorney-client privilege. 2 J. Weinstein, Evidence ¶503(d)(1)[01] (1982).[20] The Advisory Committee's report only excludes from the ambit of the attorney-client privilege advice 'sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud . . ..' 56 F.R.D. at 236.

The plaintiffs find support in two opinions by Judge Sand specifically extending the privilege exception to intentional torts. Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) and Irving Trust Co. v. Gomez, 100 F.R.D. 273 (S.D.N.Y. 1983). It is clear from Judge Sand's opinions that he was extending existing law. See e.g., Diamond, 95 F.R.D. at 505. We express no opinion as to the propriety of extending the crime or fraud exception to torts as we are bound by the Second Circuit's decision in Marc Rich which post-dated Judge Sand's innovative analysis.

[28] Finally, even were this court to accept the proposition that intentional torts should be added to the crime or fraud exceptions to the attorney-client privilege, we would nonetheless find that plaintiffs have failed to meet their burdens in overcoming the privilege. Apart from showing probable cause to believe that a crime or fraud [or tort] had been committed, the party attempting to defeat the privilege must show that 'the communications were in furtherance thereof' and 'that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud. . . .' In re Grand Jury Subpoena (Marc Rich & Co.), 731 F.2d at 1039.

*17 The plaintiffs have not provided a proffer of how the documents relate to the alleged tort. While plaintiffs often mention that Judge Brieant's opinion denying, in part, defendants' motion for summary judgment establishes plaintiffs' prima facie case, a proposition with which we have no disagreement, what plaintiffs have failed to do is make a prima facie showing that the documents which they seek somehow furthered the alleged due process violations.

> The attorney-client privilege is withdrawn upon a prima facie showing that the lawyer's advice was designed to serve his client in commission of a fraud or crime. United State v. Bob, 106 F.2d 37, 40, 125 A.L.R. 502 (2d Cir. 1939), cert. denied 308 U.S. 589, 60 S.Ct. 115, 84 L.Ed. 493 (1939).

Union Camp Corporation v. Lewis, 385 F.2d 143, 144 (4th Cir. 1967).

As the Second Circuit noted in United States v. Bob, 106 F.2d at 40, 'There must, of course, be first established a prima facie case; the mere assertion of an intended crime or fraud is not enough to release the attorney.' See also Coleman v. American Broadcasting Companies, Inc., 106 F.R.D. 201, 203 (D.C.D.C. 1985) ('In order to defeat this important privilege, more is necessary than mere allegations of wrongdoing on the part of the attorney or naming the attorneys as defendants in the litigation.') More recently, in In re Grand Jury Subpoena (Marc Rich & Co.), 731 F.2d at 1038–39, the Second Circuit took care to distinguish between those documents giving legal advice used in the business and those giving legal advice used in the fraudulent activity. Only that advice which actually furthered the ongoing fraud was exempted from the protection of the attorney-client privilege. Finally, our in camera inspection of the documents confirms our conclusion, reached without the benefit of such a viewing, that there is no basis to overturn the assertion of the attorney-client privilege claim.

Although we find that the attorney-client and governmental privilege have been properly asserted, we address plaintiffs' assertion that the policy considerations behind 42 U.S.C. § 1983 override those privileges. While we agree with the plaintiffs that § 1983 has an important federal purpose, we cannot agree that it trumps all claims of privilege. See, e.g., Ghandi v. Police Department of City of Detroit, 747 F.2d 338 (6th Cir. 1984) (balancing informant's qualified privilege over civil rights claimant); Black v. Sheraton Corporation of America, 564 F.2d 550 (D.C. Cir. 1977) (same).

[29] We recognize that the governmental privilege is qualified, not absolute. Skibo v. City of New York, 109 F.R.D. 58, 63 (E.D.N.Y. 1985); Mobil Oil, 102 F.R.D. at 5. Thus, the Court must balance the competing interests of full disclosure with the rationale underlying the privilege. In re Franklin National Bank Securities Litigation, 478 F.Supp. 577, 582 (E.D.N.Y. 1979). Chief Judge Weinstein articulated a five part test.

