

process, messenger service, transportation, and deposition transcripts). The Second Circuit, however, has disallowed reimbursement for computer research on the grounds that it "is merely a substitute for an attorney's time that is compensable under an application for attorneys' fees and is not a separately taxable cost." *United States v. Merritt Meridian Const. Corp.*, 95 F.3d 153, 173 (2d Cir. 1996); see also *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir.1998). Therefore, I will not allow plaintiff's attorney to be reimbursed \$125.13 for her computer research time.

Accordingly, plaintiff's attorney is entitled to an award of costs in this case in the amount of \$3,525.86.

CONCLUSION

For the foregoing reasons, plaintiff's motion for attorney's fees and costs, pursuant to 42 U.S.C. § 1988, is granted in part, and plaintiff's attorney, Margaret Somerset, is awarded \$94,738.16. That sum shall be paid within forty-five (45) days of the entry of this order.

IT IS SO ORDERED.



UNITED STATES of America, Plaintiff,

Jeffrey E. EPSTEIN, Ivan S. Fisher, Ellyn Bank, Debra Elisa Cohen, Diane Fisher d/b/a the Fisher Group, Fisher & Soffer a/k/a Fisher & Sophir, D. Gerzog, Robert Heilbrun, Suzanne McDermott, Christopher H. Martin, Jesse Siegel a/k/a Jessie Siegel, Siegel, Martin & Heilbrun, Ron Soffer, and Carmen Tausik, Defendants.

No. 96 CIV. 8307(DC).

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

March 31, 1998.

Federal government, as landlord, brought proceeding to evict tenants from

building. Government moved for partial summary judgment. The District Court, Chin, J., held that: (1) lease unambiguously provided that written consent to sublease was required, precluding claim that government orally consented to sublease; (2) court could apply federal common law to question of whether landlord's consent to sublease was subject to requirement that it not be unreasonably withheld; (3) court would apply law of New York, as there was no federal common law on question and no need to create any; and (4) under New York law there was no requirement that consent not be unreasonably withheld.

Motion granted.

1. Contracts ⇌147(2)

If an agreement sets forth the parties' intent clearly and unambiguously, a court need look no further.

2. Contracts ⇌176(2)

Whether the text of an agreement is ambiguous or unambiguous is a matter of law to be decided by the court.

3. Contracts ⇌143(2)

A contract is not deemed ambiguous unless it is reasonably susceptible of more than one interpretation, and the court makes this determination by reference to the contract alone.

4. United States ⇌70(7)

Provision of lease with United States as landlord, that "Tenant may sublet...with the advance written permission of Landlord," precluded any oral sublease agreement.

5. Landlord and Tenant ⇌76(3)

Generally, under New York law, when a lease requires a tenant to obtain the prior written consent of the landlord to sublet or assign leased premises, a landlord may refuse consent arbitrarily, unless the lease contains a clause specifically stating that the landlord may not unreasonably withhold such consent.

6. Federal Courts ⇨413

Federal court could apply federal common law, as opposed to state law, to determination of rights under real property lease with government as landlord.

7. Federal Courts ⇨413

Law of New York, rather than federal common law, would be applied to question whether consent of government, as landlord, to tenant's sublease of premises was subject to requirement that it not be unreasonably withheld; there was no body of federal common law governing question and no pressing need for national uniformity calling for creation of such law, while state law of landlord and tenant was well developed and parties probably entered into lease believing state law would apply.

8. United States ⇨70(7)

Under New York law, there was no requirement that consent of federal government, as landlord, to sublease not be unreasonably withheld; there was no provision to that effect in lease, and under those circumstances consent could be withheld for any reason or no reason.

Mary Jo White, United States Attorney, by Serene K. Nakano, Assistant United States Attorney, New York City, for the United States.

Wachtel & Masyr, LLP, by Steven J. Cohen, New York City, for Jeffrey E. Epstein.

Gage & Pavlis, by G. Robert Gage, Jr., Ellen J. Casey, New York City, for Ivan S. Fisher, Diane Fisher, Fisher & Soffer.

Ellyn Bank, New York City, pro se.

Debra Elisa Cohen, New York City, pro se.

■ D. Gerzog, New York City, pro se.

Robert Heilbrun, New York City, pro se.

1. The additional defendants are Ellyn Bank, Debra Elisa Cohen, Diane Fisher d/b/a The Fisher Group, Fisher & Soffer a/k/a Fisher & Sophir, ■ D. Gerzog, Robert Heilbrun, Suzanne McDermott, Christopher H. Martin, Jesse Siegel a/k/a Jessie Siegel, Siegel, Martin & Heilbrun,

Suzanne McDermott, New York City, pro se.

Christopher H. Martin, New York Defendants Service, New York City, pro se.

Jessie Siegel, New York City, pro se.

Siegel, Martin & Heilbrun, by Robert Heilbrun, New York City, pro se.

Ron Soffer, New York City, pro se.

Carmen Tausik, New York City, pro se.

OPINION

CHIN, District Judge.

In this case, the United States (the "Government") seeks to evict defendants from a building formerly used as a residence by the Deputy Consul General of the Islamic Republic of Iran ("Iran"). After diplomatic and consular relations with Iran were severed in 1980, the Office of Foreign Missions ("OFM") of the United States Department of State took possession of the building pursuant to the Foreign Missions Act, 22 U.S.C. § 4301 *et seq.* OFM leased the building to defendant Jeffrey E. Epstein in 1992. Epstein sublet the building to defendant Ivan S. Fisher in 1996, purportedly without the Government's consent. Fisher, in turn, sublet a portion of the building to several subtenants.

In 1996, the Government purported to terminate Epstein's lease and brought this action to eject Epstein and Fisher from the building. The Government later amended its complaint to assert a claim for ejectment against the subtenants as well.¹ The Government also sought to recover back rent from Epstein and Fisher.

Epstein and Fisher oppose ejectment on numerous grounds, some of which were rejected when I heard oral argument in this case on December 17, 1997. Defendants' sole remaining defenses are that (1) OFM orally consented to Epstein's proposed sublet of the premises to Fisher, and (2) OFM did not properly terminate Epstein's lease be-

Ron Soffer, and Carmen Tausik (collectively, the "Subtenants"). The Subtenants were added as defendants after the Government learned that Fisher had sublet to them without consent of OFM.

cause it breached an implied covenant of good faith and fair dealing by unreasonably withholding written consent to Epstein's request to sublet to Fisher.

Because I find as a matter of law that (1) the lease unambiguously required the prior written consent of OFM for Epstein to sublet or assign the premises, thereby rendering any alleged oral consent invalid, and (2) OFM was entitled under the lease to unreasonably withhold its written consent to Epstein's request to sublet to Fisher, the Government's motion for partial summary judgment on its claim for ejectment is granted as against all defendants.

BACKGROUND

A. *The Facts*

The premises at 34 East 69th Street in Manhattan (the "Premises") were once the residence of the former Deputy General Consul of Iran. When the United States severed diplomatic ties with Iran in 1980, the Deputy General Consul vacated, but the Premises remained the property of Iran. The Government, through the Secretary of State, was entrusted with the care and maintenance of the Premises under the Foreign Missions Act ("FMA"), 22 U.S.C. § 4305(c), and the Vienna Convention on Consular Relations, Apr. 24, 1963, art. 27(1)(a), 21 U.S.T. 77, 596 U.N.T.S. 261, a multilateral treaty entered into by the United States and Iran, among other nations.

In 1992, OFM entered into a two-year lease with Epstein, to run from February 1, 1992 through January 31, 1994. The agreed rent was \$15,000 per month. Pursuant to the lease's Use Clause, only Epstein, his family, servants, or approved subtenants or assignees could occupy the premises. Under the Assignment and Sublease Clause, Epstein was required to obtain prior written consent of OFM to assign or sublet the Premises. The lease contained no clause prohibiting OFM from unreasonably withholding its consent to a sublet or assignment.

On August 28, 1992, OFM and Epstein extended the lease for three more years, to January 31, 1997. The lease amendment did not alter either the Use Clause or the As-

signment and Sublease Clause. Epstein was granted, however, a right of first refusal to renew the lease upon its expiration at the end of January, 1997.

Epstein and his family continued to reside at the Premises until January of 1996, at which time Epstein abandoned. OFM did not discover that Epstein had abandoned the Premises, however, until several months later. In March of 1996, Epstein commenced negotiations with Xenophon Galinas for a possible sublease or assignment of the Premises. The proposed arrangement between Epstein and Galinas included payment by Galinas to Epstein of \$100,000 for improvements to the Premises made by Epstein during his tenancy. At the same time, Epstein also commenced negotiations to sublet the Premises to Fisher. Fisher informed Epstein, however, that he would not enter into a sublease unless it was approved by the State Department and Fisher could be assured that he could remain in the Premises beyond January 31, 1997. Epstein told Fisher that he had a right of first refusal under the lease amendment, and that pursuant to this right, he would take all necessary steps to renew at the end of the lease term.

In the meantime, Galinas contacted OFM directly about a new lease for the Premises beginning in February of 1997. Negotiations between Galinas and OFM culminated in a "letter agreement" dated April 12, 1996 by which Galinas agreed to rent the Premises for a five-year term beginning February 1, 1997 for \$16,000 per month, with yearly increases, up to \$18,000 per month for the last year of the lease term. This agreement was expressly made subject to Epstein exercising his right of first refusal and renewing his lease for personal use only. In other words, OFM told Galinas that it would not consent to any request by Epstein for a sublet beyond January 31, 1997, and that it would permit Epstein to renew the lease beyond that date only if he occupied the premises personally.

On April 16, 1996, Epstein notified OFM by letter that he intended to exercise his right of first refusal and renew the lease. Epstein contends that in a telephone conference between Richard Massey of OFM and

Jeffrey Schantz, Epstein's transaction counsel, on April 19, 1996, OFM orally consented to Epstein's request to sublet the Premises to Fisher. The same day, Epstein wrote back, requesting "written confirmation" of OFM's alleged approval. By letter dated April 26, 1996, OFM formally responded to Epstein's request. In this letter, Thomas E. Burns, a representative of OFM, informed Epstein of OFM's intention to lease the Premises to Galinas beginning February 1, 1997 in the event that Epstein decided not to renew the lease and occupy the premises personally, and denied Epstein's request to sublet the Premises to Fisher. OFM's stated reasons for the denial were to (1) "minimize any difficulties in turning over the house to the tenant we have selected should Mr. Epstein decide not to reoccupy the premises under the new lease," and (2) "minimize the potential for damage to the premises from a short-term tenant occupancy." (Schantz Aff., Exh. D). OFM did, however, grant Epstein permission to sublet the Premises to Galinas for the remainder of 1996.

On May 3, 1996, Epstein again wrote to OFM, formally exercising his right of first refusal, believing such right to have been triggered by the April 12, 1996 letter agreement between OFM and Galinas. Thereafter, on May 7, 1996, Epstein and Fisher entered into a sublease agreement at a rental price of \$20,000 per month, despite OFM's express denial of Epstein's request for permission to sublet to Fisher. Fisher claims to have entered into the sublease agreement based on Epstein's representations that the sublease was approved by the State Department and that Epstein had properly exercised his right of first refusal to renew the lease. The original sublease was to commence May 7, 1996 and terminate on January 31, 1997. In the event that Epstein's lease with OFM was extended, and the new rent under that lease did not exceed \$20,000 per month, the sublease would be automatically extended for an additional five-year period.

On May 8, 1996, OFM wrote to Epstein informing him that his attempt to exercise his right of first refusal was premature because OFM had not yet made a formal offer to lease the Premises to someone else. On

May 10, 1996, OFM again wrote to Epstein reiterating that the exercise of his right of first refusal was premature, and explaining that the prior arrangement with Galinas was not a binding contract, but rather merely an "expression of interest." Then, on May 16, 1996, OFM officials visited the Premises and discovered that Fisher, not Epstein, was in possession.

Throughout this period, Epstein continued to pay, and OFM continued to accept, rent for the Premises, despite its knowledge that Fisher was in possession. OFM accepted and deposited Epstein's May 1996 rent check on May 28, 1996. On June 3, 1996, OFM sent Epstein a notice of default, as required by the lease, stating that he was in violation of (1) the Use Clause, because he was no longer personally occupying the premises, and (2) the Assignment and Sublease Clause, because he had sublet to Fisher without prior written consent of OFM. Consistent with the terms of the Lease, Epstein was given 30 days to cure the default. On June 28, 1996, OFM accepted Epstein's June rent check. The cure period then expired on July 10, 1996. Epstein had not cured by this time, but rather than terminating the lease, OFM served Epstein with a 10-day notice to cure and demanded the July rent. OFM then accepted Epstein's check for the July rent. Finally, on August 7, 1996, OFM notified Epstein that the amended lease would be terminated as of August 23, 1996 for failure to cure the defaults. OFM demanded that Epstein vacate the Premises and return the keys on or before that date.

Despite OFM's notice of termination, Epstein tendered August rent on August 30, 1996. On September 13, 1996, OFM wrote to Epstein stating that rent was being accepted only through August 23, 1996, and refunded the balance to Epstein. On September 16, 1996, OFM wrote to Fisher advising that the lease agreement between OFM and Epstein had been terminated, that he was occupying the premises illegally, and demanded that the Premises be vacated immediately. Fisher met with an Assistant United States Attorney on September 23, 1996, who informed Fisher that Richard Massey, the OFM representative with whom Epstein dealt, would

swear under oath that he never orally approved the sublet to Fisher. Fisher contends that he offered to continue paying rent directly to OFM rather than to Epstein, an offer to which the Government never responded. At that time, Fisher stopped paying rent to Epstein pursuant to the sublease.

B. *Prior Proceedings*

1. *The Original Actions*

The Government commenced this action against Epstein and Fisher in October of 1996. It seeks a declaration by the Court that it is entitled to exclusive possession of the Premises and that it is entitled to have Epstein and Fisher ejected therefrom because Epstein's lease was properly terminated as of August 23, 1996. In addition, the Government seeks dismissal of Fisher's first and second counterclaims, which seek equitable relief against the Government.² Finally, the Government demands back rent from Epstein and/or Fisher.

In February of 1997, Epstein commenced a holdover proceeding in the Civil Court of the City of New York against Fisher for nonpayment of rent under the terms of the sublease. Fisher removed the state court action to this Court.

The Government moved for partial summary judgment on its claim for ejection of Epstein and Fisher. In addition, it sought an order requiring Epstein and Fisher to pay into an escrow fund \$15,000 per month from August 23, 1996 to the date this action is finally decided. Epstein cross-moved against Fisher to remand its holdover action to state court, and Fisher cross-moved against Epstein for consolidation of the holdover action with the pending federal action.

2. In its first counterclaim, Fisher seeks a declaration that the sublease is valid and that Fisher is lawfully entitled to full possession and use of the premises. In its second counterclaim, Fisher seeks a declaration that the sublease was automatically renewed for a five-year term, commencing January 31, 1997, because Epstein properly exercised his right of first refusal.
3. Technically, Epstein asserted only the first argument, and Fisher asserted all four arguments. Epstein is no longer occupying the Premises, but

I heard oral argument on the motions on December 17, 1997. Collectively, Epstein and Fisher asserted four arguments in opposition to the Government's motion for summary judgment.³ They contend that there are genuine issues of material fact as to whether the Government properly terminated the lease entered into between OFM and Epstein. Specifically, they argue, factual questions exist as to (1) whether the Government waived Epstein's alleged default of the lease by accepting rent after the Government became aware that Fisher was occupying the premises; (2) whether the OFM-Epstein lease permitted oral approval of an assignment or sublease (*i.e.*, whether the Assignment and Sublet Clause is ambiguous on the issue of whether an assignment or sublet could be approved orally); (3) whether OFM in fact orally approved the sublease to Fisher; and (4) whether the Government breached an obligation of good faith and fair dealing inherent in its lease with Epstein by unreasonably withholding written approval of a sublet to Fisher, assuming the Court holds as a matter of law that oral approval was not permitted by the lease.

At the conclusion of the argument, I resolved several of the issues pertaining to these motions on the record. As an initial matter, I denied Epstein's motion to remand and granted Fisher's motion to consolidate. I then addressed the Government's motion for summary judgment and its application concerning the creation of an escrow fund.

I granted summary judgment in favor of the Government on Epstein's and Fisher's waiver argument, holding that "no reasonable fact finder could conclude from [the] undisputed facts and the sequence of events, including the acceptance of rent after the cure period but before the actual termination

still has an interest in the Court's decision as to whether OFM properly terminated its lease with Epstein. Moreover, Fisher's rights as subtenant derive from Epstein's rights as overtenant, for if I decide as a matter of law that the lease was properly terminated on August 23, 1996, neither Epstein nor Fisher has any right to occupy the Premises beyond that date. Thus, I will treat all four arguments in opposition to the Government's motion as though they were asserted by Epstein and Fisher jointly.

of the lease, that that could constitute a waiver in light of the very clear nonwaiver clause in the lease." (Tr. at 39). I reserved decision, however, on the following issues: (1) whether the lease unambiguously required that OFM's consent to an assignment or sublet be in writing, in which case Massey could not have orally consented, as a matter of law, to Epstein's sublet of the Premises to Fisher, (2) whether OFM was permitted under the lease to unreasonably withhold consent to Epstein's consent to a sublet to Fisher, or whether it was bound by an implied obligation of good faith and fair dealing, and (3) whether, assuming the latter, OFM in fact withheld its consent unreasonably.

Finally, I ordered Epstein to pay into an escrow fund eight days' worth of the \$15,000 rent for the month of August 1996 and an additional \$15,000 for September 1996 (because OFM had already accepted his tender of rent through August 23, 1996, and Epstein had collected rent from Fisher through September 30, 1996). Additionally, I ordered Fisher to pay into the fund \$15,000 per month, beginning October 1, 1996 to date, and continuing for each month thereafter.

2. *The Government's Addition of the Subtenants as Defendants*

In the course of discovery on its claims for relief against Epstein and Fisher, the Government learned that Fisher had further sublet the Premises to the Subtenants, also without the prior written consent of OFM. The Government then sought leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15 to name the Subtenants as additional defendants in the action. I granted the Government's motion on the record at the December 17, 1997 oral argument. The Government thereafter filed a second amended complaint and served a copy on each of the Subtenants.

In an effort to settle the case, I held a conference on January 28, 1998. At the conclusion of that conference, the Government requested permission to file a motion seeking partial summary judgment against the Subtenants. By stipulation and order dated March 5, 1998, all of the named Subtenants, except for Diane Fisher d/b/a The Fisher

Group and Ron Soffer, agreed to be bound by any order I entered with respect to Fisher's right to occupy the Premises. On March 13, 1998, after the Government submitted its motion, Diane Fisher executed the stipulation and order, also agreeing to be bound. To date, Soffer still has not executed the stipulation. Hence, the Government's motion for summary judgment against the Subtenants is still pending with respect to Soffer only.

DISCUSSION

A. *Standards for Summary Judgment*

The standards applicable to motions for summary judgment are well-settled. A court may grant summary judgment only where there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. See Fed. R.Civ.P. 56(c). Accordingly, the court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is inappropriate if, resolving all ambiguities and drawing all inferences against the moving party, *id.* at 255, 106 S.Ct. 2505 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)), there exists a dispute about a material fact "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

Once the moving party meets its initial burden of production, the burden shifts to the nonmoving party to demonstrate that there exist genuine issues of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To defeat a motion for summary judgment, however, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586, 106 S.Ct. 1348. There is no issue for trial unless there exists sufficient evidence in the record favoring the party opposing summary judgment to support a jury verdict in that party's

favor. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. As the Supreme Court stated in *Anderson*, "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50, 106 S.Ct. 2505 (citations omitted). With these standards in mind, I turn to the Government's motions for partial summary judgment.

B. The Government's Motion for Partial Summary Judgment against Epstein and Fisher

1. Whether the Lease Permitted Oral Consent to a Proposed Sublet or Assignment

Epstein and Fisher contend that summary judgment should be denied because there exists a genuine issue of material fact as to whether OFM orally consented to Epstein's request to sublet the Premises to Fisher. The Government, on the other hand, argues that the lease unambiguously required that a sublet or assignment of the Premises be approved in advance in writing, and that, therefore, even if OFM did orally consent, such consent was invalid as a matter of law.

[1-3] In contract disputes, the Court begins by examining the language of the contract itself to determine the parties' intent. *Stroll* ■ *Epstein*, 818 F.Supp. 640, 643 (S.D.N.Y.), *aff'd*, 9 F.3d 1537 (2d Cir.1993). If the agreement sets forth the parties' intent clearly and unambiguously, the Court need look no further. *See Sterling Drug Inc.* ■ *Bayer AG*, 792 F.Supp. 1357, 1365-66 (S.D.N.Y.1992), *aff'd in part, remanded in part*, 14 F.3d 733 (2d Cir.1994). Whether the text of an agreement is ambiguous or unambiguous is a matter of law to be decided by the Court. *Sterling Drug*, 792 F.Supp. at 1366. A contract is not deemed ambiguous unless it is reasonably susceptible of more than one interpretation, and the Court makes this determination by reference to the contract alone. *Banque Arabe et Internationale D'Investissement* ■ *Maryland Nat'l Bank*, 57 F.3d 146, 152 (2d Cir.1995).

[4] The lease clearly provides that Epstein was required to obtain the advance written consent of OFM to sublet the Prem-

ises to Fisher. The Assignment and Sublet Clause expressly states that "Tenant may sublet all or part of the Premises, or assign this lease or permit any other person to use the Premises with the advance written permission of Landlord." (Massey Decl., Exh. B at 4) (emphasis added). Epstein's and Fisher's argument that the word "may" suggests that OFM could approve a sublease or assignment in writing or orally is tortured. Only one interpretation of this clause is tenable: prior written consent of OFM was required for a sublet. Epstein's and Fisher's argument would render the language of the clause meaningless, and I am obliged to read the lease in a manner that gives full force and effect to all clauses contained therein. *See Lloyds Bank PIC* ■ *Republic of Ecuador*, No. 96 Civ. 1789 (DC), 1998 WL 118170, at *8 (S.D.N.Y. Mar. 16, 1998). Accordingly, OFM could not have orally consented to Epstein's proposed sublet to Fisher, as a matter of law, and, therefore, I need not reach the question of whether OFM actually gave oral consent.

2. Whether the Lease Permitted OFM to Unreasonably Withhold Written Consent to a Proposed Sublet

The last issue to be decided on this motion is whether OFM was entitled to refuse Epstein's proposed sublet to Fisher arbitrarily, or whether it breached a duty of good faith and fair dealing implicit in the lease agreement by unreasonably refusing to grant such consent in writing. Resolution of this issue turns on whether federal contract law or New York landlord-tenant law applies.

[5] Generally, under New York law, where a lease requires a tenant to obtain the prior written consent of the landlord to sublet or assign leased premises, a landlord may refuse consent arbitrarily, unless the lease contains a clause specifically stating that the landlord may not unreasonably withhold such consent. *See Dress Shirt Sales, Inc.* ■ *Hotel Martinique Assocs.*, 12 N.Y.2d 339, 239 N.Y.S.2d 660, 662, 190 N.E.2d 10 (Ct.App. 1963). The Assignment and Sublet Clause in the lease between OFM and Epstein required Epstein to obtain prior written consent of OFM to a proposed sublet, but it

Cite as 27 F.Supp.2d 404 (S.D.N.Y. 1998)

contained no provision prohibiting OFM from unreasonably withholding such written consent.

The Government, relying on New York landlord-tenant law, asserts that it was entitled to withhold its consent to Epstein's proposed sublet to Fisher for any reason, or for no reason at all. Epstein and Fisher, however, disagree. They contend that, because the Government is a party to the lease, interpretation of the lease is governed by principles of federal common law, not New York State law. Pursuant to federal common law of contracts, Epstein and Fisher continue, the lease between OFM and Epstein contains an implied covenant of good faith and fair dealing, citing *Neal & Co. v. United States*, 36 Fed. Cl. 600 (1996), *aff'd*, 121 F.3d 683 (Fed.Cir. 1997). The requirement of good faith and fair dealing, they argue, prohibits OFM from withholding consent unreasonably. OFM's refusal to consent to Epstein's proposed sublet of the Premises to Fisher, they contend, was motivated by its desire to enter into a lease with Galinas at a higher rent beginning February 1, 1997. Such conduct was unreasonable, they argue, and, therefore, OFM breached the implied covenant of good faith and fair dealing in the lease.

[6, 7] I conclude that New York landlord-tenant law rather than general federal contract principles should apply. As a threshold matter, although I agree as a policy matter that federal law should apply, there is no federal statutory or common law governing landlord-tenant relations. Federal law should apply because the United States is a party. I have jurisdiction over this action based on 28 U.S.C. § 1345 and the FMA, 22 U.S.C. § 4301 *et seq.* The subject matter of this action is a landlord-tenant dispute, however, and while application of federal law is appropriate in federal question cases where applicable federal substantive law exists, there is no federal statutory or common law

4. In *United States v. Bedford Associates*, 657 F.2d 1300 (2d Cir.1981), *cert. denied*, 456 U.S. 914, 102 S.Ct. 1767, 72 L.Ed.2d 173 (1982), the Second Circuit upheld the district court's application of federal contract law to determine whether the United States and a potential lessor of a commercial building had in fact made a contract, stating that "[t]his court undoubtedly has power

of landlord and tenant. *Powers v. United States Postal Serv.*, 671 F.2d 1041, 1042, 1045 (7th Cir.1982); *Reed v. United States Postal Serv.*, 660 F.Supp. 178, 181 (D.Mass.1987). The question remains, therefore, what law applies in the absence of a federal rule on point.

As the Supreme Court has made clear, my power to create federal common law in the absence of federal landlord-tenant law is limited. Several recent Supreme Court decisions have reaffirmed the principle that the power of the federal courts to fashion principles of federal common law is limited. See, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (noting that cases where the formulation of a "special federal rule" are "few and restricted"); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (noting that a federal court "should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand") (citations omitted). While this recent Supreme Court authority leaves room for federal courts to create principles of federal common law in certain narrow circumstances, generally a "significant conflict between some federal policy or interest and the use of state law" is required before "judicial creation of a special federal rule [is] justified." *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048. While few courts have addressed the precise issue of whether leases to which the Government is a party are governed by general federal common law of contracts or state landlord-tenant law, there is some case law on point. The Second Circuit has not yet spoken definitively on this issue,⁴ but recently noted the existence of a

to apply federal law in disputes between the United States and its lessors." *Id.* at 1309 n. 7. The court in *Kerin v. United States Postal Serv.*, 116 F.3d 988 (2d Cir.1997), acknowledged the *Bedford Associates* decision, but implied that *Bedford Associates* involved the issue of creation of a lease only, stating that there is "room for fair debate" as to whether federal or state law ap-

conflict between the Federal Circuit and the Seventh Circuit concerning "whether federal common law or state law applies to the interpretation of Postal Service Leases." *Kerin* █ *United States Postal Serv.*, 116 F.3d 988, 990 (2d Cir.1997). On the one hand, the Federal Circuit has held that federal law applies to resolve disputes between the United States and its lessors or tenants. See, e.g., *Forman* █ *United States*, 767 F.2d 875, 879-80 (Fed.Cir.1985);⁵ *Kelley* █ *United States*, 19 Cl.Ct. 155, 162 (1989). On the other hand, the Seventh Circuit has held that state substantive law governs in landlord-tenant disputes involving the Government. See *Powers* █ *United States Postal Serv.*, 671 F.2d 1041, 1043-46 (7th Cir.1982).⁶

The Second Circuit in *Kerin* did not reach the issue of whether federal common law or state law applied because, in that case, federal law and state law led to the same result. See *Kerin*, 116 F.3d at 991. I agree with the Seventh Circuit's conclusion, for two reasons.

First, although Epstein and Fisher argue that a federal rule should be created to promote the creation of a uniform body of law in landlord-tenant disputes involving the Government, there is no "distinct need" for a nationwide legal standard or a uniform national rule. See *Kamen*, 500 U.S. at 98, 111 S.Ct. 1711. Landlord-tenant law traditionally has been a matter of state law. There is no compelling reason to disrupt expectations that tenants and landlords may have under state law merely because they are entering into a lease with the federal government. Courts have long held that, "[a]bsent controlling federal legislation or rule of law, questions involving real property rights are de-

termined under state law, even when the United States is a party." *United States* █ *O'Block*, 788 F.2d 1433, 1435 (10th Cir.1986) (citing *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-81, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977)).⁷

termined under state law, even when the United States is a party." *United States* █ *O'Block*, 788 F.2d 1433, 1435 (10th Cir.1986) (citing *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-81, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977)).⁷

Second, application of state substantive law directly on point is eminently more logical than application of general principles of federal contract law. While application of general federal contract law to Government contracts may be appropriate in certain instances, where, as here, the particular government contract is a lease for the use of real property, the adoption of state common law of landlord-tenant relations, a body of law that has developed precisely to address the rights and duties of individuals in the unique relationship of landlord and tenant, makes sense. Application of the state rule, which permits a landlord to refuse consent to a sublet or assignment arbitrarily in the absence of a clause to the contrary, better serves the interests of the Government as a landlord because it permits the Government to have unfettered discretion in deciding who occupies its property. Given the sensitive political considerations that often come into play when governmental property, such as the property here in issue owned by Iran, is involved, the Government should have as much discretion as possible.

Noting that federal landlord-tenant law does not exist, Judge Posner stated in *Powers*:

The Federal Courts could of course create that law, picking and choosing among existing state laws and proposed reforms in accordance with the recommendations of

feited by the Government must pay the Government a reasonable rent for the period of his occupancy); *Reed*, 660 F.Supp. at 181 (holding that Massachusetts law governs the rights of the parties under a Postal Service lease).

5. While the *Forman* court stated that federal law governs in landlord-tenant disputes involving the Government, it nevertheless relied on state law cases in interpreting the particular provision of the Postal Service lease at issue. See 767 F.2d at 880-81.

6. Other courts, too, have applied state substantive law as the rule of decision in landlord-tenant disputes involving the Government. See, e.g., *Braxton* █ *United States*, 858 F.2d 650, 655 (11th Cir.1988) (holding that Florida law applies to determine whether one who occupies land for-

7. Indeed, the Supreme Court has articulated that the normal federal disposition where no substantive federal provision is relevant to the legal issue at hand is for "federal courts [to] 'incorporat[e] [state law] as the federal rule of decision.'" *Kamen*, 500 U.S. at 98, 111 S.Ct. 1711 (emphasis added) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979)).

eminent scholars and practitioners. It is not to be expected that the federal courts would do a very good job of devising a model code of landlord-tenant law, since they have very little experience in landlord-tenant matters; and though eventually some body of law would emerge it would not in all likelihood be a uniform body, because there are [thirteen] federal circuits and the Supreme Court could be expected to intervene only sporadically

. . . [W]e do not have to balance competing federal and state interests in this case after all. The overriding federal interest here is in certainty of right and obligation flowing from conformity to known law; the state interest is in offering its landlords a like certainty. These interests converge in favor of adopting . . . state law rather than federal common law.

Powers, 671 F.2d at 1045-46. This reasoning is quite convincing, particularly in a case such as this, where the Government and Epstein, in all likelihood, "entered [a] legal relationship with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98, 111 S.Ct. 1711.

Finally, Epstein's and Fisher's reliance on *Neal & Co. v. United States*, 36 Fed. Cl. 600 (1996), *aff'd*, 121 F.3d 683 (Fed.Cir.1997), is therefore misplaced. There, the United States Court of Federal Claims stated that "[e]very contract, including those in which the Government is a party, contains an implied covenant of good faith and fair dealing," *id.* at 631, and from this statement, Epstein and Fisher extrapolate that there exists an implied covenant of good faith and fair dealing in the lease agreement between Epstein and the Government at issue here.

The facts of *Neal & Co.* are distinguishable, however. *Neal & Co.* involved a construction contract to build a housing project entered into between the Government and a contractor, not a lease for occupancy of real property. While a lease is a type of contract, the considerations surrounding a lease of real property are sufficiently different from those involved in a conventional contract as to militate against the extension of *Neal & Co.* and

like cases to landlord-tenant disputes. A construction contract does not implicate the Government's rights, as a possessor of a valuable leasehold, to regulate the possession and use of real property under its control.

Thus, as between general federal contract principles and specific state landlord-tenant law, the latter should be applied. Land is unique. It is logical, therefore, that a landlord should have virtually complete say in who occupies its property. See *Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 464 N.Y.S.2d 793, 798 (2d Dep't 1983) (noting that landlords have a "substantial interest in controlling the assignability of leases"), *aff'd*, 62 N.Y.2d 930, 479 N.Y.S.2d 213, 468 N.E.2d 51 (Ct.App. 1984). It makes sense for the law to permit a landlord to unreasonably withhold consent to a proposed sublet unless the parties specifically bargain otherwise. See Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 Va. L.Rev. 751, 758 (1988) (discussing the majority view that absent contractual agreement to the contrary landlords are permitted to unreasonably withhold consent to a sublet or assignment, and noting that the rule stems from the "paramount importance of the lessor's ability to control the selection of his tenants so as to protect the value of his reversionary interest" in the leasehold).

[8] I therefore adopt the relevant rule of New York landlord-tenant law for purposes of deciding the remaining issue in this dispute, and hold that, consistent with New York law, OFM was entitled to arbitrarily withhold its consent to Epstein's request to sublet the Premises to Fisher. Even assuming OFM had a hidden agenda in refusing Epstein's request to sublet to Fisher, specifically, that it preferred to enter into a new lease with Galinas at a higher rental price, it was entitled to withhold its consent to a sublet for a good reason, a bad reason, or no reason at all. There existed no implied covenant of good faith and fair dealing in its lease with Epstein requiring OFM to act reasonably in deciding whether to approve Epstein's proposed sublet, and, therefore, OFM cannot be held liable for a breach thereof.

Thus, I need not reach the issue of whether OFM in fact unreasonably withheld consent. And, as Fisher was occupying the Premises pursuant to an illegal sublet, OFM was within its rights to terminate Epstein's lease. Accordingly, the Government's motion for partial summary judgment on its claim for ejectment of Epstein and Fisher from the Premises is hereby granted.

C. The Government's Motion for Partial Summary Judgment Against the Subtenants

Eleven of the twelve Subtenants signed a stipulation agreeing to be bound by the Court's decision on the Government's claim for ejectment against Epstein and Fisher. I now grant the Government's motion for partial summary judgment against Epstein and Fisher; hence, the motion is also granted with respect to these eleven Subtenants.

The remaining Subtenant, Ron Soffer, did not sign the stipulation. He has not responded to the Government's motion because the motion is not returnable until April 20, 1998. Soffer, however, can have no greater rights than Fisher. Hence, the Government's motion is granted as to Soffer as well. Of course, if Soffer believes he has some basis for arguing that he has greater rights than Fisher has, he may make a motion for reconsideration within ten days hereof.

CONCLUSION

For the foregoing reasons, the Government's motion for summary judgment on its claim for ejectment is granted as to Epstein, Fisher, and all of the Subtenants.

SO ORDERED.



UNION CARBIDE CORPORATION, individually and on behalf of and as the successor in interest of Seadrift Polypropylene Company, Plaintiff,

MONTELL [REDACTED]; Montell Polyolefins; Montell North America Incorporated; Montell USA Incorporated; Technipol S.r.l.; Montedison S.p.A.; Montell Finance USA, Inc.; Royal Dutch Petroleum Company, p.l.c.; The Shell Transport and Trading Company, p.l.c.; Shell Petroleum [REDACTED]; The Shell Petroleum Company Limited; Shell Petroleum Inc.; Shell Oil Company; Shell Polypropylene Company; Shell Canada Limited; Shell International Chemical Company Limited; and Shell Internationale Research Maatschappij [REDACTED], Defendants.

No. 95 Civ. 0134(SAS).

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

Aug. 4, 1998.

Producer of polypropylene resin brought antitrust action against alleged conspirators, arising out of one conspirator's termination of negotiation to construct new resin manufacturing plants. Following settlement with one alleged conspirator, remaining conspirator moved for summary judgment. The District Court, Scheindlin, J., held that: (1) there was fact issue whether conspiracy existed to limit trade in resin; (2) termination was ancillary restraint of trade, precluding determination that it was per se violation of Sherman Act § 1; and (3) there was no unreasonable restraint of trade, under rule of reason standard.

Summary judgment granted in part.

1. Federal Civil Procedure ⇨2484

Due to the potential chilling effect of prolonged antitrust litigation on competition, parties that forward economically implausible antitrust claims must come forward with more persuasive evidence to support them

Westlaw.

Page 1

Maria Tankenson Hodge
Current Firm Information Unknown
hodgfran@islands.vi

Position:

Member

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University of California at Berkeley, Boalt Hall School of Law, Berkeley, CA,
1971

J.D., Doctor of Jurisprudence

University of California, Santa Cruz, California, 1989
B.A.Govt., Bachelor of Arts in Government

Admitted:

California, 1972
Virgin Islands, 1974
U.S. Court of Appeals 3rd Circuit
U.S. Supreme Court, 1983

Affiliations:

The West Indian Company, Limited, Director, 1989 - Present

Representative Clients:

Public Services Commission
The West Indian Company, Limited
Virgin Islands Port Authority

References:

Chase Manhattan Bank, N.A., St. Thomas, Virgin Islands
Kodak Corporation, Hato Rey, Puerto Rico
Prudential Securities, St. Thomas, Virgin Islands

West Practice Categories:

Estate Planning
Family Law
Litigation & Appeals
Real Estate Law
Land Use & Zoning

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Appellate Practice
Real Estate
Civil Practice

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NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: J. EPSTEIN & COMPANY, INC.

Selected Entity Status Information

Current Entity Name: J. EPSTEIN & COMPANY, INC.

Initial DOS Filing Date: NOVEMBER 18, 1988

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC BUSINESS CORPORATION

Current Entity Status: INACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

GOLD & WACHTEL, ESQS

10 EAST 53RD STREET

NEW YORK, NEW YORK, 10022

Registered Agent

NONE

NOTE: New York State does not issue organizational identification numbers.

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NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: JEFFREY E. EPSTEIN, INC.

Selected Entity Status Information

Current Entity Name: J. EPSTEIN & COMPANY, INC.

Initial DOS Filing Date: NOVEMBER 18, 1988

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC BUSINESS CORPORATION

Current Entity Status: INACTIVE

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CLOSED, STANDARD

**United States District Court
Eastern District of Pennsylvania (Philadelphia)
CIVIL DOCKET FOR CASE #: 2:02-cv-07671-CN**

SHANKS ■ WEXNER et al
Assigned to: HONORABLE CLARENCE C. NEWCOMER
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 10/02/2002
Date Terminated: 10/21/2003
Jury Demand: None
Nature of Suit: 195 Contract Product
Liability
Jurisdiction: Diversity

Plaintiff**NELSON SHANKS**

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Defendant

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INDIVIDUALLY
doing business as
J. EPSTEIN AND COMPANY, INC.