> In this balancing of competing interests, some of the factors that assume significance are (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

***18** In re Franklin National Bank Securities Litigation, 478 F.Supp. at 583 [citations omitted].

Applying Judge Weinstein's balancing test we find parts three (the seriousness of the issues) and four (the role of the government) favor the plaintiffs.

> The Congressional policy in favor of broad enforcement of the civil rights laws supports complete discovery when their violation is alleged. Similarly, when the case involves colorable claims of official misconduct the Courts are reluctant to permit officials to withhold relevant material by claiming privilege.

Kinoy v. Mitchell, 67 F.R.D. 1, 12 (S.D.N.Y. 1975) [footnotes omitted]. In addition, the government body claiming the privilege is the very body accused of violating the plaintiffs' rights. See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 329 (D.D.C. 1966), aff'd on op. below, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

Counterbalancing these factors is the fundamental rationale for the governmental privilege, which would clearly be served by upholding the privilege given the specific nature of the documents withheld, and parts one and two of the balancing test which strike decidedly against disclosure.

It is obvious that the more relevant the documents are to the issues in the case, the greater the reason for disclosure. In re Franklin National Bank, 478 F.Supp. at 586 ('The information in the reports is relevant to numerous issues in the litigation; the litigant's claim of need is concrete, not abstract'). Here, however, no proffer of relevancy has been made and an in camera inspection shows no specific relevancy to the matter at bar. See United States v. Harley, 682 F.2d 1018, 1020 (D.C.Cir. 1982). As previously explained, this case is very straight forward. The plaintiffs either received due process or not, and either there was a taking or not. The communications between the Corporation Counsel and the various City agencies do not change the process which plaintiffs were due or the process they received. Similarly, if there was a property interest taken without just compensation, the communications would remain irrelevant. Where the denial of access to documents 'would not significantly deprive them of relevant evidence . . . the argument for disclosure is not compelling.' In re Franklin National Bank, 478 F.Supp. at 588.

Weighing equally against disclosure is the availability of other evidence. In each case where production has been ordered the evidence was not otherwise available. See, e.g., Kinoy, 67 F.R.D. at 12 ('In this case plaintiffs have made the strongest possible showing of need for the documents requested.'); In re Franklin

National Bank, 478 F.Supp. at 586 ('This factor is powerful in a situation like that presented here, where no satisfactory alternative source of information exists.'). Plaintiffs have shown neither a need, nor an unavailability of alternative sources. Plaintiffs' showing on this prong might have been stronger had they conducted extensive discovery. However, despite urging from this Court, plaintiff has taken only one deposition. In these circumstances, we will not breach a recognized privilege in order to compensate for plaintiffs' lack of diligence in discovery.

*19 In sum, we find that the defendants have properly invoked the attorney-client and governmental privileges, and that these privileges have neither been waived nor is any exception been found applicable. We therefore deny plaintiffs' motion to compel production of the 45 documents as to which attorney-client and/or governmental privilege was asserted.

Settlement Document

[30] Plaintiffs have moved to compel production of a settlement agreement entered into between the City and the new owners of the property involved in this litigation.[21] Defendants have resisted production on the ground that this settlement document is privileged under Rule 408 of the Federal Rules of Evidence.[22]

In advancing their claim of privilege defendants rely on affidavits from the signatories to the settlement agreement which state that the maintenance of confidentiality was an integral part of their agreement. The intention of the parties to the agreement, even if reflected in a confidentiality clause (which was not included here), is not controlling. Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 562 (S.D.N.Y. 1977). We note, moreover, that defendants' reliance on affidavits was compelled by the parties' failure to take the appropriate and surer measure of requesting the court to seal the settlement agreement. See Palmieri v. State of New York, 779 F.2d 861 (2d Cir. 1985).

In any event, defendants' reliance on Fed. R. Evid. 408 as a privilege to prevent disclosure is equally unavailing. This evidence rule limits a document's relevance at trial; not its disclosure during discovery.[23] NAACP Legal Defense and Educational Fund, Inc. v. Department of Justice, 612 F.Supp. 1143, 1146 (D.D.C. 1985); Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 (D.D.C. 1983).