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Defendant

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J. FOX
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/02/2002	<u>1</u>	COMPLAINT against JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER (Filing fee \$ 150 receipt number 803892.), filed by NELSON SHANKS.(ti,) Additional attachment(s) added on 2/13/2003 (ldb,). (Entered: 10/03/2002)
10/02/2002		Summons Issued as to JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER.Four Forwarded To: Counsel on 10/3/02 (ti,) (Entered: 10/03/2002)
12/16/2002	<u>2</u>	ORDER THAT JEFFREY E. EPSTEIN ; GHISLAINE MAXWELL ; ABIGAIL WEXNER ; LESLIE WEXNER HAVE UNTIL 12/31/02 TO ANSWER, MOVE, OR OTHERWISE PLEAD TO THE COMPLAINT;

		[REDACTED] J. FOX WILL ACCEPT SERVICE ON BEHALF OF ALL DEFENDANTS ETC. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 12/16/02. 12/17/02 ENTERED AND COPIES MAILED (ph,) (Entered: 12/17/2002)
12/30/2002	<u>3</u>	MOTION FOR DISMISSAL PURSUANT TO FRCP 12(b)(2), MEMORANDUM, CERTIFICATE OF SERVICE FILED BY EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER..(ph,) Additional attachment(s) added on 2/13/2003 (ldb,). (Entered: 12/31/2002)
01/15/2003	<u>4</u>	STIPULATION & ORDER THAT PLAINTIFF SHALL HAVE UNTIL 1/31/03 TO FILE A RESPONSE TO DEFENDANT'S MOTION TO DISMISS. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 1/15/03. 1/15/03 ENTERED AND COPIES MAILED.(rv,) (Entered: 01/15/2003)
02/07/2003	<u>5</u>	STIPULATION AND ORDER THAT PLAINTIFF SHALL HAVE UNTIL 2/14/03 TO FILE A RESPONSE TO DEFENDANT'S MOTION TO DISMISS FILED IN THIS MATTER ON 12/30/02. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 2/7/03. 2/10/03 ENTERED AND COPIES MAILED (ph,) (Entered: 02/10/2003)
02/14/2003	<u>6</u>	REPLY filed by NELSON SHANKS to Defendant's Motion to Dismiss pursuant to F.R.C.P. 12(b)(2), Certificate of Service. (rv,) (Entered: 02/18/2003)
02/27/2003	<u>7</u>	REPLY to Plaintiff's Response to Defendants' Motion to Dismiss filed by JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER, Certificate of Service. (ar,) (Entered: 02/28/2003)
03/18/2003	<u>8</u>	OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR DISMISSAL. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 3/18/03.3/19/03 ENTERED AND COPIES MAILED (ph,) (Entered: 03/19/2003)
04/07/2003	<u>9</u>	STIPULATION AND ORDER THAT JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER'S ANSWER IS EXTENDED TO 4/18/03. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 4/7/03. 4/8/03 ENTERED AND COPIES MAILED (ph,) (Entered: 04/08/2003)
04/24/2003	<u>10</u>	STIPULATION AND ORDER THAT ABIGAIL WEXNER AND LESLIE WEXNER'S ANSWER IS DUE 4/30/03. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 4/24/03. 4/25/03 ENTERED AND COPIES MAILED (ph,) (Entered: 04/25/2003)
04/30/2003	<u>11</u>	ANSWER, affirmative defenses to Complaint by JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER, Certificate of service.(ph,) Additional attachment(s) added on 5/16/2003 (ph,). (Entered: 05/01/2003)

04/30/2003		Issue Joined (ph,) (Entered: 05/01/2003)
05/05/2003	<u>12</u>	NOTICE of Hearing: Pretrial Conference set for 5/13/2003 03:15 PM in Judge's Chambers, Room 13614 (13th Floor) before HONORABLE CLARENCE C. NEWCOMER. (mf) (Entered: 05/05/2003)
05/19/2003	<u>13</u>	STIPULATION AND ORDER THAT PLAINTIFF SHALL HAVE UNTIL 5/30/03 TO RESPOND TO DEFENDANTS' ANSWER AND COUNTERCLAIMS FILED ON 4/30/03. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 5/19/03. 5/19/03 ENTERED AND COPIES MAILED (ph,) (Entered: 05/19/2003)
05/22/2003	<u>14</u>	ORDER THAT DISCOVERY IS DUE 8/13/03; DISPOSITIVE MOTIONS BY 8/13/03; RESPONSES TO DISPOSITIVE MOTIONS BY 8/25/03; FINAL PRETRIAL/SETTLEMENT CONFERENCE BY 9/24/03 AT 11:15 A.M.; PRETRIAL MEMORANDA BY 9/17/03; COUNSEL SHALL BE PREPARED FOR TRIAL BY 9/23/03. SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 5/22/03. 5/22/03 ENTERED AND COPIES MAILED (ph,) (Entered: 05/22/2003)
05/29/2003	<u>15</u>	MOTION TO DISMISS COUNTERCLAIM FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, MEMORANDUM, CERTIFICATE OF SERVICE FILED BY NELSON SHANKS.(ph,) Modified on 5/29/2003 (ph,). Additional attachment(s) added on 6/16/2003 (vw,). (Entered: 05/29/2003)
06/19/2003	<u>16</u>	STIPULATION AND ORDER THAT THE TIME IN WHICH THE DEFENDANTS MUST SUBMIT A REPLY TO PLAINTIFF'S MOTION TO DISMISS COUNT II OF DEFENDANTS' COUNTERCLAIM, IS EXTENDED UNTIL AND INCLUDING 6/30/03 . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 6/19/03. 6/19/03 ENTERED AND COPIES MAILED (ph,) (Entered: 06/19/2003)
07/08/2003	<u>17</u>	STIPULATION AND ORDER THAT DEFENDANTS MUST SUBMIT A REPLY TO PLAINTIFF'S MOTION TO DISMISS COUNT II OF DEFENDANTS' COUNTERCLAIM BY 7/14/03 ETC . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 7/8/03. 7/9/03 ENTERED AND COPIES MAILED AND FAXED 7/8/03(ph,) Additional attachment(s) added on 7/9/2003 (ldb,). (Entered: 07/09/2003)
07/14/2003	<u>18</u>	Reply to plaintiff's motion to dismiss pursuant to FRCP 12(b)(6), Certificate of service filed by ABIGAIL WEXNER, LESLIE WEXNER. (ph,) Additional attachment(s) added on 7/17/2003 (ph,). (Entered: 07/15/2003)
07/18/2003	<u>19</u>	Response to defendants' reply to motion to dismiss counterclaim for failure to state a claim upon which relief can be granted, Certificate of service filed by NELSON SHANKS. (ph,) (Entered: 07/21/2003)
08/13/2003	<u>20</u>	MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST

		JEFFREY EPSTEIN WITH RESPECT TO COUNT I OF THE COMPLAINT (BREACH OF CONTRACT), CERTIFICATE OF SERVICE FILED BY NELSON SHANKS..(ph,) (Entered: 08/13/2003)
08/21/2003	<u>21</u>	ORDER THAT UPON CONSIDERATION OF PLAINTIFF'S MOTION TO DISMISS AND DEFENDANTS' RESPONSE, IT IS ORDERED THAT SAID MOTION IS DENIED ETC. . SIGNED BY JUDGE JAMES R. MELINSON ON 8/21/03.8/22/03 ENTERED AND COPIES MAILED (ph,) (Entered: 08/22/2003)
08/26/2003	<u>22</u>	PLAINTIFF'S MOTION TO COMPEL FILED BY NELSON SHANKS,CERTIFICATE OF COUNSEL, CERTIFICATE OF SERVICE.(ar,) (Entered: 08/26/2003)
08/26/2003	<u>23</u>	ANSWER AND AFFIRMATIVE DEFENSES OF PLAINTIFF TO COUNTERCLAIMS OF DEFENDANTS LESLIE AND ABIGAIL WEXNER BY NELSON SHANKS, CERTIFICATE OF SERVICE.(ar,) (Entered: 08/26/2003)
08/26/2003	<u>24</u>	Supplement to Plaintiff's Motion for Judgment on the Pleadings Against Defendant Jeffrey Epstein with Respect to Count I of Plaintiff's Complaint (Breach of Contract) filed by NELSON SHANKS, Certificate of Service. (ar,) (Entered: 08/26/2003)
08/27/2003	<u>25</u>	Memorandum in opposition to plaintiff's motion for judgment on the pleadings as to count one - breach of contract, Certificate of service filed by JEFFREY E. EPSTEIN. (ph,) Additional attachment(s) added on 9/4/2003 (ph,). (Entered: 08/28/2003)
08/28/2003	<u>26</u>	Reply to EPSTEIN'S memorandum in opposition to plaintiff's motion for judgment on the pleadings, Certificate of service by NELSON SHANKS. (ph,) (Entered: 08/29/2003)
08/28/2003	<u>27</u>	MOTION TO STRIKE DEFENDANT'S MEMORANDUM IN OPPOSITION FOR VIOLATION OF COURT ORDER, CERTIFICATE OF SERVICE filed by NELSON SHANKS. (SEE #26).(ph,) (Entered: 08/29/2003)
09/04/2003	<u>28</u>	ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS WITH RESPECT TO COUNT I, THE COURT FINDS THAT THERE ARE FACTUAL ISSUES IN THIS CASE AS TO WHETHER A CONTRACT WAS FORMED BETWEEN THE PARTIES AND THE TERMS OF ANY SUCH CONTRACT. . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 9/4/03.9/4/03 ENTERED AND COPIES MAILED AND FAXED. (ph,) (Entered: 09/04/2003)
09/05/2003	<u>29</u>	RESPONSE to plaintiff NELSON SHANKS' motion to compel, Certificate of service filed by JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER. (ph,) (Entered: 09/08/2003)
09/05/2003	<u>30</u>	MOTION FOR PROTECTIVE ORDER TO QUASH NOTICE OF

		DEPOSITIONS, MEMORANDUM, CERTIFICATION OF COUNSEL, CERTIFICATE OF SERVICE filed by JEFFREY E. EPSTEIN, GHISLAINE MAXWELL, ABIGAIL WEXNER, LESLIE WEXNER.. (ph,) Additional attachment(s) added on 10/1/2003 (ph,). Additional attachment(s) added on 10/10/2003 (ph,). (Entered: 09/08/2003)
09/09/2003	<u>31</u>	ORDER MOOTING PLAINTIFFS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AND RESPONSES TO INTERROGATORIES ETC. . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 9/9/03.9/10/03 ENTERED AND COPIES MAILED AND FAXED 9/9/03(ph,) (Entered: 09/10/2003)
09/10/2003	<u>32</u>	Reply to defendants' motion for a protective order to quash notice of depositions and supplemental memorandum of law in connection with plaintiff's motion to compel discovery responses, Certification of counsel, Certificate of service filed by NELSON SHANKS. (ph,) Additional attachment(s) added on 9/18/2003 (fh,). (Entered: 09/11/2003)
09/18/2003	<u>33</u>	ORDER DENYING AS MOOT DEFENDANT'S MOTION TO QUASH NOTICE OF DEPOSITIONS, UPON REPRESENTATION THAT THE PARTIES HAVE AGREED UPON THE LOCATIONS OF THE NOTICED DEPOSITIONS ETC. . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 9/18/03.9/18/03 ENTERED AND COPIES MAILED (ph,) (Entered: 09/18/2003)
09/23/2003	<u>34</u>	ORDER THAT THE COURT'S PRETRIAL SCHEDULING ORDER IS AMENDED AS FOLLOWS: DISCOVERY BY 10/10/03, SETTLEMENT/FINAL PRETRIAL CONFERENCE ON 10/20/03 AT 11:15; PRETRIAL MEMORANDA AND JOINT PROPOSED JURY INSTRUCTIONS 10/15/03; COUNSEL SHALL BE PREPARED FOR TRIAL ON 10/20/03 . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 9/23/03. 9/24/03 ENTERED AND COPIES MAILED (ph,) (Entered: 09/24/2003)
09/23/2003		SETTLEMENT CONFERENCE SET FOR 10/20/2003 11:15 AM BEFORE HONORABLE CLARENCE C. NEWCOMER. (ph,) (Entered: 09/24/2003)
10/21/2003	<u>35</u>	STIPULATION AND ORDER THAT THE COURT DISMISS THE CAPTIONED MATTER, INCLUDING ALL CLAIMS AND COUNTERCLAIMS, WITH PREJUDICE. . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 10/21/03. 10/21/03 ENTERED AND COPIES MAILED AND FAXED.(ph,) (Entered: 10/21/2003)
10/24/2003	<u>36</u>	STIPULATION AND ORDER THAT PURSUANT TO FRCP 41(a)(1) (ii) AND THE SETTLEMENT AGREEMENT, THAT THE PARTIES REQUEST THE COURT DISMISS THE CAPTIONED MATTER, INCLUDING ALL CLAIMS AND COUNTERCLAIMS, WITH PREJUDICE. . SIGNED BY JUDGE CLARENCE C. NEWCOMER ON 10/24/03. 10/24/03 ENTERED AND COPIES MAILED AND FAXED BY CHAMBERS(ph,) (Entered: 10/24/2003)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NELSON SHANKS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
█	:	
	:	
LESLIE and ABIGAIL WEXNER, et al.	:	
	:	
Defendants.	:	NO. 02-7671

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER
TO QUASH NOTICE OF DEPOSITIONS**

Defendants, by and through their counsel, hereby move this Court, pursuant to Fed. R. Civ. P. 26(c)(2), for a protective order to reschedule and relocate the depositions of Jeffrey Epstein, Ghislaine Maxwell, and Abigail and Leslie Wexner, who received notices of oral deposition to be taken in the offices of Plaintiff's counsel, Gollatz, Griffin & Ewing, located in Philadelphia, Pa.: Jeffrey Epstein and Ghislaine Maxwell, noticed for September 9, 2003; Abigail and Leslie Wexner, noticed for September 10, 2003.

In support of this motion, Defendants submit the accompanying Memorandum of Law.

Dated: September 5, 2003

██████████ J. Fox
Attorney Identification No. 15261
Christopher J. Guiton
Attorney Identification No. 89866
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996

Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NELSON SHANKS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
█.	:	
	:	
LESLIE and ABIGAIL WEXNER, et al.	:	
	:	
Defendants.	:	NO. 02-7671

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER TO QUASH NOTICE OF DEPOSITIONS**

Without any consultation with counsel for Defendants to find mutually acceptable dates and times, on August 27, 2003, Plaintiff Nelson Shanks provided notices to Defendants' counsel of the oral depositions of Defendants Jeffrey Epstein, Ghislaine Maxwell, Abigail Wexner and Leslie Wexner to be taken on September 9th and 10th, 2003 in the offices of Gollatz, Griffin & Ewing, P.C., in Philadelphia, Pa.

As Plaintiff well knows, defendants Jeffrey Epstein and Ghislaine Maxwell reside in the U.S. Virgin Islands, and defendants Abigail and Leslie Wexner reside in New Albany, Ohio.

While Plaintiff may be permitted to designate his location of choice for the depositions, this Court has the power and duty under Fed. R. Civ. P. 26(c) to determine the most appropriate location for each deposition. See e.g., O'Connor █. Trans Union Corp., 1998 U.S. Dist. LEXIS 6774 (E.D. Pa. May 11, 1998). This Court has previously determined "that as a general rule, if a deponent lives a substantial distance from the deposing party's residence, the deposing party should be required to take the deposition at

a location in the vicinity in which the deponent resides.” First Fidelity Bancorporation v. National Union Fire Ins. Co., 1992 U.S. Dist. LEXIS 3367 (E.D. Pa. Mar. 5, 1992).

Pursuant to Fed. R. Civ. P. 26(c)(2), defendants seek an order that would protect them from the undue burden and expense of traveling to Philadelphia for these depositions; defendants Jeffrey Epstein and Ghislaine Maxwell will submit to a deposition in the Virgin Islands; and defendants Abigail and Leslie Wexner seek an order that would protect them from being forced to travel from New Albany, Ohio to Philadelphia for their depositions.

Under the circumstances, the Notice served on August 27, 2003 requiring each of the defendants to fly to Philadelphia is unreasonable and unduly burdensome. As the Court well knows, the basis for asserting jurisdiction over these defendants does not include any instance when any of them visited Pennsylvania. It was Plaintiff who traveled to New York and Ohio in connection with this matter. Accordingly, if these depositions are to proceed, they should occur at the locations of the defendants. It is far less dislocating for Plaintiff’s lawyer to travel to take these depositions in the Virgin Islands and Ohio than it would be to force four people to take the time required to travel to Philadelphia.

Although Plaintiff had earlier expressed a commitment to working out a schedule that is convenient to all parties, Plaintiff has unilaterally scheduled the depositions with no regard to the inconvenience it may impose on the parties to be deposed. Such conduct is in direct contrast with the manner in which Defendants have attempted to depose Plaintiff.

For example, Defendants noticed the deposition of Plaintiff Nelson Shanks for June 9, 2003. Immediately thereafter, Defendants agreed with Plaintiff to postpone that date so that the parties could come to a mutually agreeable date for the deposition. Plaintiff still, nearly three months later, has yet to agree to a date in which Shanks can be deposed, but has instead unilaterally designated September 9th and 10th in Philadelphia as the time and place for Defendants' depositions. Defendants object to these depositions being taken in Philadelphia given the difficulty for these individuals to make arrangements to be deposed miles away from their respective residences.

Based upon Plaintiff's recent reluctance to discuss, much less honor, any mutual agreements, Defendants ask this Court to quash Plaintiff's Notice of Depositions and grant this protective order, rescheduling the depositions for a date and time that is suitable for both the Defendants and Plaintiff, and relocating the depositions from Philadelphia to the U.S. Virgin Islands for Mr. Epstein and Ms. Maxwell; and New Albany, Ohio for the Wexners.

Accordingly, this Court should grant Defendants' motion for a protective order and quash the depositions of Jeffrey Epstein, Ghislaine Maxwell, and Abigail and Leslie Wexner, without prejudice to have them rescheduled at a convenient location.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant its Motion for a Protective Order or such other relief as the Court deems appropriate.

Dated: September 5, 2003

██████████ J. Fox
Attorney Identification No. 15261
Christopher J. Guiton
Attorney Identification No. 89866
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Christopher J. Guiton, hereby certify that on this 5th day of September 2003, I caused a true and correct copy of the foregoing Defendants' Motion for a Protective Order and accompanying Memorandum of Law to be served as follows:

VIA HAND DELIVERY

Jeffrey Hofferan, Esquire
Gollatz, Griffin & Ewing, P.C.
Four Penn Center, Suite 200
Philadelphia, PA 19103
(Attorney for Plaintiff)

Dated: September 5, 2003

By: _____
Christopher J. Guiton

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NELSON SHANKS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
█.	:	
	:	
LESLIE and ABIGAIL WEXNER, et al.	:	
	:	
Defendants.	:	NO. 02-7671

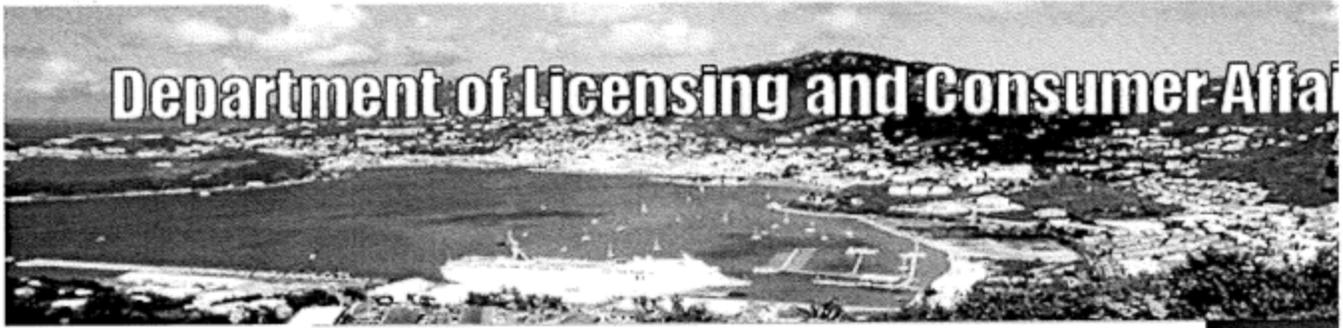
**CERTIFICATION OF GOOD FAITH EFFORTS
TO RESOLVE DISCOVERY DISPUTES
BEFORE FILING MOTION**

█ J. Fox, Esquire, hereby certifies that he is counsel for Defendants and that prior to filing Defendants' Motion for a Protective Order to reschedule and relocate the depositions of Jeffrey Epstein, Ghislaine Maxwell, and Abigail and Leslie Wexner, he engaged in good-faith efforts with Plaintiff's counsel, Jeffrey Hofferma, to resolve this dispute. He wrote Mr. Hofferma a letter requesting rescheduling. Mr. Hofferma did not bother to respond to the letter.

█ J. Fox

Counsel for Defendants,

Dated: September 5, 2003



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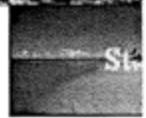
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(Cite as: Not Reported in F.Supp.)

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U.S. █ Epstein
S.D.N.Y., 1998.

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.
UNITED STATES OF AMERICA, Plaintiff,

█
Jeffrey E. EPSTEIN and Ivan S. Fisher,
Defendants.
No. 96 Civ. 8307(DC).

Feb. 19, 1998.

Mary Jo White, United States Attorney for the
Southern District of New York, by Serene Nakano,
Assistant United States Attorney, New York City,
for the United States.

Gage & Pavlis, by G. Robert Gage, Jr., Ellen J.
Casey, New York City, for Ivan S. Fisher.

MEMORANDUM DECISION

CHIN, J.

*1 In this case, the United States (the "Government") seeks to evict defendants Jeffrey E. Epstein and Ivan S. Fisher from a building formerly used as a residence by the Deputy Consul General of the Islamic Republic of Iran ("Iran"). After diplomatic and consular relations with Iran were severed in 1980, the Office of Foreign Missions ("OFM") of the United States Department of State took possession of the building pursuant to the Foreign Missions Act, 22 U.S.C. § 4301 *et seq.* OFM leased the building to Epstein in 1992. Epstein eventually sublet the premises to Fisher, purportedly without the Government's consent. Fisher, in turn, sublet a portion of the premises to several other lawyers.

In 1996, the Government purported to terminate Epstein's lease and brought this action to evict Epstein and Fisher. The other sub-tenants were later added as defendants. The Government also seeks to recover back rent from Epstein and Fisher.

During discovery, the Government requested production of Fisher's 1996 tax return to verify the amount of rent that he had collected from his subtenants. Fisher objected to the request. At a conference on December 10, 1997, I overruled the objection on the condition that the return be protected by an appropriate confidentiality order, which the parties were to negotiate. Fisher and the Government, however, were unable to agree on the terms of a protective order. Hence, they submitted separate proposed protective orders for my consideration.

The Government's proposed order contains a provision ("Proposed Paragraph 7(c)") that would permit the United States Attorney's Office for the Southern District of New York to disclose any confidential information governed by the protective order to other government agencies for the purpose of enforcing the criminal or civil laws of the United States. Thus, the Government seeks to reserve the right to use confidential information produced by Fisher in this case in unrelated civil or criminal matters. The Government contends that Proposed Paragraph 7(c) is necessary because the U.S. Attorney's Office has a statutory duty to enforce the laws, citing 28 U.S.C. § 547(c), and that it therefore cannot ignore any evidence of a violation of law-even evidence that comes to its attention only because it is produced pursuant to a protective order in discovery in a civil case. Fisher objects to Proposed Paragraph 7(c). He contends that use of any confidential documents produced in this case should be limited to this lawsuit.

Fisher's objection is sustained, for three reasons.

First, confidentiality orders are intended "to 'secure the just, speedy, and inexpensive determination' of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant." *Martindell █ International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir.1979). Unless protective orders are "fully and fairly enforceable," persons

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relying upon such orders will be inhibited from providing essential testimony and information in civil litigation, "thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences." *Id.* A provision that would permit the use of confidential information outside of this lawsuit would defeat the very purpose of the protective order.

*2 Second, although the Court recognizes the strong public interest in obtaining all relevant evidence required for law enforcement purposes, the Government as investigator " 'has awesome powers' [that] render unnecessary its exploitation of the fruits of private litigation." *Id.* (quoting *GAF Corp. v. Eastman Kodak Co.*, 415 F.Supp. 129, 132 (S.D.N.Y.1976)). Proposed Paragraph 7(c) should not be included in the protective order "merely to accommodate the Government's desire to inspect protected [information] for possible use in a criminal [or civil] investigation." *Martindell*, 594 F.2d at 296; *cf. id.* (denying Government's order to modify or vacate protective order to permit it access to witnesses' deposition transcripts protected by the order). The Government will still be able to fulfill its statutory obligation to enforce the law through ordinary criminal and civil process and by taking advantage of the substantial resources available to the Government to investigate suspected violations of the law.

Third, tax information has traditionally been treated as private and confidential information. Section 6103 of the Internal Revenue Code, for example, specifically prohibits any person, including an officer or employee of the United States, from "disclos[ing] any return or return information obtained ... in any manner in connection with his [or her] service as such an officer or employee." 26 U.S.C. § 6103(a). Section 6103 also spells out the limited situations when an officer or employee may disclose return information. *See, e.g.*, § 6103(h)(2) (disclosure of returns and return information to Department of Justice employees), § 6103(h)(4) (disclosure of returns or return information in judicial or administrative proceedings). This section provides specific limits on the disclosure of returns and return information and bolsters the conclusion that Fisher's tax return is entitled to

protection from disclosure by the Government in this action. *See Richards v. Stephens*, 118 F.R.D. 338, 339 (S.D.N.Y.1988) (§ 6103 is intended to protect the confidentiality of taxpayers' returns by "regulat[ing] ... disclosure of tax returns by people having access to tax returns in their official capacity"). Fisher should not become the subject of an IRS tax investigation merely because of documents he produced in what is essentially a landlord-tenant suit.

For these reasons, I will enter a protective order that does not contain Proposed Paragraph 7(c). The Government may not use confidential information produced in discovery pursuant to the protective order for any purpose other than prosecuting this lawsuit, absent further order of the Court.

SO ORDERED.

S.D.N.Y., 1998.
 U.S. v. Epstein
 Not Reported in F.Supp., 1998 WL 67676
 (S.D.N.Y.)

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tered trade dress, in violation of § 43(a) of the Lanham Act. Hargen contends that FT cannot obtain relief under the Lanham Act because FT's trade dress is functional.⁴

[10, 11] A trade dress is functional when the trade dress "is essential to the uses or purposes of the article or if it affects the cost or quality of the article." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n. 10, 102 S.Ct. 2182, 2187 n. 10, 72 L.Ed.2d 606 (1982). A product's trade dress must be viewed in its totality. *Le Sportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 75 (2d Cir.1985). However, if a trade dress is found to be functional, its features may be copied even if confusion would result. *American Greetings Corp. v. Dan-Dee Imports, Inc.*, 807 F.2d 1136, 1141 (3d Cir.1986).

FT states that its packaging design was chosen because the design was pretty, sophisticated, and showed off the novelty value of the deodorant stone. Rosenblatt dep. at 520-522. FT also states that FT colored the package blue because it liked that color, not because blue was a common color used in cosmetic packaging. *Id.* at 378. Moreover, the evidence before us indicates FT and at least one other producer of deodorant stones pack their deodorant products in other packaging besides plastic boxes. For example, plaintiff also packs its deodorant stone in a soft plastic pouch, a triangular cardboard box, a shrink-wrapped soap dish and satin pouches of various colors. Rosenblatt aff. ¶¶ 5, 9, 13. Moreover, another company, whose name Rosenblatt could not recall at his deposition, distributes a similar product in a velvet, drawstring pouch. Rosenblatt dep. at 379-380. This evidence suggests that plaintiff's packaging in this case may not be functional.

Defendant claims that FT's packaging is functional because the packaging is allegedly efficient and compact, because the packaging allows consumers to see the product, and because the packaging is commonly used in the stick and roll-on deodorant industry.

4. Defendant alternatively claims that even if the packaging is not functional, plaintiff cannot claim that the color blue is distinctive of its product and therefore protectable. Memo in Support of Summary Judgment at 16. Plaintiff,

Moreover, Hargen also claims that FT's plastic boxes are functional because they allow for easy shipping, allow for shelf display and stacking, protect the crystals from chipping, protect the crystals from dissolving in moist places, and are designed to hold the crystal deodorant in the same way that a soap dish holds soap. Memo in Support of Summary Judgment at 11-13. See Rosenblatt dep. at 95; vol. IV at 19. As is apparent, disputed issues of material fact remain about the functionality or non-functionality of the plaintiff's trade dress. Therefore, Hargen's motion for summary judgment on FT's trade dress claims is denied.

III. Causes of Action Under New York Law

Because Hargen has undertaken no independent analysis of FT's New York causes of action, Hargen's motion for summary judgment on these causes of action is denied.

Conclusion

Hargen's motion for summary judgment is denied.

SO ORDERED.



Michael R. STROLL, Plaintiff,

Jeffrey EPSTEIN, Defendant.

No. 92 Civ. 1021 (KC).

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

April 15, 1993.

Second joint venturer brought suit against first venturer, seeking to recover un-

however, is not claiming exclusive rights to the use of blue in its packaging. Memo in Opp. to Summary Judgment at 13. Rather, plaintiff claims a proprietary interest in the entirety of its packaging. *Id.* at 12.

Cite as 818 F.Supp. 640 (S.D.N.Y. 1993)

der contract in which second venturer released his interest in venture. First venturer moved to dismiss or for summary judgment, and second venturer cross-moved for summary judgment. The District Court, Conboy, J., held that: (1) agreement under which first joint venturer agreed to return capital contribution to second joint venturer upon return of all interests in venture by second venturer unambiguously indicated that first venturer was acting solely in representative capacity, not personal capacity, and (2) modification of original joint venture agreement making first joint venturer personally liable for managing affairs of joint venture could not be construed as imposing personal liability on first joint venturer in event joint venture subsequently bought out second venturer's interest.

Motions granted in part and denied in part.

1. Federal Courts ⇨409

In diversity action, federal court sitting in New York must apply New York law, including New York's choice-of-law rules.

2. Contracts ⇨144

Under New York's choice-of-law rules, when court is construing meaning of contract, court should apply local law of state which has greatest interest in or most significant relationship to transaction and parties.

3. Joint Adventures ⇨4(1)

New York was state with most significant relationship to agreement in which one joint venturer agreed to return capital contribution to another venturer, and thus, New York law governed meaning of agreement, in diversity action; contract was executed in New York and one party was New York citizen.

4. Bills and Notes ⇨147

Contract under which one joint venturer agreed to return capital contribution to another venturer was not "negotiable instrument" as it was not payable to order or bearer, and thus, provision of New York Uniform Commercial Code governing interpretation of negotiable instruments did not

apply. N.Y.McKinney's Uniform Commercial Code §§ 3-104(1)(d), 3-403, 3-403(2)(b).

See publication Words and Phrases for other judicial constructions and definitions.

5. Contracts ⇨176(2)

Whether contract is ambiguous is matter of law to be determined by court.

6. Contracts ⇨143(2)

Contract is "ambiguous" if it is reasonably susceptible of more than one interpretation.

See publication Words and Phrases for other judicial constructions and definitions.

7. Contracts ⇨143(2)

Unambiguous contract language is not rendered ambiguous simply because parties urge different interpretations in litigation.

8. Contracts ⇨143.5

Whether contract is ambiguous is to be determined by considering contract as whole, under New York law.

9. Joint Adventures ⇨4(1)

Agreement under which first joint venturer agreed to return capital contribution to second joint venturer upon return of all interests in venture by second venturer unambiguously indicated that first venturer was acting solely in representative capacity, not personal capacity, when he agreed to return second venturer's contribution, under New York law; agreement indicated that first venturer was acting both as officer of venture and as agent for venture, although first joint venturer did not sign contract expressly in representative capacity.

10. Contracts ⇨179

Contract which demonstrates on its face that defendant was acting solely in representative capacity will not be rendered ambiguous under New York law simply because defendant failed to sign contract in representative capacity.

11. Principal and Agent ⇨136(1)

Under New York law, agent for disclosed principal will not be held personally liable unless there is clear and explicit evi-

dence of agent's intent to substitute or add his own personal liability for, or to, that of principal.

12. Evidence \S 384

If contract is unambiguous on its face, extrinsic evidence may not be presented to create ambiguity, under New York law.

13. Joint Ventures \S 4(1)

Modification of original joint venture agreement making first joint venturer personally responsible for managing affairs of joint venture could not be construed as imposing personal liability on first joint venturer in event of joint venture subsequently buying out second venturer's interest in venture.

14. Evidence \S 384

Where parties have expressed their agreement in unambiguous and integrated writing, New York's parol-evidence rule operates to exclude evidence of all prior and contemporaneous negotiations or agreements offered to contradict or modify terms of writing.

15. Evidence \S 397(2)

Writing is "integrated" for purpose of New York's parol-evidence rule if it completely and accurately embodies all mutual rights and obligations of parties.

See publication Words and Phrases for other judicial constructions and definitions.

16. Evidence \S 397(1)

Evidence that first joint venturer orally promised to personally repay second venturer's capital contribution contradicted unambiguous terms of integrated written agreement entered by first venturer in his representative capacity, and thus was inadmissible under New York's parol-evidence rule.

17. Joint Ventures \S 4(1)

Alleged partial payment or promise to pay personally by first joint venturer after

1. As this Court will consider matters extrinsic to the complaint, we will treat defendant Epstein's motion to dismiss as a motion for summary judgment. See Fed.R.Civ.P. 12(b).

execution of agreement under which second joint venturer's capital contribution was to be returned by venture could not make first venturer personally liable under such contract.

18. Contracts \S 170(1)

Where contract is unambiguous on its face, evidence of conduct occurring subsequent to execution of contract may not be introduced to create ambiguity.

Arthur M. Handler, Whitman & Ransom, New York City, for plaintiff.

Elliot Silverman, Gold & Wachtel, New York City, for defendant.

ORDER

CONBOY, District Judge:

We have before us an action for breach of contract. Plaintiff Michael R. Stroll ("Stroll") seeks to recover from defendant Jeffrey Epstein ("Epstein") money allegedly owed pursuant to a contract in which Stroll relinquished his interest in a joint venture. Epstein asserts that he executed the contract in a representative capacity, as an agent for the venture and as an officer of the Intercontinental Asset Group ("I.A.G."), and that, therefore, he is not personally liable under the contract.

Pending before the Court are two motions: (1) defendant Epstein's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment;¹ and (2) plaintiff Stroll's cross-motion for summary judgment. For the reasons that follow, Epstein's motion for summary judgment is granted, and Stroll's cross-motion is denied.

Discussion²

A. The November 1984 Contract

[1-3] Defendant Epstein moves for summary judgment on the ground that the No-

2. This Court has diversity jurisdiction over the present action pursuant to 28 U.S.C. § 1332(a), as plaintiff Stroll is a citizen of Florida, defendant Epstein is a citizen of New York, and the sum in controversy is \$440,000.

Cite as 818 F.Supp. 640 (S.D.N.Y. 1993)

vember 1984 contract unambiguously indicates the parties' intention that Epstein was acting solely in a representative capacity when he agreed to return Stroll's capital contribution in the joint venture.³

[4-8] "Under New York law,⁴ ... the Court must look first to the parties' written agreement to determine the parties' intent and [must] limit its inquiry to the words of the agreement itself if the agreement sets forth the parties' intent clearly and unambiguously." *Sterling Drug Inc. v. Bayer AG*, 792 F.Supp. 1357, 1365 (S.D.N.Y.1992). See also *Chimart Associates v. Paul*, 66 N.Y.2d 570, 498 N.Y.S.2d 344, 346, 489 N.E.2d 231, 233 (Ct.App.1986) (Where a contract is unambiguous on its face, the Court may not consider evidence extrinsic to the contract to determine the parties' intent.). Whether a contract is ambiguous is a matter of law to be determined by the Court. *Sterling*, 792

In a diversity action, a federal court sitting in New York must apply New York law, including New York's choice of law rules. *J & B Schoenfeld Fur Merchants, Inc. v. Kilbourne & Donahue, Inc.*, 704 F.Supp. 466, 468 (S.D.N.Y.1989). See *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941); see also *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). Under New York's choice of law rules, when a court is construing the meaning of a contract, the Court should "apply the local law of that state which has the greatest interest in or the most significant relationship to the transaction and the parties." See *Index Fund, Inc. v. Ins. Co. of N. Am.*, 580 F.2d 1158, 1162 (2d Cir.1978), cert. denied, 440 U.S. 912, 99 S.Ct. 1226, 59 L.Ed.2d 461 (1979). In the present action, the state with the most significant relationship to the transaction is New York: the contract being sued upon was executed in New York, defendant Epstein is a New York citizen, and I.A.G. is a New York corporation. Moreover, both parties agree that New York law applies in this case. Accordingly, we look to New York law to construe the meaning of the November 1984 contract.

3. Initially, we note that Epstein contends that this action is time-barred pursuant to N.Y. C.P.L.R. § 213(2) (McKinney 1990), which provides a six-year statute of limitations for breach of contract claims. Stroll contends that the statute of limitations was tolled as he received a \$10,000 personal check from Epstein in May of 1988, accompanied by Epstein's promise to pay more of the debt upon his receipt of personal funds. See *Commissioners of the State Ins. Fund v. Warner*, 156 A.D.2d 131, 548 N.Y.S.2d 883, 883 (1st Dep't 1989) (stating the common law rule that the statute of limitations will be tolled if

F.Supp. at 1366. A contract is ambiguous if it is reasonably susceptible of more than one interpretation. *Chimart*, 498 N.Y.S.2d at 346, 489 N.E.2d at 233. Unambiguous contractual language is not rendered ambiguous "simply because the parties urge different interpretations in litigation." *Sterling*, 792 F.Supp. at 1366. Moreover, whether a contract is ambiguous is to be determined by considering the contract as a whole. *Wing v. Wing*, 112 A.D.2d 932, 492 N.Y.S.2d 450, 452 (2d Dep't 1985).

[9] Applying the above-mentioned principles, this Court concludes that the November 1984 contract, when read as a whole, unambiguously indicates the parties' intention that Epstein was acting solely in a representative capacity when he agreed to return Stroll's capital contribution. The body of the contract makes clear that Epstein executed the

the creditor can show that the payment "was a payment of a portion of the admitted debt ... accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder."). Epstein asserts that he paid Stroll \$10,000 because Stroll had purchased a horse for him. Epstein presents no evidence of this purchase, though. Because all reasonable inferences on a summary judgment motion are to be drawn in favor of the non-moving party, *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986), we hold that the present action is not time-barred for the purposes of this motion.

4. Stroll contends that § 3-403(2)(b) of the New York Uniform Commercial Code should govern our interpretation of the November 1984 contract. See N.Y.U.C.C. § 3-403(2)(b) (McKinney 1991). We disagree. Section 3-403 governs negotiable instruments. *Finnish Fur Sales Co. v. Juliette Shuloff Furs, Inc.*, 770 F.Supp. 139, 147 (S.D.N.Y.1991); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141, 143, 385 N.E.2d 1068, 1070 (Ct.App.1978). As Stroll concedes, the present contract is not a negotiable instrument because it is not "payable to order or to bearer." See N.Y. U.C.C. § 3-104(1)(d) (McKinney 1991). We have found no case which applies § 3-403(2)(b) to a non-negotiable instrument. Moreover, at least one New York court has specifically held that if the contract being sued upon is a not a negotiable instrument, § 3-403 cannot be applied to determine whether an agent executed the contract in an individual capacity. *Pepsi-Cola Buffalo Bottling Corp. v. Wehrle Drive Supermarkets*, 123 A.D.2d 515, 507 N.Y.S.2d 107, 108 (4th Dep't 1986).

contract in a representative capacity. In one sentence, the contract states that the November 1984 contract shall consist of terms and conditions verbally agreed upon on September 10, 1984. In an adjacent sentence, the contract states that the following agreement was reached on September 10, 1984: "in your capacity as both an officer of Intercontinental Asset Group and as agent for the joint venture you verbally agreed to accept my rescission of my acquisition of the joint venture *ab initio*, and my tender to you of all my interests in the venture and you are to return all amounts contributed by me to the venture..." (emphasis added). Read together, these two sentences clearly indicate that the November 1984 contract was executed by Epstein in his representative capacity.

Stroll asserts that the above-quoted sentence demonstrates that Epstein acted in a representative capacity only when he agreed to accept Stroll's demand for rescission, and that Epstein personally agreed to buy out Stroll's interest in the venture. We find Stroll's interpretation of this sentence strained and unreasonable as there is nothing in the sentence to indicate that the phrase "in your capacity as ... an officer ... and as agent..." does not apply to the entire sentence.