Rule 408, which is designed to encourage frank and open discussions in order to encourage settlements rather than protracted litigation, accomplishes its purpose in a limited fashion.

> The protection afforded by Rule 408 is far less broad that the [defendant] asserts. While its intent is to foster settlement negotiations, the sole means chosen to effectuate that end is a limitation on the admission of evidence produced during settlement negotiations for the purpose of proving liability at trial, not the application of a broad discovery privilege. Otherwise parties would be unable to discover compromise offers which could be offered for a relevant purpose, i.e., proving bias or prejudice of a witness, opposing a claim of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or enforcing a settlement agreement.

Center For Auto Safety, 576 F.Supp. at 749. See also Olin Corporation v. Insurance Company of North America, 603 F.Supp. 445, 449 (S.D.N.Y. 1985); J. Weinstein and M. Berger, 2 Weinstein's Evidence, ¶408[01] (1982).

[31] Nevertheless, our rejection of defendants' claim of privilege under Rule 408 does not end the inquiry. In order to compel production the plaintiffs must show that the material they seek to discover comes within the scope of discovery allowed by Rule 26(b) of the Federal Rules of Civil Procedure, i.e., plaintiffs must show that the settlement agreement sought will be admissible or lead to admissible evidence. Bottaro v. Hatton Associates, 96 F.R.D. 158, 159 (E.D.N.Y. 1982). Plaintiffs have failed to make such a showing.

***20** [32] Plaintiffs assert that they seek the settlement agreement 'to determine whether [plaintiffs] have been treated discriminatorily compared to the treatment afforded by [sic] the new owners of the property.' (Plaintiffs' brief at 40). With such a stated purpose, the settlement agreement would not be admissible at trial, since its introduction would violate Rule 408 as it would be utilized to prove liability. Nor have the plaintiffs articulated any reasonable connection between the settlement agreement entered into in 1986 and the events of 1982 which could lead to evidence admissible in this action. Finally, plaintiffs suggest in their reply brief that 'the Settlement Agreement can be used to impeach witnesses called to the stand by the defendants.' (Plaintiffs' Reply at 29). No further explanation is provided of how or to whom plaintiffs refer. Such broad, unsubstantiated allegations are not sufficient to enable plaintiffs to come within the permissible uses of settlement agreements accorded by Rule 408. See Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 486 F.Supp. 414, 423 n.10 (S.D.N.Y. 1980).

In sum, we believe that the policy considerations behind Fed. R. Evid. 408 require the type of relevance analysis we have just undertaken when settlement documents are sought in discovery. In this connection we find Judge Neaher's characterization of this process instructive.

> The question in this case, however, is whether an inquisitor should get discovery into the terms of the agreement itself based solely on the hope that it will somehow lead to admissible evidence on the question of damages. Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement. Since the terms of settlement do not appear to be reasonably calculated to lead to discovery of admissible evidence and the defendants have not made any showing to the contrary, this justification for a Rule 37 order must fail.

Bottaro, 96 F.R.D. at 160.

Accordingly, having concluded that plaintiffs have made no showing that discovery of the settlement agreement is admissible or will lead to admissible evidence, we find that the settlement agreement is outside the scope of discovery and therefore deny the motion to compel.

Deposition Questions

Plaintiffs have moved to compel defendant Irving E. Minkin to answer questions that his counsel directed him not to answer during his deposition and for an order directing Minkin to answer questions regarding demolition. In response to a request from chambers, plaintiff's counsel selected certain examples of questions and answers and categorized them by the nature of the objection. We have read each question and objection submitted under cover of counsel's letter

of October 23, 1986. Having done so, we make the following observations and rulings.

*21 First, while these transcripts do not necessarily represent the nadir of deposition decorum, they certainly do not approach the level of civilized, courteous professionalism which this and every court can properly expect from counsel. See Manual on Discovery, United States District Court, Eastern District of New York (including Standing Orders of the Court on Effective Discovery in Civil Cases), 1984. It is hoped that future depositions will be conducted in a cooperative and courteous spirit and that counsel will recognize, at a minimum, that it is in their and their client's self-interest to have meaningful and rapid discovery, which is not sidetracked by colloquy and improper questioning.