In an attempt to establish Epstein's personal liability, Stroll points to selected phrases of the contract which use personal pronouns to refer to Epstein (e.g., "I hereby accept your demand for rescission and tender upon the terms and conditions contained herein."). However, the very first time the contract uses a personal pronoun to refer to Epstein, the contract states, "in your capacity as both an officer of Intercontinental As-

set Group and as agent for the joint venture you ... agreed to accept my rescission of my acquisition ... and my tender to you of all my interests in the venture and you are to return all amounts contributed by me to the venture..." (emphasis added). This sentence indicates that when the contract, after this sentence, uses only personal pronouns to refer to Epstein, it is referring to Epstein in a representative capacity.

[10, 11] Finally, Stroll argues that Epstein's signature on the contract reveals the parties' intention to hold Epstein personally liable because Epstein did not sign the contract as an agent or as a corporate officer. Epstein signed the contract as follows: */s/ Jeffery Epstein I.A.G.* Under New York law, a signature in a representative capacity would have been "Jeffrey Epstein for I.A.G." or "I.A.G., by Jeffrey Epstein". 2 N.Y.Jur.2d, Agency, § 181. However, under New York common law principles of agency, which govern this contract,⁵ a contract which demonstrates on its face that the defendant was acting solely in a representative capacity will not be rendered ambiguous simply because the defendant failed to sign the contract in a representative capacity. See *Stylianiades v. De Lorean Motor Co.*, 115 Misc.2d 861, 454 N.Y.S.2d 799, 800 (N.Y.Sup.Ct.1982); 2 N.Y.Jur.2d §§ 180, 182. See generally *Ell Dee Clothing Co., Inc. v. Marsh*, 247 N.Y. 392, 395, 160 N.E. 651 (Ct.App.1928) ("[W]here one party to a written contract is known to the other party to be in fact acting as agent for some known principal, he does not become personally liable whether he signs individually or as [an] agent."). Accordingly, because the body of the contract clearly indicates that Stroll knew, or should

5. Under New York common law, an agent for a disclosed principal will not be held personally liable "unless there is clear and explicit evidence of the agent's intention to substitute or superadd his own personal liability for, or to that of his principal." *Paribus Properties, Inc. v. Benson*, 146 A.D.2d 522, 536 N.Y.S.2d 1007, 1008 (1st Dep't) (quoting *Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177 (Ct.App.1953)). As stated in *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 217 N.Y.S.2d 55, 57, 176 N.E.2d 74, 76 (Ct.App. 1961), the rationale underlying this presumption against personal liability was the "great danger

in allowing a single sentence in a long contract to bind individually a person who sign[ed] only as a corporate officer." Other cases have applied this presumption even where the contract was only a page or two long and where the agent signed in an individual capacity. See, e.g., *Shoenthal v. Bernstein*, 276 A.D. 200, 93 N.Y.S.2d 187, 188-90 (1949). Accordingly, we hold that New York common law governs the present case, where the contract was only one and a half pages long, and where the defendant signed in an individual capacity.

have known,⁶ Epstein was acting in a representative capacity, the failure of Epstein's signature to meet the technical requirements of a representative signature is insufficient to render the contract ambiguous as to the parties' intent.

Based on the above analysis, the Court concludes that the November 1984 contract, when read as a whole, is unambiguous on its face and indicates the parties' intention that Epstein was acting in a representative capacity when he agreed to return Stroll's capital contribution.

Stroll, however, seeks to introduce extrinsic evidence to generate ambiguity in the contract. Specifically, Stroll seeks to introduce a prior written contract executed by Stroll, I.A.G., and Epstein on June 18, 1982. Stroll argues that an interpretation of the November 1984 contract as imposing personal liability on Epstein would be consistent with Epstein's assumption of personal liability under the June 1982 contract.

[12] As noted above, if a contract is unambiguous on its face, extrinsic evidence may not be presented to create an ambiguity in the contract. Therefore, Stroll cannot introduce the June 1982 contract to create an ambiguity in the November 1984 contract.

[13] However, even if we consider the June 1982 contract, our conclusion that the November 1984 contract is unambiguous and does not establish personal liability remains unchanged. The June 1982 contract is a modification of Stroll and I.A.G.'s original joint venture agreement, with one of the modifications making Epstein personally responsible for managing the affairs of the joint venture. The contract makes no mention of any future refund of Stroll's capital contribution, or of a buy out in the event of a rescission.

The relevant provisions of the June 1982 contract are:

The purpose of this letter is to . . . modify certain provisions of the Joint Venture agreement which will continue to be operative.

6. The Court observes that the November 1984

The following will constitute our agreement:

1. For all purposes *hereof* and in respect of the management of the affairs of the Joint Venture *as hereinafter provided*, Jeffrey E. Epstein ("Epstein") shall act on behalf of I.A.G. and notwithstanding the separate legal existence of I.A.G., as between the parties hereto, I.A.G. and Epstein shall be treated as one and the same. (emphasis added). The definition of "hereof" is "of this" (i.e., of this agreement). See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 664 (1st ed. 1966). Therefore, the June 1982 contract, when read in the light most favorable to Stroll, merely makes Epstein liable for the purposes of the modified joint venture agreement. A buy out was not a purpose of the modified joint venture agreement. Therefore, the June 1982 contract cannot be construed as imposing personal liability on Epstein in the event of I.A.G. buying out Stroll's interest in the joint venture.

B. Parole Evidence

[14, 15] Where the parties have expressed their agreement in an unambiguous and integrated writing, "the parole evidence rule operates to exclude evidence of all prior and contemporaneous negotiations or agreements offered to contradict or modify the terms of their writing." *Adler & Shaykin v. Wachner*, 721 F.Supp. 472, 476, 479 (S.D.N.Y.1988). A writing is integrated if it "completely and accurately embodies all the mutual rights and obligations of the parties." *Id.* at 476. New York law provides that a "contract which appears complete on its face is an integrated agreement as a matter of law." *Happy Dack Trading Co., Ltd. v. Argo Industries, Inc.*, 602 F.Supp. 986, 991 (quoting *Battery S.S. Corp. v. Refineria Panama, S.A.*, 513 F.2d 735, 738 n. 3 (2d Cir. 1975)). The parole evidence rule serves to protect a party to a written contract from infirmity of memory, perjury, or the death of witnesses. *Adler*, 721 F.Supp. at 476.

[16] We have examined the November 1984 contract and find it to be a complete integration of the parties' agreement. See contract was drafted by Stroll's attorneys.

Id. at 476-478. Moreover, even the plaintiff does not contest that the November 1984 contract is a complete integration.

Stroll seeks to introduce evidence that during the September 10, 1984 meeting at the office of Stroll's attorney, Epstein orally promised to personally repay Stroll's capital contribution. In addition, Stroll seeks to introduce evidence that at the November 15, 1984 meeting, Epstein took Stroll aside and orally reiterated his personal promise to return Stroll's capital contribution. However, the evidence Stroll seeks to present directly contradicts the unambiguous terms of the November 1984 contract. The contract states that, "[o]n September 10, 1984, you [Epstein] and I [Stroll] met in the law office of Henry M. Grannan.... During the course of this meeting, in your capacity as both an officer of Intercontinental Asset Group and as an agent for the joint venture you verbally agreed to accept my rescission ... and my tender to you of all my interests ... and you are to return all amounts contributed by me...." (emphasis added). Moreover, the November 1984 contract states that the terms of the November 1984 contract are the same as those agreed upon at the September 10, 1984 meeting. Therefore, because the evidence Stroll seeks to present contradicts the unambiguous terms of the integrated November 1984 contract, this evidence is inadmissible under the parole evidence rule.

C. Subsequent Conduct

[17] Stroll asserts that in May 1988, Epstein made a part payment on the debt of \$10,000, by personal check. Stroll also asserts that in September 1991, Epstein promised to pay him \$75,000 from a fee Epstein was expecting to receive. Epstein concedes

7. In order to establish that there is a genuine issue of material fact, Stroll may introduce evidence of conduct subsequent to the November 1984 contract either to establish that a novation occurred, or to show that, at some time subsequent to the November 1984 contract, Epstein agreed to personally guarantee I.A.G.'s debt.

A novation is not enforceable absent consideration. *Kasper v. Roberts*, 119 Misc.2d 829, 464 N.Y.S.2d 642, 644 (N.Y.Civ.Ct.1983). Moreover, an oral promise to guarantee the debt of another is not enforceable if the party making the guarantee did not receive "new consideration which

that he paid Stroll \$10,000, but claims that he paid this money to Stroll because Stroll had purchased a horse for him. Moreover, Epstein asserts that at no time subsequent to the execution of the November 1984 contract did he ever promise to personally repay Stroll's capital contribution.

[18] Where a contract is unambiguous on its face, evidence of conduct occurring subsequent to the execution of the contract may not be introduced to create ambiguity in the contract. See *Allied Chemical Corporation v. Alpha Portland Industries*, 58 A.D.2d 975, 397 N.Y.S.2d 480, 482 (4th Dep't 1977). Therefore, even if we view the evidence in the light most favorable to Stroll, a partial payment or a promise to pay personally made by Epstein subsequent to the execution of the November 1984 contract cannot make Epstein personally liable under the November 1984 contract.

Because Epstein has established that he is not personally liable under the November 1984 contract, he has met his burden of establishing that there is no genuine issue of material fact.⁷

Conclusion

The Court finds that the November 1984 contract unambiguously indicates that defendant Epstein was acting solely in a representative, and not in a personal, capacity. Accordingly, Epstein's motion for summary judgment is granted, and Stroll's motion for summary judgment is denied. The Clerk of the Court is directed to enter judgment in favor of the defendant.

SO ORDERED.



... is beneficial to him." *Karl Ehmer Forest Hills Corp. v. Gonzalez*, 159 A.D.2d 613, 553 N.Y.S.2d 22, 23 (2d Dep't 1990). We hold that Epstein's check does not constitute a written promise to guarantee the remainder of I.A.G.'s debt because the check was for only \$10,000, and had no other written notation on it. Therefore, even viewing the evidence in the light most favorable to Stroll, he has presented no evidence that Epstein received consideration for his part payment, or for his promise subsequent to the November 1984 contract to personally refund the remainder of Stroll's capital contribution.

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Shanks v. Wexner
 E.D.Pa., 2003.

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
 Nelson SHANKS, Plaintiff,

Leslie and Abigail WEXNER, h/w, Jeffery E.
 Epstein, individually, and d/b/a J. Epstein and
 Company, Inc., and Ghislaine Maxwell, Defendants.
 No. Civ.A. 02-7671.

March 18, 2003.

OPINION

NEWCOMER, J.

I. Introduction

*1 This case arises out of a contract dispute.^{FN1} The Plaintiff claims that the Defendants contracted with him to paint a family portrait of Abigail Wexner and her three children. The Plaintiff alleges that the Defendants breached this contract by refusing to pay for the portrait after it was delivered. Currently before the Court is the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. For the following reasons the Motion will be denied.

FN1. The Defendants deny that a contract was ever formed. For purposes of this Motion only we will accept that there was a contract between the two parties.

II. Legal Standard for Personal Jurisdiction

As a federal court sitting in diversity, our personal jurisdiction inquiry is two-fold. First, we must decide whether the Pennsylvania Long Arm Statute authorizes jurisdiction over the Defendants, and second, we must decide whether exercising

jurisdiction over these Defendants satisfies the Due Process Clause of the Constitution. *Vetrotex Certainteed Corp. v. Consolidated Fiber and Glass Products Co.*, 25 F.3d 147, 151 (3d Cir.1996). Because the Pennsylvania Long Arm Statute is coextensive with the Due Process Clause, however, the decisive issue is whether exercising personal jurisdiction over the Defendants offends due process. 42 Pa. Cons.Stat. Ann. § 5322(b) (West 2003).

There are two requirements to satisfy due process in the personal jurisdiction context. First a party must have minimum contacts with Pennsylvania sufficient to show that the party has purposely availed itself to the laws of this forum. *IMO Indus. v. Kiekert AG*, 155 F.3d 254 (3d Cir.1998). When determining whether these minimum contacts are present, it is the quality and not necessarily the quantity of contacts that is determinative. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Further, because the Plaintiff claims that specific jurisdiction exists in this case, the relevant contacts are those that gave rise to the cause of action.^{FN2} If minimum contacts exist, the Court must decide whether forcing the out-of-state defendants to submit to jurisdiction in Pennsylvania conforms with traditional notions of fair play and substantial justice. *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 481 (3d Cir.1993) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In making this determination we should consider the following: 1) the interests of the forum state; 2) the plaintiff's interest in obtaining relief; 3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and 4) the shared interest of the several States in furthering fundamental substantive social policies. *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3d Cir. 1990) (citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987)).

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FN2. The Plaintiff makes two claims in this case, breach of contract and promissory estoppel. The Court will not engage in a specific jurisdiction analysis for each of the Plaintiff's two claims. Both claims center on essentially the same events and circumstances, and therefore, the considerations for jurisdictional purposes are identical. See *Remick v. Manferdy*, 238 F.3d 248, 255 (2001) (claim specific analysis is only required when there are different jurisdictional considerations).

II. Procedure for Determining Minimum Contacts

When a Defendant moves for dismissal under 12(b)(2) for lack of personal jurisdiction the burden shifts to the party seeking to impose jurisdiction. *Provident Nat. Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434 (3d Cir.1987). In response to a 12(b)(2) motion, a party must make a prima facie showing that minimum contacts warranting personal jurisdiction exist.^{FN3} *Mellon Bank (East) PSFS Nat. Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992).

FN3. The Court notes that although a Plaintiff need only make a prima facie showing of jurisdiction to defeat a motion under Fed.R.Civ.P. 12(b)(2), a Plaintiff has to establish personal jurisdiction by a preponderance of the evidence at trial. *Carteret Saving Bank v. Shushan*, 954 F.2d 141, 146 (3d Cir.1992). The Defendants need not do anything to preserve their right to raise personal jurisdiction again at trial.

*2 The law in the Third Circuit, however, is not clear as to what a Court should consider in deciding whether the Plaintiff has met this burden. Two lines of cases differ as to whether affirmative proof of minimum contacts is required, or if the Plaintiff can merely rely on contacts alleged in his pleadings. Several cases have stated that a plaintiff cannot rely on the bare pleadings alone, but must sustain his burden of proof by establishing with reasonable

particularity sufficient contacts through sworn affidavits or other competent evidence. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 and n. 9 (3d Cir.1984); *National Paintball Supply, Inc. v. Cossio*, 996 F.Supp. 459 (E.D.Pa.1998); *Rose v. Granite City Police Dept.*, 813 F.Supp. 319, 321 (E.D.Pa.1993). Following these cases, a court would not accept the allegations of jurisdictional facts in a complaint as true without some affirmative proof. See *Time Share Vacation Club*, 735 F.2d 61, 66 at nt. 9. ("Once [a Rule 12(b)(2) motion] is made, plaintiff must respond with actual proofs, not mere allegations.") However, several other cases have held the contrary, finding that a court should accept the allegations in a complaint as true. *Carteret Saving Bank v. Shushan*, 954 F.2d 141, 142 at nt. 1(3d Cir.1992); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F.Supp. 191, 192-93 & n. 2(E.D. Pa. 174); See, also, *Behagen v. Amateur Basketball Ass'n of U.S.A.*, 744 F.2d 731, 733 (10th Cir.1984).
FN4

FN4. Despite the apparent contradictory nature of these precedents, several cases have claimed that a District Court should both require proof of jurisdictional facts, and accept all factual allegations in the complaint as true. See *Feinberg v. Central Asia Capital Corp.*, 936 F.Supp. 250, 254 (E.D.Pa.1996) (stating that "Plaintiff must go beyond the pleadings and make an affirmative proof" and later citing *Carteret* for the proposition that the Court should accept Plaintiff's allegations as true); *Poole v. Sasson*, 122 Fed.Supp.2d 556, 557 (E.D.Pa.2000) ("Although all allegations in the Complaint are taken as true, a plaintiff may not solely rely on bare pleadings to satisfy his jurisdictional burden"). This Court will decline to follow this approach because of its contradictory nature and the lack of guidance it will give to future litigants.

These precedents give little guidance in a case, such as this one, where the exhibits submitted by the Plaintiff may not be sufficient to support

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jurisdiction on their own, but if considered in conjunction with assertions made in the Complaint would satisfy the minimum contacts requirement. If the Court were to follow the *Time Share* approach of requiring competent evidence of all jurisdictional facts, this Court would have to dismiss the Plaintiff's case. If the Court followed the procedure of *Carteret* of accepting factual allegations in the Complaint, than jurisdiction has been established.

Because the Defendants did not attempt to controvert any of the allegations in the Plaintiff's Complaint, this Court finds that the most fair procedure is to accept them as true for the purpose of this Motion. This approach is followed in several other circuits. *Brown* ■ *Flowers Industries, Inc.*, 688 F.2d 328, 332 (5th Cir.1982); *Turnock* ■ *Cope*, 816 F.2d 332, 333 (7th Cir.1987); *Dowless* ■ *Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305, 1307 (4th Cir.1986); *Behagen* ■ *Amateur Basketball Ass'n of U.S.A.*, 744 F.2d 731, 733 (10th Cir.1984); *Jet Charter Service, Inc.* ■ *Koeck*, 907 F.2d 1110, 1111 (11th Cir.1990). While this procedure places a burden on the party challenging jurisdiction to at least question the allegations of jurisdictional facts, this burden is consistent with the other requirements placed on Defendants bringing a 12(b)(2) motion. When a complaint is filed there is no affirmative duty to plead personal jurisdiction because it is assumed that personal jurisdiction exists. *Stirling Homex Corp.* ■ *Homasote Co.*, 437 F.2d 87, 88 (2d Cir.1971). It is incumbent on a party to raise the lack of personal jurisdiction. See *Zelson* ■ *Thomforde*, 412 F.2d 56 (3d Cir.1969) (district court cannot raise personal jurisdiction *sua sponte*). Further, if a party wishes to challenge personal jurisdiction of a Court he must do so at the responsive pleading stage or he will have waived his objection. Fed. R. Civ. P. 12(h)(1) (personal jurisdiction is waived if not raised). It logically follows that a party must respond to the allegations upon which the power of a court is premised and that any failure to do so will result in the party admitting those facts for the purpose of the 12(b)(2) Motion. This procedure also strikes a balance between the two contradictory lines of cases cited above. It still requires the Plaintiff to do more than simply rely on bare pleadings, albeit only when those pleadings are

challenged. It also gives the substantial deference to pleadings that is required by other 12(b) motions and was advocated by the *Carteret* line of cases. See *Oxford First Corp.* ■ *PNC Liquidating Corp.*, 372 F.Supp. 191, 192-93 & n. 2 (E.D.Pa.1974) (relying on the case law in other 12(b) motions to support the procedure of accepting as true all jurisdictional facts).

III. Jurisdictional Facts

*3 Considering the above analysis the Court will accept the facts as pleaded in the Plaintiff's Complaint and accompanying exhibits.^{FN5} These allegations show that the Defendant has the following relevant contacts with Pennsylvania: 1) a fax sent from the Defendants to the Plaintiff seeking to set up a meeting between Mrs. Wexner and the Plaintiff in New York City; 2) a fax sent from the Defendants to the Plaintiff detailing his itinerary for his trip to Ohio to meet with and photograph the subjects of the portrait; 3) a letter from the Plaintiff to Ms. Wexner thanking her for her hospitality during his stay in Ohio; 4) a fax from the Defendants to the Plaintiff including the measurements of Ms. Wexner and her children, which were to be used to make mannequins in preparation for the portrait; 5) a letter from Defendant Maxwell to the Plaintiff confirming the price of the portrait; 6) a letter to Defendant Maxwell from the Plaintiff regarding a proposed frame for the painting; 7) a courier hired by the Defendants who traveled to Pennsylvania and picked up the painting; and, 8) an invoice sent from the Plaintiff to the Wexners. The Defendants also admit that the Defendants initiated the relationship by contacting the Plaintiff in Pennsylvania.