Second, plaintiffs have contended that the City's assertion of the attorney-client privilege was improper because there was no attorney-client relationship between Mr. Minkin and the Corporation Counsel. We reject that argument for the reasons stated in our discussion earlier on the attorney-client privilege. Supra at 4___-4___.

[33] Third, we have reviewed the other cited examples of directions to the witness not to answer and regretably find them well-founded. While as a general rule witnesses ought not to be directed not to answer questions on grounds other than privilege, see Order dated December 18, 1985, we cannot say that there are not some occasions when a defending attorney is left with no truly viable alternaive. Unfortunately, some of those occasions occurred here. We cite two examples: 'Mr. Minkin, do you feel oppressed?' (p. 122) and 'What are you telling me, plan examiners are idiots; they approved the first one and made a mistake on the other one?' (p. 722).

Finally, plaintiffs' requested a direction that Minkin answer questions about the demolition issue. Try as they might, plaintiffs have not persuaded us that they seek to inquire about an issue other than the one which may not be relitigated in federal court because of the doctrine of res judicata.

Accordingly, plaintiffs' motion to compel is denied in its entirety.

Additional Depositions

[34] Plaintiffs seek an order compelling the depositions of certain 'senior official' defendants, Fruchtman, Esnard and Sturz, and members of the Corporation Counsel's office. The subject of the depositions of senior City officials has already been addressed in a Memorandum and Order, dated September 12, 1985, and on a motion for reconsideration, which was denied on November 13, 1985. In relevant part, the September 12, 1985 order read:

> The depositions of numerous City employees and officials which have not been objected to should commence. The conduct of this discovery may obviate the need for the objected to discovery of senior City officials and counsel as well as the need for tenant discovery. During the depositions of the City employees, plaintiffs should pose questions concerning the involvement of senior officials and the terms of tenant relocation. In addition to possibly reducing the need for additional depositions, those questions should create a record upon which the City's objections may be resolved more intelligently. Thus, a ruling on the objections posed by the City to the depositions of senior officials and counsel, except as otherwise noted below, is reserved at this time.

*22 While we find it somewhat unusual that plaintiffs should renew this request

again after having taken only a single deposition, we nevertheless have reviewed plaintiffs' presentation, including the deposition transcript references, and have concluded that plaintiffs have adequately supported their request for the deposition of Sturz, since he was directly involved in the decision to revoke the alteration permit. With respect to all the other depositions sought, plaintiffs have failed to show at this stage the involvement of the desired deponent with a viable cause of action and/or the absence of an attorney-client privilege barrier.

Appointment of a Special Master

[35] For a second time plaintiffs have moved this Court to appoint a Special Master to supervise discovery. Plaintiffs complain that during the five days of Irving Minkin's deposition defense counsel made 116 speaking objections, 55 directions not to answer, had 15 discussions with the witness after the question and had 8 discussions with the witness before the answer. The inability of counsel to resolve routine discovery disputes amongst themselves has already required this Court to enter an order, dated December 18, 1985, establishing behavior rules to be followed at depositions in this case.[24] Nevertheless, as the discussion below sets out, the appointment of a special master is a most unusual remedy and wholly inappropriate here.

A court may appoint a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure. This reference is limited by subsection (b). 'A reference to a master shall be the exception and not the rule . . .. [A] reference shall be made only upon the showing that some exceptional condition requires it.' See generally 5A Moore's Federal Practice ¶53.05.

The plaintiffs cite only one case in either their moving or reply brief to support their request. That case, In re Agent Orange Product Liability Litigation, 97 F.R.D. 427 (E.D.N.Y. 1983), is readily distinguishable from the one at bar. The Agent Orange litigation concerned some four million documents and thousands of claims of privilege. The instant action pales in comparison.

The Supreme Court has held that neither calendar considerations, complexity of issues, nor the possibility of long trials are exceptional conditions warranting a Special Master. LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). The circuit courts have interpreted this rule as 'sharply limiting' the use of Special Masters. Liptak v. United States, 748 F.2d 1254, 1257 (8th Cir. 1984). See Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 712 (7th Cir. 1984), cert. denied, 469 U.S. 1018, 105 S.Ct. 432, 83 L.Ed.2d 359 (1984). Indeed, only recently the Second Circuit admonished District Courts against using Special Masters to avoid performance of judicial duty. Madrigal Audio Laboratories, Inc. v. Cello, Ltd., 799 F.2d 814, 230 U.S.P.Q. 764, 766 n.2 (2d Cir. 1986).

***23** Having found no special circumstances in this case, we therefore deny the plaintiffs request to appoint a Special Master.

Request For Attorney's Fees

[36] Having rejected plaintiffs' challenges to defendants' privilege assertions, their motion to compel Minkin to answer deposition questions, and only having partially granted their request for additional depositions, we find no basis for an award of attorney's fees. We therefore deny plaintiffs' request.

Footnotes

1 Whether this structure is one building or more than one building has been an issue in dispute throughout this proceeding. See Judge

Brieant's June 24, 1985 opinion. In fact, plaintiffs allege that the three buildings were originally built as one. Amended Complaint, ¶24. We use the term building for the entire structure in dispute and discuss this issue in more depth infra.

2 For a more detailed discussion of the procedural history of this case see the two earlier opinions of Judge Brieant, dated June 24, 1985 and October 31, 1985.

3 Weissman v. City of New York, No. 14180/82 (N.Y. Sup.Ct.), rev'd, 96 A.D.2d 454, 464 N.Y.S. 2d 764 (1st Dep't), appeal dismissed, 60 N.Y.2d 815, 469 N.Y.S. 2d 700, 457 N.E. 2d 807 (1983) ('Weissman I').

4 A civil conspiracy is a combination of two or more persons to do an unlawful act by unlawful means or for an unlawful purpose.' Powell v. Kopman, 511 F.Supp. 700 (S.D.N.Y. 1981). Section 1985 explicitly requires that a conspiracy be between 'two or more persons.' This Court recognizes that a municipality is a person for purposes of 42 U.S.C. §§ 1983 and 1985, Owens v. Haas, 601 F.2d 1242, 1247 (2d Cir. 1979), cert. denied, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979); Heimbach v. Village of Lyons, 597 F.2d 344, 346 (2d Cir. 1979), but we do question whether a second person has been alleged in this conspiracy. 'It is the law of this Circuit that that requirement is not met where a conspiracy is alleged to have occurred among a corporation and its directors, 'all of whom acted solely within their official capacities." Legal Aid Society v. Association of Legal Aid Attorneys of the City of New York, 554 F.Supp. 758, 766 (S.D.N.Y. 1982). The same rule has been applied when the conspiracy was alleged to have been perpetrated by a law school, its trustees and members of its faculty, Herrmann v. Moore, 576 F.2d 453, 459 (2d Cir. 1978), cert. denied, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 679 (1978), or a union and its officials. Gilliard v. New York Public Library, 597 F.Supp. 1069, 1075 (S.D.N.Y. 1984). Similarly, plaintiffs here have alleged only acts by city employees within their official capacity. While not deciding the matter on this basis, this court is hard pressed to find more than one 'person' involved in this alleged conspiracy.

5 Curiously, the allegations against Esnard include the following: 'On January 30, 1986, a corporation owned by the plaintiffs was sentenced in the Criminal Court of the City of New York to pay a fine of $20,000 because of the violations, and such fine has been paid.' (Proposed Amended Complaint, ¶49).

6 The allegations against Ms. Specktor appear in the Amended Complaint, but are absent from the proposed Second Amended Complaint.

7 As a separate ground for their opposition, defendants correctly point out that whether state and local governments must pay damages to a landowner who claims a temporary 'taking' by regulation is an open question. Given the open status of the legal issue raised, we decline to deny the motion to amend on this ground, since the defendants have not established that under no circumstances could relief be awarded. McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980); Conley v. Gibson, 355 U.S. 41,

45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957). Nor do we find any prejudice to the defendants from plaintiffs pleading this new legal theory as it does not change the scope of discovery nor concern any additional facts.