FN5. Some of the contacts asserted in the Plaintiff's brief were not made by the Defendants personally but by other parties. The Plaintiff has alleged in his complaint that these parties were acting as the agents of the Defendants. Accordingly, these contacts will be imputed to the Defendants. *Wells Fargo & Co.* ■ *Wells Fargo Express Co.*, 556 F.2d 406, 419 (9th Cir.1977).

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IV. Analysis of minimum contacts

Based on the above facts it is clear that the Defendants did have sufficient minimum contacts to justify personal jurisdiction. The Defendants reached out to a Pennsylvania resident to have him paint the portrait. Jurisdiction is proper when parties "reach out beyond one state and create continuing relationships and obligations with the citizens of another state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 256 (1985). In cases where a out-of-state resident contracts with a forum resident, whether the out-of-state resident initiated the relationship is crucial. See *Vetrotex Certaineed Corp. v. Consolidated Fiber*, 75 F.3d 147 (3d Cir.1996).

Simply initiating a contractual relationship with a Pennsylvania resident, however, is not the only contact in this case which goes towards establishing personal jurisdiction. Indeed, the Defendants also engaged in crucial communications about the performance of the contract directed at the state of Pennsylvania. See *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir.1993) (mail and telephone contacts may support jurisdiction). These contacts cannot be dismissed as mere informational contacts, rather some of them go to the heart of the transaction. Specifically, the May 16, 2000, letter from the Defendants finalized the price of the portrait. These contacts evidence a conscious decision by the Defendants to do business with a Pennsylvania resident operating in the Commonwealth of Pennsylvania.

Perhaps the most meaningful contact occurred when the portrait was delivered to the Defendants' agent within the state of Pennsylvania. This delivery is crucial to the breach of contract claim because delivery of the portrait was necessarily an implied condition of the contract. Not only is it significant to the contract, but by sending a courier to drive on Pennsylvania roads, make a pick up at a Pennsylvania business, and then return to Ohio, the Defendants purposely availed themselves to the benefits of doing business in the Commonwealth. While merely passing through a state is not a sufficient contact to warrant jurisdiction, when a party makes a business delivery in the state

purposeful availment has been established. *Papachristou v. Turbines, Inc.*, 902 F.2d 685, 685 (8th Cir.1990); see *Carney v. Bill Head Trucking, Inc.*, 83 F.Supp.2d 554, 557 (E.D.Pa.2000) (drawing a distinction between merely passing through a state and stopping and making a delivery).

*4 The Defendants argue that they are not amenable to personal jurisdiction in Pennsylvania because they never physically entered the state. They attempt to support this argument with the fact that the only two face-to-face meetings between the parties occurred in New York and Ohio. As noted above, however, for jurisdictional purposes the courier pickup of the painting was a physical contact with the state because the courier was an agent of the Defendants. See note 5 *supra*. Moreover, the lack of any physical contacts with the state would not bar this Court from exercising personal jurisdiction over the Defendants. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The Court is also not troubled by the Defendants' assertions that the majority of negotiations for the contract occurred in New York. Nothing in due process restricts more than one state from having personal jurisdiction over a party to a given transaction. The contacts the Defendants may have had with New York are not relevant to whether there are sufficient contacts with Pennsylvania. As discussed above, the initiation of the relationship with the Pennsylvania Plaintiff, the entangling contacts with Pennsylvania during the painting of the portrait, and the final delivery of the portrait to the Defendants at the Pennsylvania Plaintiff's business, satisfy the minimum contacts requirement regardless of the fact that significant negotiations may have taken place in New York.

■ Traditional Notions of Fair Play and Substantial Justice

Because the Court concludes that the Defendants had sufficient minimum contacts to warrant jurisdiction, we must now turn to the second part of our due process inquiry, whether this Court's exercise of jurisdiction over the Plaintiff comports with traditional notions of fair play and substantial justice. At this point in the analysis, the burden falls

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on the Defendants to convince the Court that these principles will be offended by this Court's exercise of jurisdiction. *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3d Cir.1990). We conclude that the Defendants cannot meet this burden. The interests of both the Commonwealth of Pennsylvania and the Plaintiff are substantially forwarded by hearing the case in this Court. The Plaintiff, a Pennsylvania resident, should be able to seek a remedy in his home state. It is certainly no more unfair for the Plaintiff to bring the Defendants into a Pennsylvania court, than it would be to force the Plaintiff to travel to Ohio in search of a remedy. Moreover, Pennsylvania has an interest in assuring that its residents have a convenient forum to remedy breaches of contracts, particularly when it appears that the vast majority of the contract was performed within the Commonwealth. Accordingly, the Court sees no reason why exercising jurisdiction over the Defendants would violate traditional notions of fair play and substantial justice.

VI. Conclusion

For the foregoing reasons, the Defendants Motion to Dismiss for Lack of Personal Jurisdiction is denied. An appropriate order will follow.

E.D.Pa., 2003.

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340-775-2525



Golden Roc
Chr.
St. Cro
Phone: (3
Fax: (34



Administ
St. Joh
Phone: (3
Fax: (34



Prop. & Pr
1 Sub B
St. Thon
Phone: (3
Fax: (34

St. Thomas
License #: 1-2021802-2006

--Gasoline Station--
GREEN CAY MARINA
St. Croix
License #: 2-2024637-2006

--Holding Company--
PARTICLE FINANCIAL, LLLP
St. Thomas
License #: 1-1003805-2006

--Hotel & Guest House B 40-99 beds--
TAMARIND REEF HOTEL
C'STED, St. Croix
License #: 2-2024547-2006

--Marinas--
GREEN CAY MARINA
St. Croix
License #: 2-2024637-2006

--Rental of Commercial Space--
GREEN CAY MARINA
St. Croix
License #: 2-2024637-2006

Found 34 Records
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Records 21 to 30

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07/17/2002	3	AFFIDAVIT OF SERVICE of summons, complaint & rule 1.9 statement as to Jeffrey E. Epstein by first class mail on 7/15/02 . Answer due on 8/5/02 for Jeffrey E. Epstein . (db) (Entered: 07/19/2002)
07/17/2002	3	AFFIDAVIT OF SERVICE of summons, complaint & rule 1.9 statement as to Financial Trust by Helen Kim on 7/15/02 . Answer due on 8/5/02 for Financial Trust . (db) (Entered: 07/19/2002)
07/17/2002	3	AFFIDAVIT OF SERVICE of summons, complaint & rule 1.9 as to Jeffrey E. Epstein by Helen Kim on 7/15/02 . Answer due on 8/5/02 for Jeffrey E. Epstein . (db) (Entered: 07/19/2002)
08/02/2002	4	ORDER, Counsel are directed to appear in courtroom 23A on 9/13/02, at 10:30 a.m. for an initial case management conference purs. to FRCP 16 . (signed by Judge Sidney H. Stein); Copies mailed. (sb) (Entered: 08/05/2002)
08/16/2002	5	STIPULATION and ORDER, that defendants' time to answer, move or otherwise respond to the complaint in the above-captioned action is hereby extended to and including 9/3/02 . (signed by Judge Sidney H. Stein) (dle) (Entered: 08/19/2002)
09/03/2002	7	NOTICE OF MOTION (Filed on Service Date) by Jeffrey E. Epstein, Financial Trust for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint ; or, in the alternative, for an order, the proceedings should be stayed pending the adjudication of the first-filed action ; Return Date 9/26/02. (rec'd in the night deposit box on 10/9/02 at 5:07 p.m.) (sac) (Entered: 10/16/2002)
09/20/2002	16	NOTICE OF MOTION (FILED ON SERVICE DATE) by Citibank, N.A., for summary judgment pursuant to Rule 56 of the FRCP on each of the first and second claims for relief asserted in the complaint in this action . Return Date 10/11/02. Annexed affidavit of Vita Cusumano and the statement pursuant to Local Civil Rule 56.1. (kw) Modified on 10/28/2002 (Entered: 10/28/2002)
09/30/2002	6	STIPULATION; defendants shall serve their reply submission in further support of their motion to dismiss or stay, and their submission in opposition to plaintiff's motion for summary judgment, on 10/8/02; plaintiff shall serve its reply submission in further support of its motion for summary judgment on 10/22/02 ; both defendant's motion to dismiss or stay and plaintiff's motion for summary judgment shall be returnable before the Court on 10/24/02; each party shall file its respective motion papers, and provide the Court with courtesy copies, in accordance with Judge Stein's individual rules of practice; the parties jointly request that oral argument be held with respect to both motions at the Court's earliest available time . (signed by Judge Sidney H. Stein) (kkc) (Entered: 10/03/2002)
10/09/2002	8	MEMORANDUM OF LAW by Jeffrey E. Epstein, Financial Trust in support of [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed

		action. (rec'd in the night deposit box on 10/9/02 at 5:07 p.m.) (sac) (Entered: 10/16/2002)
10/09/2002	9	RULE 1.9 CERTIFICATE filed by Jeffrey E. Epstein, Financial Trust. (rec'd in the night deposit box on 10/9/02 at 5:06 p.m.) (sac) (Entered: 10/16/2002)
10/09/2002	10	DECLARATION of Edward S. Feig by Jeffrey E. Epstein, Financial Trust in support Re: [7-1] motion for an order, purs. to Rules 1, 12 and 13 (a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action. (rec'd in the night deposit box on 10/9/02 at 5:07 p.m.) (sac) (Entered: 10/16/2002)
10/09/2002	11	MEMORANDUM OF LAW by Citibank, N.A. in opposition to [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action. (sac) (Entered: 10/16/2002)
10/09/2002	12	AFFIDAVIT of Marshall H. Fishman by Citibank, N.A. in opposition to [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action. (sac) (Entered: 10/16/2002)
10/09/2002	13	AFFIDAVIT of Dayle Davison by Citibank, N.A. in opposition to [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action. (sac) (Entered: 10/16/2002)
10/09/2002	14	REPLY MEMORANDUM by Jeffrey E. Epstein, Financial Trust in support re: [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action. (rec'd in the night deposit box on 10/9/02 at 5:07 p.m.) (sac) (Entered: 10/16/2002)
10/09/2002	15	REPLY DECLARATION of Edward S. Feig by Jeffrey E. Epstein, Financial Trust in support re: [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action (rec'd in the night deposit box on 10/9/02 at 5:07 p.m.) (sac) (Entered: 10/16/2002)
10/22/2002	17	MEMORANDUM OF LAW by Citibank, N.A. in support of [16-1] motion for summary judgment pursuant to Rule 56 of the FRCP on each of the first and second claims for relief asserted in the complaint in this action. (kw) (Entered: 10/28/2002)
10/22/2002	18	MEMORANDUM OF LAW by Jeffrey E. Epstein, Financial Trust in opposition to [16-1] motion for summary judgment pursuant to Rule 56

		of the FRCP on each of the first and second claims for relief asserted in the complaint in this action. (Rec. in the night deposit box). (kw) (Entered: 10/28/2002)
10/22/2002	19	RULE 56.1 STATEMENT filed by Jeffrey E. Epstein, Financial Trust. (Rec. in the night deposit box). (kw) (Entered: 10/28/2002)
10/22/2002	20	REPLY MEMORANDUM by Citibank, N.A. re: [16-1] motion for summary judgment pursuant to Rule 56 of the FRCP on each of the first and second claims for relief asserted in the complaint in this action. (kw) (Entered: 10/28/2002)
10/24/2002	21	SUPPLEMENTAL DECCLARATION of EDWARD S. FEIG by Jeffrey E. Epstein, Financial Trust Re: . in response to the latest mudslinging tactic by Citibank. (vb) (Entered: 10/29/2002)
09/17/2003	22	NOTICE of attorney appearance for Jeffrey E. Epstein, Financial Trust by Gerald B. Lefcourt. (cd) (Entered: 09/19/2003)
09/17/2003	23	STIPULATION and ORDER; that the counsel representing defendants in this matter Gerald B. Lefcourt, P.C., in the place of Arent Fox Kinter Plotkin & Kahn, PLLC . (signed by Judge Sidney H. Stein) (pl) (Entered: 09/22/2003)
09/17/2003	24	ORDER; dismissing [16-1] motion for summary judgment pursuant to Rule 56 of the FRCP on each of the first and second claims for relief asserted in the complaint in this action without prejudice as moot; granting [7-1] motion for an order, purs. to Rules 1, 12 and 13(a) of the FRCP, dismissing the Complaint, granting [7-2] motion for an order, the proceedings should be stayed pending the adjudication of the first-filed action and this action is stayed; the Clerk of Court is directed to place this action on the suspense calendar . (signed by Judge Sidney H. Stein); (pl) (Entered: 09/22/2003)
12/18/2003	25	TRANSCRIPT of proceedings held on 9/17/03 before Judge Sidney H. Stein.(ml,) Modified on 1/6/2004 (kkc,). (Entered: 12/18/2003)
07/26/2005	26	STIPULATION AND ORDER OF DISMISSAL, IT IS HEREBY STIPULATED AND AGREED by the parties to this action, by their respective undersigned counsel of record, that the above entitled action be, and the same hereby is, dismissed with prejudice and without costs to any of the parties as against the other. (Signed by Judge John G. Koeltl on 7/25/05) (dt,) (Entered: 07/27/2005)

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Description:	Docket Report	Search Criteria:	1:02-cv-05332-SHS

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CLOSED

**U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:96-cv-08307-DC**

USA █ Epstein, et al
Assigned to: Judge Denny Chin
Demand: \$0
Cause: 28:1345 USA Plaintiff

Date Filed: 11/04/1996
Date Terminated: 03/17/1999
Jury Demand: Defendant
Nature of Suit: 230 Rent Lease &
Ejectment
Jurisdiction: U.S. Government Plaintiff

Plaintiff

United States of America

represented by **M. Chinta Gaston**
MARY JO WHITE
U.S. Attorney for SDNY
100 Church Street
19th Floor
New York, NY 10007
█
LEAD ATTORNEY

Defendant

Jeffrey E. Epstein

represented by **Steven J Cohen**
Wachtel & Masyr, LLP
110 East 59th Street
New York, NY 10022
█
LEAD ATTORNEY

Defendant

Ivan Fisher

represented by **Eileen J. Casey**
Gage Buschmann & Pavlis
120 West 45th Street
New York, NY 10036
█
LEAD ATTORNEY

G. Robert Gage, Jr.
Gage Buschmann & Pavlis
120 West 45th Street
New York, NY 10036
█
LEAD ATTORNEY

Counter Claimant

Ivan Fisher

represented by **G. Robert Gage, Jr.**
(See above for address)
LEAD ATTORNEY

■
Counter Defendant

United States of America

represented by **M. Chinta Gaston**
(See above for address)
LEAD ATTORNEY

Cross Claimant

Ivan Fisher

represented by **G. Robert Gage, Jr.**
(See above for address)
LEAD ATTORNEY

■
Cross Defendant

Jeffrey E. Epstein

represented by **Steven J Cohen**
(See above for address)
LEAD ATTORNEY

Defendant

Ellyn Bank

Defendant

Debra Elisa Cohen

represented by **Ellen Yaroshefsky**
Clayman & Rosenberg
305 Madison Avenue, Ste. 1301
New York, NY 10165
[REDACTED]
Fax: [REDACTED]
Email: ellen@clayro.com
LEAD ATTORNEY

Defendant

Diane Fisher
doing business as
The Fisher Group

Defendant

Fisher & Soffer
also known as
Fisher & Sophir

represented by **Eileen J. Casey**
(See above for address)
LEAD ATTORNEY

Defendant

█ D. Gerzog

Defendant

Robert Heilbrun

represented by **Robert Heilbrun**
Siegel & Heilbrun
575 Madison Avenue
New York, NY 10022
█
LEAD ATTORNEY

Defendant

Suzanne McDermott

Defendant

Christopher H. Martin

represented by **Robert Heilbrun**
(See above for address)
LEAD ATTORNEY

Defendant

Jessie Siegel
also known as
Jesse Siegel

represented by **Robert Heilbrun**
(See above for address)
LEAD ATTORNEY

Defendant

Siegel, Martin & Heilbrun

represented by **Robert Heilbrun**
(See above for address)
LEAD ATTORNEY

Defendant

Ron Soffer

Defendant

Carmen Tausik
TERMINATED: 08/06/1998

Defendant

John Does 1 through 10

Defendant

X Corporations 1 through 10

Cross Claimant

Jeffrey E. Epstein

represented by **Steven J Cohen**
(See above for address)
LEAD ATTORNEY

█

Cross Defendant

Ivan Fisher

represented by **G. Robert Gage, Jr.**
 (See above for address)
LEAD ATTORNEY

Date Filed	#	Docket Text
11/04/1996	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE \$ WAIVED (USA). (ricm) (Entered: 11/06/1996)
11/04/1996		Magistrate Judge Ellis is so Designated. (ricm) (Entered: 11/06/1996)
01/24/1997	2	STIPULATION and ORDER, by and between parties reset answer due for 2/3/97 for Ivan Fisher .. So Ordered.... (signed by Judge Denny Chin). (pl) (Entered: 01/27/1997)
01/31/1997	3	WAIVER OF SERVICE Returned Executed as to Ivan Fisher mailed on 12/3/96 Answer due on 2/3/97 for Ivan Fisher (ls) (Entered: 02/05/1997)
02/11/1997	4	Affidavit of service as to Jeffrey E. Epstein by Walter Doulin, co-worker on 1/31/97 Answer due on 2/20/97 for Jeffrey E. Epstein (ls) (Entered: 02/13/1997)
02/11/1997	4	Affidavit of service as to Jeffrey E. Epstein by mail on 2/1/97 Answer due on 2/21/97 for Jeffrey E. Epstein (ls) (Entered: 02/13/1997)
02/11/1997	5	AMENDED COMPLAINT by USA , (Answer due 2/24/97 for Ivan Fisher, for Jeffrey E. Epstein) amending [1-1] complaint ; Summons issued. (ls) (Entered: 02/13/1997)
02/24/1997	6	Affidavit of service of Amended Complt. and Amended Summons as to Ivan Fisher by Federal Express on 2/11/97 Answer due on 3/3/97 for Ivan Fisher (ls) (Entered: 02/24/1997)
02/26/1997	7	Affidavit of service of the amended s/c as to Jeffrey E. Epstein by Federal Express to Steven Cohen, Esq. on 2/13/97. Answer due on 3/5/97 for Jeffrey E. Epstein. (lam) Modified on 02/26/1997 (Entered: 02/26/1997)
03/07/1997	8	STIPULATION, extending time for deft Ivan Fisher to answer the Amended Complaint is extended from 2/28/97 to 4/7/97 , reset answer due for 4/7/97 for Ivan Fisher (signed by Judge Denny Chin). (kg) (Entered: 03/07/1997)
03/07/1997	9	STIPULATION and ORDER, Extending defendant's time to answer, move or otherwise respond to the Amended Complaint , Reset answer due for 3/26/97 for Jeffrey E. Epstein. SO ORDERED: (signed by Judge Denny Chin). (ae) (Entered: 03/11/1997)
03/10/1997	10	Affidavit of service as to Jeffrey E. Epstein by Michelle Heapy on 2/27/97 and by mail on 2/28/97. (kw) (Entered: 03/11/1997)
04/03/1997	11	STIPULATION and ORDER, extending time for deft Jeffrey E. Epstein to answer to the Amended Complaint is extended to 4/7/97 , reset answer

		due for 4/7/97 for Jeffrey E. Epstein (signed by Judge Denny Chin). (kg) (Entered: 04/03/1997)
04/08/1997	12	ANSWER to Complaint by Jeffrey E. Epstein (Attorney Steven J. Cohen) (pl) (Entered: 04/09/1997)
04/08/1997	13	ANSWER by Ivan Fisher (Attorney G. Robert Gage Jr.) to amended complaint; jury demand ; Firm of: Gage Buschmann & Pavlis by attorney G. Robert Gage Jr. for defendant Ivan Fisher (ls) (Entered: 04/09/1997)
04/09/1997	13	COUNTERCLAIM by Ivan Fisher against USA (ls) (Entered: 04/09/1997)
04/09/1997	13	CROSSCLAIM by Ivan Fisher against Jeffrey E. Epstein (ls) (Entered: 04/09/1997)
05/01/1997	14	STIPULATION and ORDER, extending time for deft Jeffrey E. Epstein to respond to deft Ivan S. Fisher's cross-claim , Response to crossclaim deadline set for 5/13/97 (signed by Judge Chin). (kg) (Entered: 05/01/1997)
05/14/1997	15	ANSWER by Jeffrey E. Epstein to [13-1] cross claim of defendant Ivan S. Fisher. (ae) (Entered: 05/15/1997)
06/28/1997	24	REPLY MEMORANDUM of LAW by USA re: in Support of its Motion for Partial Summary Judgment and for other Relief (dj) (Entered: 07/31/1997)
07/14/1997	16	Rule 56.1(a) statement filed by Jeffrey E. Epstein (pl) (Entered: 07/16/1997)
07/14/1997	17	MEMORANDUM by Jeffrey E. Epstein in opposition to the Governments' motion for partial summary judgment (pl) (Entered: 07/16/1997)
07/14/1997	18	AFFIDAVIT in opposition of Jeffrey A. Schantz Re: Plaintiffs' motion for partial summary judgment (pl) (Entered: 07/16/1997)
07/14/1997	19	MEMORANDUM by Ivan Fisher in opposition to Governments' motion for Partial Summary Judgement (pl) (Entered: 07/16/1997)
07/14/1997	20	Rule 56.1(b) statement filed by Ivan Fisher (pl) (Entered: 07/16/1997)
07/14/1997	21	AFFIDAVIT in opposition of Ivan S. Fisher (pl) (Entered: 07/16/1997)
07/28/1997	22	MEMORANDUM of LAW by USA in support of its Motion for Partial Summary Judgment and other Relief (dj) (Entered: 07/31/1997)
07/28/1997	23	SUPPLEMENTAL DECLARATION of Serene K. Nakano (dj) (Entered: 07/31/1997)
07/28/1997	25	NOTICE OF MOTION by USA for summary judgment , purs to Rule 56 (b) of the FRCP dismissing the counterclaims of defendant Ivan S. Fisher against the Government for declaratory relief and purs to Rule 65 of the FRCP directing defendants Jeffrey E. Epstein and Fisher to pay into a

		Court fund within thirty days of decision on this motion monies for the use and benefits of the premises known as 34 East 69th Street, NY, in the amount of \$15,000.00 per month from August 23, 1996 until the date that this action is finally determined , Return date 7/28/97; w. Rule 5 6.1 Statement and Declarations (djc) Modified on 07/31/1997 (Entered: 07/31/1997)
10/10/1997	26	ORDER, reset discovery due for 12/5/97 ; reset pretrial conference for 10:00 12/5/97 (signed by Judge Denny Chin); Copies mailed (cd) (Entered: 10/14/1997)
11/12/1997	27	Filed Memo-Endorsement on letter to Judge Chin from Steven J. Cohen dated 11/10/97; the objection to production of the entire lease is overruled; Mr. Epstein shall produce the entire lease; if he wants, production of the lease can be subject to a reasonable confidentiality stipulation and order ; (signed by Judge Denny Chin) (ls) (Entered: 11/12/1997)
12/23/1997	28	SECOND AMENDED COMPLAINT by USA (Answer due 1/5/98 for Ivan Fisher, for Jeffrey E. Epstein) amending [5-1] amended complaint against Ellyn Bank, Debra Elisa Cohen, Diane Fisher, Fisher & Soffer, [REDACTED] D. Gerzog, Robert Heilbrun, Suzanne McDermott, Christopher H. Martin, Jessie Siegel, Siegel, Martin, Ron Soffer, Carmen Talsig, John Does 1 - 10, X Corporations 1-10; Summons issued. (sac) (Entered: 12/30/1997)
01/05/1998	29	Filed Memo-Endorsement on letter dated 12/30/97 from Ellen J. Casey, granting parties request for additional time, until 1/7/98 to submit the additional legal authorities and discovery materials (signed by Judge Denny Chin) (kw) Modified on 01/07/1998 (Entered: 01/06/1998)
01/13/1998	30	STIPULATION and ORDER, reset answer to Second Amended Complaint due for 2/2/98 for Jeffrey E. Epstein (signed by Judge Denny Chin). (emil) (Entered: 01/14/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to Ellyn Bank by personal service on 1/10/98; Answer to Second Amended Complaint due on 1/30/98 for Ellyn Bank (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to Debra Elisa Cohen by Mr. Searson, Doorman on 1/2/98; Answer to Second Amended Complaint due on 1/22/98 for Debra Elisa Cohen (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to [REDACTED] D. Gerzog by Pat Bowles, Secretary, authorized to accept service on 1/5/98; Answer to Second Amended Complaint due on 1/26/98 for [REDACTED] D. Gerzog (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to Robert Heilbrun by Pat Bowles, Secretary, authorized to accept service on 1/5/98; Answer to Second Amended Complaint due on 1/26/98 for Robert Heilbrun (ae) (Entered: 01/22/1998)

01/20/1998	31	Affidavit of service of Second Amended Complaint as to Suzanne McDermott by personal service on 1/10/98; Answer to Second Amended Complaint due on 1/30/98 for Suzanne McDermott (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service as to Jessie Siegel by Pat Bowles, Secretary, authorized to accept service on 1/5/98; Answer to Second Amended Complaint due on 1/26/98 for Jessie Siegel (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to Siegel, Martin by Pat Bowles, Secretary, authorized to accept service on 1/5/98; Answer to Second Amended Complaint due on 1/26/98 for Siegel, Martin (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to Ron Soffer by Pat Bowles, Secretary, authorized to accept on 1/5/98; Answer to Second Amended Complaint due on 1/26/98 for Ron Soffer (ae) (Entered: 01/22/1998)
01/20/1998	31	Affidavit of service of Second Amended Complaint as to Carmen Talsig by Pat Bowles, Secretary, authorized to accept service on 1/5/98; Answer to Second Amended Complaint due on 1/26/98 for Carmen Talsig (ae) (Entered: 01/22/1998)
01/22/1998	32	STIPULATION and ORDER, reset answer to second amended complaint due for 1/30/98 for Fisher & Soffer, for Diane Fisher, for Ivan Fisher (signed by Judge Denny Chin). (djc) Modified on 01/23/1998 (Entered: 01/23/1998)
02/04/1998	35	ORDER, that the Clerk of the Court shall establish an interest-bearing account (the "account") and that payment of any funds tendered pursuant to or in accord with this order shall be deposited by the Clerk of the Court into the account and that the Clerk of the Court shall maintain the account until such further order of this Court. Send \$225,000.00 to Texas Chris acct. (signed by Judge Denny Chin); Copies mailed; copy of docmt sent to Cashiers office (djc) (Entered: 02/23/1998)
02/06/1998	33	Transcript of record of proceedings before Judge Chin filed for dates of December 17, 1997 (bm) (Entered: 02/06/1998)
02/19/1998	34	MEMORANDUM DECISION, I will enter a protective order that does not contain Proposed Paragraph 7(c). The Government may not use confidential information produced in discovery pursuant to the protective order for any purpose other than prosecuting this lawsuit, absent further order of the Court (signed by Judge Denny Chin); Copies mailed (ae) Modified on 02/23/1998 (Entered: 02/20/1998)
02/24/1998	36	PROTECTIVE ORDER, regarding procedures that will govern the handling of confidential information (signed by Judge Denny Chin); Copies mailed (also docketed in 97cv1489) (cd) Modified on 02/25/1998 (Entered: 02/25/1998)
03/05/1998	37	ANSWER by Jeffrey E. Epstein (Attorney Steven J. Cohen) to second

		amended complaint (ae) (Entered: 03/09/1998)
03/05/1998	37	CROSSCLAIMS by Jeffrey E. Epstein against Ivan Fisher (ae) (Entered: 03/09/1998)
03/09/1998	38	STIPULATION and ORDER, reset answer to second amended complaint due for 2/27/98 for Jeffrey E. Epstein, for Ivan Fisher, for Ellyn Bank, for Debra Elisa Cohen, for Diane Fisher, for Fisher & Soffer, for Robert Heilbrun, for Suzanne McDermott, for Christopher H. Martin, for Jessie Siegel, for Siegel, Martin, for Ron Soffer, for Carmen Talsig, for John Does 1 - 10, for X Corporations 1-10 (signed by Judge Denny Chin). (ae) (Entered: 03/10/1998)
03/09/1998	39	Filed Memo-Endorsement on letter by Serene K. Nakano to Judge Chin dated 2/24/98, reset Government's motion for summary judgment filing deadline for 3/13/98 (signed by Judge Denny Chin) (ae) (Entered: 03/10/1998)
03/16/1998	40	ANSWER by Ivan Fisher, Fisher & Soffer (Attorney Eileen J. Casey) to amended complaint; by attorney Eileen J. Casey for defendant Fisher & Soffer (dj) (Entered: 03/20/1998)
03/16/1998	40	AMENDED COUNTERCLAIM by Ivan Fisher: amending [13-1] counter claim (dj) (Entered: 03/20/1998)
03/16/1998	40	AMENDED CROSSCLAIM by Ivan Fisher, Jeffrey E. Epstein [37-1] cross claim (dj) (Entered: 03/20/1998)
03/20/1998	41	ANSWER by Ivan Fisher to [37-1] cross claim; Firm of: Gage & Pavlis (cd) (Entered: 03/24/1998)
03/24/1998	42	STIPULATION and ORDER, answer to the second amended complaint due for 3/16/98 for Fisher & Soffer, for Diane Fisher (signed by Judge Denny Chin). (cd) (Entered: 03/25/1998)
04/01/1998	43	NOTICE OF MOTION by USA for an order, purs. to Rule 56(a), granting summary judgment on the second cause of action of the second amended complaint as against defts Diane Fischer d/b/a The Fischer Group and Rom Soffer ; Return date 4/20/98. Declaration in support attached. (sac) (Entered: 04/02/1998)
04/01/1998	44	MEMORANDUM by USA in support of [43-1] motion for an order, purs. to Rule 56(a), granting summary judgment on the second cause of action of the second amended complaint as against defts Diane Fischer d/b/a The Fischer Group and Rom Soffer (sac) (Entered: 04/02/1998)
04/01/1998	45	ANSWER by Jeffrey E. Epstein to [13-1] cross claim ; by attorney Steven J. Cohen for cross-defendant Jeffrey E. Epstein (sac) (Entered: 04/02/1998)
04/01/1998	46	MEMORANDUM OPINION #80385, the Government's motion for summary judgment on its claim for ejectment is granted as to Epstein, Fisher, and all of the Subtenants (Signed by Judge Denny Chin); Copies mailed. (emil) (Entered: 04/03/1998)

04/09/1998	47	Filed Memo-Endorsement on letter to Judge Chin from Serene K. Nakano dated 04/02/98, the Court having already found in its March 31, 1998 decision that (a) the rights of deendant Ron Soffer to possession and occupancy of the premises known as 34 East 69th Street, NY, NY, can be no greater than those of defendant Ivan S. Fisher and (b) good and valid reasons exist for the Soffer ejection motion to be decided prior to the April 20, 1998 return date of the motion, defendant Ron Soffer shall appear before the Hon. Denny Chin, United States District Judge, United States Courthouse, 500 Pearl Street, Courtroom 11A on April 10, 1998 at 9:30 a.m., to show cause why summary judgment should not be granted on the Government's second claim alleged against him in the second amended complaint, which seeks an order (a)declaring that he is not entitled to occupy the premises; and (b) ejecting him from the premises ; service of a copy of this memorandum endorsement shall be made by the Government on defendant Ron Soffer by telecopying a copy to his attention at [REDACTED] and by sending a copy by Federal Express or overnight mail to the attention of Mr. Soffer at 34 East 69th Street, NY, NY as soon as it is received by counsel for the Government (signed by Judge Denny Chin) (djc) (Entered: 04/13/1998)
04/09/1998	49	CERTIFICATE OF SERVICE by USA re 4/7/98, memorandum endorsement (cd) (Entered: 04/14/1998)
04/10/1998	48	ORDER that the prior orders of this Court dated 12/17/97 and 12/31/97 ordering an interest-bearing escrow account for the deposit of certain monies by defts Jeffrey E. Epstein and Ivan S. Fisher are modified to the extent that Fisher is ordered to deposit the sum of \$15,000.00 per month to the Clerk of the Court by the 10th day of each month until the date that this action is finally determined (signed by Judge Denny Chin); Copies mailed. Sent to Cashier's Office on 4/14/98. (emil) (Entered: 04/14/1998)
05/21/1998	50	ORDER, Fisher seeks a stay of entry of judgment pending appeal of my ruling to the United States Court of Appeals for the Second Circuit. Considering the factors set forth in this order in light of the facts of this case I conclude that a stay is not warranted here, for Fisher has not met the "difficult burden" of proving that a stay is warranted. Accordingly, the Court wiil enter judgment against Fisher today, and the request for a stay pending appeal to the Second Circuit is hereby denied, except that the Government must give Fisher until July 15, 1998 to vacate the premises. Any request for a further stay must be made to the Second Circuit. Although I had set a trial date of August 24, 1998, the trial is adjourned without date. The parties shall submit letters addressing whether they prefer to try the issue of valuation and the claims betw. Fisher and Epstein now or whether they prefer to await resolution of the appeal of my March 31, 1998 decision. In addition, the parties shall address the issue of whether the cross claims betw. Epstein and Fisher should be severed from the Government's claims. (signed by Judge Denny Chin); Copies mailed (djc) Modified on 05/26/1998 (Entered: 05/22/1998)
05/22/1998	51	ORDER & JUDGMENT; it is ordered, adjudged and decreed that the

		<p>Government's motion for partial summary judgment as to (a) its first claim alleged in its second amended complaint and (b) the counterclaims of defts Ivan S. Fisher and Fisher & Soffer a/k/a Fisher & Sophir alleged in their answer to the second amended complaint (the "Fisher counterclaim"), is granted in all respects. The Soffer ejection motion is granted as against deft Ron Soffer. Defts Jeffrey E. Epstein, Ivan S. Fisher, Ellyn Bank, Debra Elisa Cohen, Diane Fisher d/b/a The Fisher Group, Fisher & Soffer a/k/a Fisher & Sophir, [REDACTED] D. Gerzog, Robert Heilburn, Suzanne McDermott, Christopher H. Martin, Jessie Siegel a/k/a Jesse Siegel, Siegel, Martin & Heilbrun, Ron Soffer, and Carmen Tausig are not entitled to occupy the premises known as 34 East 69th, N.Y., N.Y. 10021. The Government is hereby awarded exclusive possession of the premises purs. to the Foreign Missions Act, 22 U.S.C. 4301 et seq. The occupants shall vacate the premises on or before 7/15/98 at 5:00 p.m. and deliver all keys to the premises on or before 7/15/98 at 5:00 p.m., to the U.S. Atty's Office. The foregoing constitutes the order of the court purs. to Rule 54(b) of the FRCP partially adjudicating the claims of the parties before this Court. The Court finds that there is no just reason for delay in entering judgment on the Government's claims for ejection and with respect to the issues of possession of the premises, for these claims and issues are separate and distinct from the issues remaining in the case (although there would be some overlap in the proof). Specifically, I find that a delay in the the entry of judgment could result in possible injustice, as defts right to have the ability now to appeal from my 3/31/98 decision, for their right to possession of the promises is at stake. As they are being ejected from their home (in Fisher's case) and office, they should have the right to seek review promptly. The remaining claims involve money damages only. (signed by Judge Denny Chin); Mailed copies and notice of right to appeal. (sac) Modified on 05/27/1998 (Entered: 05/26/1998)</p>
05/22/1998		Case closed (sac) (Entered: 05/26/1998)
05/22/1998		Memo endorsed on motion; granting, per opinion dated 3/31/98, [43-1] motion for an order, purs. to Rule 56(a), granting summary judgment on second cause of action of the second amended complaint as against defts Diane Fischer d/b/a The Fischer Group and Rom Soffer (signed by Judge Denny Chin); Copies mailed. (dj) Modified on 05/29/1998 (Entered: 05/27/1998)
05/22/1998		Memo endorsed on motion, doc. #25; motion granted per opinion dated 3/31/98 (signed by Judge Denny Chin); Copies mailed. (kw) (Entered: 05/27/1998)
05/22/1998		Case reopened. CASE CLOSED IN ERROR. (dcap) (Entered: 08/28/1998)
05/29/1998	52	Letter filed by USA to Judge Chin dated 12/31/97, re: in response to (a) the citations by defendants Jeffrey E. Epstein and Ivan S. Fisher to the testimony of witnesses whose depositions were taken after the submission of the Government's motion for partial summary judgment; and (b) the Court's invitation to the parties to supplement the record and

		their memorandum of law concerning any further legal authorities (ae) (Entered: 06/01/1998)
05/29/1998	53	Letter filed by Ellen J. Casey o/b/o Ivan Fisher to Judge Chin dated 1/7/98, re: in response to the government's motion for partial summary judgment (ae) (Entered: 06/01/1998)
06/05/1998	54	NOTICE OF APPEAL by Ivan Fisher ; from [51-1] judgment order . Copies of notice of appeal mailed to Attorney(s) of Record: Serene K. Nakano, Esq., fee pd., \$105.00, rec # 317761 . (as) (Entered: 06/08/1998)
07/06/1998	55	ORDER, plttf shall file and serve any opposition by 7/10/98; and deft shall file and serve her reply, if any, by 7/15/98 (signed by Judge Denny Chin); Copies mailed. (kg) (Entered: 07/07/1998)
07/08/1998	56	Filed Memo-Endorsement on letter by David Wikstrom to Judge Chin dated 7/5/98, counsel for defendant Ivan Fisher, requests a conference before the Court some time this week in connection with this case, and in particular with the 7/15 deadline for ejection set forth in the Court's judgment of 5/20; Fisher may file a Rule 60(b) motion w/out a pre-motion conference. He shall do so as soon as possible. The Government need not respond until directed to by the Court ; In addition, if Mr. Wikstrom is substituting for Gage & Parlis, he should submit the proper papers. If he is appearing as co-counsel, he should file a notice of apperance (signed by Judge Denny Chin) (ae) Modified on 07/09/1998 (Entered: 07/09/1998)
07/10/1998	57	DECLARATION in opposition by Serene K. Nakano for plttf USA re the motion by deft Suzanne McDermott for summary jdgmt. (ls) (Entered: 07/10/1998)
07/10/1998	58	GOVT'S MEMORANDUM OF LAW by USA in opposition to motion of deft Suzanne McDermott for partial summary jdgmt. (ls) (Entered: 07/10/1998)
07/27/1998	59	RETURN OF SERVICE executed as to Forcible eviction on 7/16/98. Order left at residence. Tenants moved out & took their personal belongings. (sac) (Entered: 07/28/1998)
08/04/1998	60	NOTICE OF MOTION by ██████████ D. Gerzog for an order granting summary judgment, pursuant to Rule 56 of the FRCP ; affirmation in support is attached. (kw) (Entered: 08/05/1998)
08/04/1998	61	MEMORANDUM by ██████████ D. Gerzog in support of [60-1] motion for an order granting summary judgment, pursuant to Rule 56 of the FRCP. (kw) (Entered: 08/05/1998)
08/06/1998	62	NOTICE of dismissal of complaint against defendant Carmen Tausik, purs to Rule 41(a)(1) of the FRCP; Plaintiff United States of America hereby dismisses the second amended complaint as against defendant Carmen Tausik (signed by Judge Denny Chin) (djc) (Entered: 08/06/1998)
08/11/1998	63	ANSWER to Complaint by Robert Heilbrun, Christopher H. Martin,