8 We have been furnished with plaintiffs' motion before Judge Leisure seeking reconsideration of the dismissal of plaintiffs' claim for damages based upon the denial of the demolition permit. In their motion plaintiffs rely exclusively on Davidson v. Capuano, 792 F.2d 275 (2d Cir. 1986), a case which we believe to be readily distinguishable from the case at bar. In Davidson, the Second Circuit held that a successful plaintiff in a state Article 78 proceeding where damages are not available should not be barred from seeking damages in federal court in a § 1983 action. We find Finkelstein and its progeny to create three classes of potential federal plaintiffs. The first are those who were successful in their Article 78 proceeding and are entitled to bring a damage action in federal court. See, e.g., Giano v. Flood, 803 F.2d 769 (2d Cir. 1986); Davidson, 792 F.2d at 275; Catten v. Coughlin, 644 F.Supp. 1228 (S.D.N.Y. 1986) (Duffy, J.). The second category of potential plaintiffs are those who lost their Article 78 proceeding on procedural grounds. Having never had an opportunity to have their claim judged on the merits, under traditional res judicata principles, these plaintiffs still have a right to bring an action in federal court. J. Moore, 1B Moore's Federal Practice, ¶0.409 (2d ed. 1984). See, e.g., Fay v. South Colonie Central School District, 802 F.2d 21 (2d Cir. 1986); Leonardi v. Board of Fire Commissioners of Mastic Beach Fire District, 643 F.Supp. 610 (E.D.N.Y. 1986); Lundy v. Coughlin, No. 85 Civ. 5945, slip op. (S.D.N.Y. June 25, 1986) (Sand, J.) [Available on WESTLAW, DCTU database]. The third category of potential plaintiffs, and the one applicable to the instant matter, are those who have lost their Article 78 proceeding on the merits. Here the traditional policies of res judicata apply as well, see J. Moore, 1B Moore's Federal Practice ¶0.409 (2d ed. 1984), and remain unaffected by the Davidson doctrine. We see no suggestion in Davidson that having been unsuccessful on the merits in state court, a plaintiff is entitled to a second bite at the apple in federal court. Of course, should Judge Leisure disagree, we will adjust this opinion accordingly.

9 The issue of the statute of limitation for 42 U.S.C. § 1983 actions is now before the Second Circuit in Okure v. Owens, 625 F.Supp. 1568 (N.D.N.Y. 1986), appeal docketed, No. 86–7343 (2d Cir. May 6, 1986). We note plaintiffs' counsel's failure to include the pending appeal in their citation, contrary to the obligation imposed by ethical responsibility of giving all subsequent history of a cited case including a pending appeal. Model Code of Professional Responsibility EC 7–23 (1979). We also note that that there were numerous errors in citations (including case names, subsequent history, volume and page numbers and jurisdictions) in the memoranda of both parties which obviously imposed an unwarranted burden on the Court.

10 Query whether the City is not required to be joined as the real party in interest under Fed. R. Civ. P. 17(a) since any judgment under the 'taking' claim would be payable by the City? See Unilever (Raw Materials) Ltd. v. M/T Stolt Boel, 77 F.R.D. 384, 388 (S.D.N.Y. 1977).

11 The circuits are split as to whether the statute of limitations should be applied retroactively. Compare Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984), applying Wilson prospectively only with Wycoff v. Menke, 773 F.2d 983, 986 (8th Cir. 1985), cert. denied, 3en U.S. 4en, 106 S.Ct. 1230, 89 L.Ed.2d 339 (1986); Fitzgerald v. Larson, 769 F.2d 160, 163 (3rd Cir. 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 1985 (3d Cir.), cert. denied, 3en U.S. 4en, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985) applying Wilson retroactively.

12 We realize that the Second Circuit, in Okure, may address the issue of retroactivity of the statute of limitations. Obviously, if the Second Circuit decides the retroactivity question differently than we have, a motion for reconsideration could be made.

13 13 DR 5–102 reads as follows:
Withdrawal as Counsel When a Lawyer Becomes a Witness
(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5–101(B)(1) through (4).
(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

14 It is also possible that Taussig's or Mohr's testimony would be privileged. However, that possibility is not the basis of our decision.

15 The defendants assert that 'where it is not the trial counsel, but another attorney in a large government office whose testimony is allegedly likely to be necessary, the possibility that counsel will have to argue his own credibility to the jury, one of the traditional concerns underlying the rule, does not arise.' Defendants' Brief at 41. We agree, but remain perplexed by the listing of Gabriel Taussig, a proposed defendant and potential witness, as lead counsel for the defendants. See also Grand Jury Subpoena of Ford v. United States, 756 F.2d 249, 151–52 (2d Cir. 1985) (approving a 'Chinese Wall' to insulate counsel).

16 Plaintiffs' motion reads in full:
A. pursuant to Fed. R. Civ. P. 37(a):
(i) compelling the City defendants to produce documents requested by plaintiffs that the City defendants have withheld and redacted based on:
(a) the supposed applicability of the predecisional privilege and/or the attorney-client privilege;
(b) the supposed applicability of Rule 408 of the Federal Rules of Evidence;
(c) the requests supposedly being overly broad or vague;
(ii) compelling defendant Irving E. Minkin to answer questions posed during his deposition that Corporation Counsel directed him not to

answer, and to answer questions regarding demolition;
(iii) compelling certain of the defendants who are 'senior officials' and attorneys to appear for deposition;
(iv) directing the City defendants to pay to plaintiffs the reasonable expenses, including attorneys fees, incurred by plaintiffs on this motion;
(v) granting plaintiffs such other, further or different relief as seems just and proper to the Court.
B. pursuant to Fed. R. Civ. P. 53(a) appointing a Special Master to supervise all examinations before trial and all other aspects of pre-trial discovery.

17 Specifically, affidavits were submitted by: Charles M. Smith, Commissioner of the Department of Buildings; Alan H. Kleinman, Acting Director of the Mayor's Office of Single Room Occupancy Housing; Paul A. Crotty, Commissioner of the Housing Preservation Department and Robert Esnard, Deputy Mayor for Physical Development.

18 We note that the few courts which have adopted the implied waiver of the attorney-client privilege doctrine have agreed that it is to be narrowly applied. Hearn v. Rhay, 68 F.R.D. at 582; Connell v. Bernstein-Macaulay, Inc., 407 F.Supp. 420, 423 (S.D.N.Y. 1976).

19 For a more complete discussion see Silbert, Crime Fraud Exception, 23 Am. Crim. L. Rev. 351, 354–55 (1986).

20 Uniform Rule of Evidence 26(a) provides:
the 'privilege shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort.'
Reprinted in 2 J. Weinstein, Evidence ¶503(d)(1)[01] n.9 (1982).

21 On January 6 1986, the plaintiffs sold the property located at 400–404, 406 West 57th Street to a group headed by Toa Construction and Rikya Yamagata. As part of this sale, the plaintiffs assigned any and all rights in their pending litigation in Weissman v. City of New York, Index No. 08019/83. Thereafter, the City and the new owners entered into a written agreement settling the assigned action.

22 Rule 408 of the Federal Rules of Evidence provides:
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

23 The legislative and judicial reluctance to extend the 'settlement privilege' doctrine of Rule 408 to the discovery phase of a litigation is understandable. First, since the 'settlement privilege' was not a privilege recognized at common law, the usual parallel between privilege law for discovery and evidentiary purposes is not controlling. Oliver v. Committee for Re-Election of the President, 66 F.R.D. 553 (D.D.C. 1975). Second, there would appear to be little need for such an extension. In most cases, statements made for, or in the course of, settlement negotiations have been communicated to the adversary and need not be 'discovered.' For non-communicated settlement statements or documents, the attorney-client and work product privileges would often supply sufficient protection.

24 We note that this motion has not been premised, as indeed it could not have been, on judicial unavailability.

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