		Jessie Siegel, Siegel, and Martin. (Attorney Robert Heilbrun) (kw) (Entered: 08/11/1998)
08/26/1998	64	ORDER, set pretrial conference for 10:00 a.m. on 10/23/98 ; The parties shall have 60 days from the date of this order to complete discovery. The deadline for submission of the joint pretrial order is adjourned. A new deadline for submission of the joint pretrial order will be set at the October 23, 1998 conference. The Government's request for an adjournment of the trial on damages until after the resolution of Fisher's appeal to the Second Circuit will be decided at the October 23, 1998 conference ; The Government's response to motion reset to 9/14/98 for [60-1] motion for an order granting summary judgment, pursuant to Rule 56 of the FRCP. Gerzog may submit his reply, if any, within 10 days thereafter ; Upon consent, the Court's escrow order is hereby amended as set forth in the Government's August 13, 1998 letter. (signed by Judge Denny Chin); Copies mailed (djc) (Entered: 08/27/1998)
09/15/1998	65	Rule 56.1 statement filed by USA (djc) (Entered: 09/16/1998)
09/15/1998	66	MEMORANDUM of LAW by USA in opposition to [60-1] motion for an order granting summary judgment, pursuant to Rule 56 of the FRCP (djc) (Entered: 09/16/1998)
09/18/1998	67	SEALED DOCUMENT placed in vault (kb) (Entered: 09/18/1998)
09/22/1998	68	Certificate of service of Second Amended S&C as to Ivan Fisher, Diane Fisher, Fisher & Soffer by Ellen J. Casey, atty, on 12/23/97 (sac) (Entered: 09/23/1998)
09/22/1998	68	Certificate of service of Second Amended S&C as to Jeffrey E. Epstein by Steven Cohen, atty, on 12/23/97 (sac) (Entered: 09/23/1998)
09/24/1998	69	NOTICE of attorney appearance for Debra Elisa Cohen by Ellen Yaroshefsky (ls) (Entered: 09/28/1998)
10/09/1998	70	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [54-1] appeal by Ivan Fisher on October 9, 1998. (dt) (Entered: 10/09/1998)
10/14/1998	71	Filed Memo-Endorsement on letter to Judge Chin from Ellen Yaroshefsky dated 10/8/98; counsel for Dera Cohen requests that the Court permit the adjournment of Ms. Cohen's deposition beyond the current discovery cutoff date. I have reviewed this letter; the Govt's letter of today; and Ms. Yarostefsky's 2d letter of today, the request for an adjournment of Ms. Cohen's deposition is denied ; (signed by Judge Denny Chin) (ls) (Entered: 10/15/1998)
10/19/1998	72	ORDER, the Court has received Ron Soffer's letter of 9/24/98. Mr. Soffer is a named defendant in this action. If he wishes to be dismissed from the case, he may make either a motion to dismiss or a motion for summary judgment, w/out a pre-motion conference (signed by Judge Denny Chin); Copies mailed (ae) (Entered: 10/19/1998)
10/22/1998	73	ANSWER by Debra Elisa Cohen to the Second amended complaint; by

		attorney Ellen Yaroshefsky. (bw) (Entered: 10/23/1998)
11/09/1998	74	MANDATE OF USCA (certified copy) Re: Dismissed [54-1] appeal by Ivan Fisher. It is ordered that the appeal be, and it hereby is dismissed. (98-6133) Carolyn Clark Campbell, Cler, USCA. (as) (Entered: 11/09/1998)
02/03/1999	75	STIPULATION and ORDER, the parties agree to settle and compromise this action on the terms indicated herein. All monies deposited by the defendants with the Cashier's Office of the USDC for the SDNY in this action, including all principal and interest accrued thereon are released to the Government. The Cashier's office shall issue a check for the full amount of the escrowed monies made payable to U.S. Attorney and shall deliver the check to the U.S. Attorney's Office, c/o AUSA Serene K. Nakano. The United States Dept of State shall keep the security deposit of Jeffrey E. Epstein in the principal amount of \$12,000.00, plus all interest accrued thereon ; Upon the release of the escrowed monies set forth in this order and the delivery of the certified check set forth herein, the Government will file an order of dismissal with the Court dismissing the action against all defendants except Diane Fisher d/b/a The Fisher Group with prejudice and without costs, disbursement or attorney's fees. (signed by Judge Denny Chin). On page 8 of order remark from cashiers' office states: Received check no. 492385 dated 01/29/99 in the amount of \$335,526.17 payable to USA by Manuel Bermadez; Also received check no. 492386 dated 01/29/99 in the amount of \$19,844.35 payable to USA by Manuel Mermadez. (djc) Modified on 02/04/1999 (Entered: 02/04/1999)
03/09/1999	76	Transcript of record of proceedings before Judge Chin filed for dates of 1/12/99 (ls) (Entered: 03/15/1999)
03/17/1999	77	Order of dismissal; that this action is hereby dismissed with prejudice against all defendants, except defendant Diane Fisher d/b/a/ the Fisher Group ("Ms. Fisher"), and without costs, disbursements or attorney's fees. Upon the application of plaintiff United States of America, its claims against Ms. Fisher are dismissed without prejudice. (signed by Judge Denny Chin) (pl) (Entered: 03/18/1999)
03/17/1999		Case closed (pl) (Entered: 03/18/1999)
08/12/1999	78	SEALED DOCUMENT placed in vault (kb) (Entered: 08/12/1999)

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Billable Pages:	8	Cost:	0.64

CLOSED

U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:97-cv-01489-DC

Epstein ■ Fisher, et al
Assigned to: Judge Denny Chin
Demand: \$0
Cause: 28:1443(1) Rent, Lease & Ejectment

Date Filed: 03/05/1997
Date Terminated: 03/31/2000
Jury Demand: None
Nature of Suit: 230 Rent Lease &
Ejectment
Jurisdiction: Federal Question

Petitioner**Jeffrey E. Epstein**

represented by **William B. Wachtel**
Wachtel & Masyr, LLP
110 East 59th Street
New York, NY 10022
■
Fax: ■■■■■■■■■■
Email: wachtel@wmlp.com
LEAD ATTORNEY

Respondent**Ivan Fisher**

represented by **Eileen J. Casey**
Gage Buschmann & Pavlis
120 West 45th Street
New York, NY 10036
■■■■■■■■■■
LEAD ATTORNEY

Respondent**John Doe**

represented by **Eileen J. Casey**
(See above for address)
LEAD ATTORNEY

Respondent**X Corp**

represented by **Eileen J. Casey**
(See above for address)
LEAD ATTORNEY

Date Filed	#	Docket Text
03/05/1997	1	NOTICE OF REMOVAL from New York Civil Court County of New York; FILING FEE \$ 150.00 RECEIPT # 282380 Index # 058689/97.

		(sac) (Entered: 03/06/1997)
03/05/1997		CASE REFERRED TO Judge Chin (sac) (Entered: 03/06/1997)
03/05/1997	2	NOTICE of Notice of Filing of Notice of Removal by Ivan Fisher. (kg) (Entered: 03/06/1997)
03/14/1997	3	NOTICE OF MOTION by Jeffrey E. Epstein to remand to the Civil Court, City of NY, County of NY , Return date 4/11/97 (cd) (Entered: 03/17/1997)
03/14/1997	4	MEMORANDUM by Jeffrey E. Epstein in support of [3-1] motion to remand to the Civil Court, City of NY, County of NY (cd) (Entered: 03/17/1997)
03/21/1997		Case accepted as related to 96 CV 8307. Notice of assignment to follow. (ricm) (Entered: 03/24/1997)
03/21/1997	5	Notice of asgmt _ to Judge Denny Chin Copy of notice and judge's rules mailed to Attorney(s) of record: Eileen J. Casey, William B. Wachtel . (ricm) (Entered: 03/24/1997)
03/24/1997	6	Case Information Statement Addendum and Case Designation to a Magistrate Judge filed. Case is designated to Magistrate Judge Pitman. (em) (Entered: 03/24/1997)
03/28/1997	7	NOTICE OF CROSS MOTION by Ivan Fisher to consolidate this action with the action pending in the Court entitled U.S. of America ■ Jeffrey E. Epstein and Ivan S. Fisher, #96cv8307 , Return date 4/14/97 (pl) (Entered: 03/31/1997)
03/28/1997	8	MEMORANDUM by Ivan Fisher in opposition to [3-1] motion to remand to the Civil Court, City of NY, County of NY, in support [7-1] cross motion to consolidate this action with the action pending in the Court entitled U.S. of America ■ Jeffrey E. Epstein and Ivan S. Fisher, #96cv8307 (pl) (Entered: 03/31/1997)
04/07/1997	9	REPLY MEMORANDUM OF LAW by Jeffrey E. Epstein in support of re: [3-1] motion to remand to the Civil Court, City of NY, County of NY (ae) (Entered: 04/08/1997)
02/24/1998		PROTECTIVE ORDER, regarding procedures that will govern the handling of confidential information (signed by Judge Denny Chin); Copies mailed (original in 96cv8307, doc #36) (cd) (Entered: 02/25/1998)
03/09/1998		STIPULATION and ORDER, reset answer to second amended complaint due for 2/27/98 for X Corp, for John Doe, for Ivan Fisher (signed by Judge Chin) (orig. doc. filed in case #96 civ. 8307, doc. #38) (ae) (Entered: 03/10/1998)
03/09/1998		Filed Memo-Endorsement on letter by Serene K. Nakano to Judge Chin dated 2/24/98, reset The Government's motion for summary judgment filing deadline for 3/13/98 (signed by Judge Denny Chin) (orig. doc.

		filed in case #96 civ. 8307, doc. #39) (ae) (Entered: 03/11/1998)
03/09/1998		Terminated documents 3-1 and 7-1 as per instruction of Judge Chin dated 3/9/98 (emil) (Entered: 03/11/1998)
03/24/1998		STIPULATION and ORDER, reset answer to the second amended complaint due for 2/27/98 for Ms. Fisher and Fisher & Soffer (signed by Judge Denny Chin). (original fld in 96cv8307, doc #42) (cd) (Entered: 03/25/1998)
04/09/1998		Filed Memo-Endorsement on letter to Judge Chin from Serene K. Nakano dated 04/02/98, the Court having already found in its March 31, 1998 decision that (a) the rights of defendant Ron Soffer to possession and occupancy of the premises known as 34 East 69th Street, NY, NY, can be no greater than those of defendant Ivan S. Fisher and (b) good and valid reasons exist for the Soffer ejectment motion to be decided prior to the April 20, 1998 return date of the motion, defendant Ron Soffer shall appear before the Honorable Denny Chin, United States District Judge, United States Courthouse, 500 Pearl Street, Courtroom 11A, NY, NY on April 10, 1998, 9:30 a.m., to show cause why summary judgment should not be granted on the Government's second claim alleged against him in the second amended complaint, which seeks an order (a) declaring that he is not entitled to occupy the premises; and (b) ejecting him from the premises ; and service of a copy of this memorandum endorsement shall be made by the Government on defendant Ron Soffer by telecopying a copy to his attention at [REDACTED] and by sending a copy by Federal Express or overnight mail to the attention of Mr. Soffer at 34 East 69th Street, NY, NY, as soon as it is received by counsel for the Government (signed by Judge Denny Chin); original document docketed in case no. 96cv 8307, document #47. (djc) Modified on 04/13/1998 (Entered: 04/13/1998)
03/31/2000	10	ORDER; this action is hereby dismissed. (signed by Judge Denny Chin); Copies mailed. (sac) (Entered: 04/03/2000)
03/31/2000		Case closed. (sac) (Entered: 04/03/2000)

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of time, constitute irreparable harm. *Tenaflly*, 309 F.3d at 178, quoting, *inter alia*, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

IX. Balance of Harm to Plaintiff Versus Harm to Defendants

[33] Defendants will suffer little or no harm if the Court grants this preliminary injunction. They are not subject to criminal prosecution under the Garb Statute, there is no showing of actual or threatened disruption, disturbance or other danger at Penns Manor in permitting plaintiff to wear her cross during the remainder of this litigation, and as we have seen, there is no likelihood that defendants' permitting plaintiff to wear her cross visibly while at work would violate the Establishment Clause.

X. Public Interests

[34] Where there is no compelling state interest to justify a burden on religious freedom, "the public interest clearly favors the protection of constitutional rights." *Tenaflly*, 309 F.3d at 178, quoting *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir.1997).

XI. Conclusion

[35] The Court will grant plaintiff's request for a preliminary injunction enjoin-

1. Plaintiff's complaint also challenges the Garb Statute and the Religious Affiliations policy under the free exercise of religion clauses of the Pennsylvania Constitution and the newly enacted Pennsylvania Religious Freedom Protection Act, 71 Pa. Stat. Ann. § 2401, *et seq.*, Act of December 9, 2002, P.L. 1701, No. 214, § 1, *et seq.*, effective immediately. The 1895 predecessor to the current Garb Statute was upheld against a similar state constitutional challenge by the Supreme Court of Pennsylvania in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910), and this Court is not at liberty to reconsider that vintage ruling.

ing enforcement of ARIN's Religious Affiliations policy pending disposition of her request for a permanent injunction (hearing scheduled for August 28, 2003), and ordering defendants to reinstate her to her former position with full back pay and benefits. For all of the foregoing reasons, the Court also will deny defendants' motion to dismiss.¹

Defendants agreed at the hearing that they would not demand a bond in the event the Court ruled in plaintiff's favor, and accordingly, bond will be waived.



FINANCIAL TRUST COMPANY, INC.
and Jeffrey E. Epstein, Plaintiffs,

CITIBANK, N.A. and Citigroup, Inc.
d/b/a "Citigroup," Defendants.

No. CIV.2002-108.

District Court, Virgin Islands,
D. St. Thomas and St. John.

June 19, 2003.

Borrowers brought action alleging that bank officials misrepresented facts

The Pennsylvania Religious Freedom Protection Act of 2002 has not been judicially interpreted and this Court is hesitant to sail the uncharted waters within its reach. In any event, as defendants contend, it does not appear that plaintiff provided proper notice to the agency imposing the alleged substantial burden on the free exercise of religion (i.e., to ARIN), as required by section 5(b) of that Act, 71 Pa. Stat. Ann. § 2405, and defendants do not suggest that the Court should address this state statutory claim first, in order to avoid the First Amendment issues. Accordingly, the Court does not address plaintiff's claim under Pennsylvania's Religious Freedom Protection Act.

and fraudulently induced them to borrow funds to invest in collateralized bond obligation transaction managed by entity with which bank's subsidiary had investment banking relationship. On bank's motions to dismiss and to transfer, the District Court, Moore, J., held that: (1) bank was subject to general personal jurisdiction in Virgin Islands; (2) fact issues remained as to whether there was fiduciary relationship between bank and borrowers; and (3) borrowers failed to plead fraud with sufficient particularity.

Motions granted in part, and denied in part.

1. Federal Courts ⇌96

When defendant moves to dismiss for lack of personal jurisdiction, plaintiff must make prima facie showing of sufficient contacts between defendant and forum territory to support in personam jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

2. Federal Courts ⇌96

In evaluating motion to dismiss for lack of personal jurisdiction, court must accept all of plaintiff's allegations as true and construe disputed facts in favor of plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

3. Federal Courts ⇌1023

Bank and its parent company were subject to general personal jurisdiction in Virgin Islands in borrowers' action alleging that bank officials fraudulently induced them to borrow funds to invest in transaction, even if bank had closed all of its operations in Virgin Islands, where bank operated bank branches and marketed and provided banking services in Virgin Islands before litigation commenced, continued to process its outstanding loans in Virgin Islands via its Puerto Rican offices, and initiated litigation in Virgin Islands,

and officers initiated contact with borrowers in Virgin Islands for loans that were subject of litigation. 5 █ § 4903.

4. Federal Courts ⇌1023

Virgin Islands was proper venue for Virgin Islands borrowers' action against New York bank for fraudulently inducing it to participate in transaction, even though borrowers agreed to submit to jurisdiction of New York courts and to waive defense of inconvenient forum, where borrowers did not agree to sue or be sued exclusively in New York, bank was subject to general personal jurisdiction in Virgin Islands, and bank officials solicited borrowers while they were in Virgin Islands. 28 U.S.C.A. § 1391(a).

5. Federal Courts ⇌143, 144

Party seeking transfer of venue for convenience of parties and witnesses and in interest of justice bears burden of establishing by preponderance of evidence that transfer is necessary. 28 U.S.C.A. § 1404(a).

6. Federal Courts ⇌101, 103, 105

Although trial judge is afforded great discretion in deciding motion to transfer for convenience of parties and witnesses, he or she should not disturb plaintiff's choice of forum unless balance of factors strongly weighs in favor of transfer. 28 U.S.C.A. § 1404(a).

7. Federal Courts ⇌1023

Transfer of venue for convenience of parties and witnesses from Virgin Islands to Southern District of New York was not warranted in Virgin Islands borrowers' fraud action against New York bank, where borrowers resided in Virgin Islands, most of documents needed to try case had already been filed in Virgin Islands court, bank was currently litigating other cases in Virgin Islands, and there was no evi-

dence that key witnesses were unable to travel to Virgin Islands. 28 U.S.C.A. § 1404(a).

8. Contracts ⇨206

Choice of law provision in promissory note did not govern borrowers' claims against lender for fraud, misrepresentation, misinformation, and breach of fiduciary duty in advising borrowers to invest in collateralized bond obligation transaction managed by entity with which bank's subsidiary had investment banking relationship, where borrowers' claims did not involve construction, validity, or performance of note.

9. Federal Civil Procedure ⇨1831

Issue of whether bank adequately disclosed to investors its relationship with fund manager presented fact questions that could not be resolved on motion to dismiss investors' action alleging that bank misrepresented facts and fraudulently induced them to borrow funds to invest in collateralized bond obligation transaction managed by fund manager with which bank's subsidiary had investment banking relationship.

10. Banks and Banking ⇨100

Under Virgin Islands law, borrowers' allegation that lenders failed to disclose their relationship with fund manager and did not promptly assist them in understanding how to remove it as fund manager adequately alleged that lenders' fraudulent conduct caused their financial losses, where borrowers claimed that they could have obtained new fund manager or reduced their losses in some other fashion if they had known of conflict of interest.

11. Federal Civil Procedure ⇨1831

Issue of whether lender had substantial control over borrowers' business affairs presented fact questions that could not be resolved on motion to dismiss bor-

rowers' claim against lender for breach of fiduciary duty by failing to disclose conflict of interest in connection with investment.

12. Banks and Banking ⇨100

Under Virgin Islands law, subscription agreement between fund manager and investors did not bar investors' claim against its bank for breach of fiduciary duty as result of bank's failure to inform investors of manager's relationship with its subsidiary, even though agreement acknowledged that investors did not rely on bank's advice in making investment, where bank was not party to agreement, and did not speak to long-term relationship between bank and investors.

13. Banks and Banking ⇨100

Under Virgin Islands law, borrowers' allegation that bank negligently failed to disclose that they or their affiliates had pecuniary interest in investment and that borrowers relied upon information and advice provided by bank officials to their detriment adequately stated claim of negligent misrepresentation. Restatement (Second) of Torts § 552.

14. Federal Civil Procedure ⇨636

Borrowers' allegation that bank officials did not disclose bank's relationship with fund manager before advising borrowers to invest with manager failed to plead fraud claims against bank with sufficient particularity, where complaint did not state who made alleged misrepresentations to borrowers, or exactly what false statement or representation was made. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

Maria Tankenson Hodge, Hodge & Francois, St. Thomas, VI, for the plaintiffs.

Gregory H. Hodges, Dudley, Topper and Feuerzeig, LLP, St. Thomas, VI, for the defendants.

MEMORANDUM OPINION

MOORE, District Judge.

After careful consideration of the parties' written and oral arguments, I will deny the defendants' motions to dismiss for lack of personal jurisdiction and to transfer this case to New York. Further, I find that the amended complaint adequately states claims of breach of fiduciary duty and negligent misrepresentation. Finally, I will grant the defendants' motion to dismiss Counts I, II, III, and VI for failure to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement for fraud, but I will grant leave for the plaintiffs to amend their pleadings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In their amended complaint, Jeffrey E. Epstein ["Epstein"] and Financial Trust Company, Inc. ["FTC"] [collectively "plaintiffs"] allege that Citibank, N.A. ["Citibank"] and Citigroup, Inc. ["Citigroup"] [collectively "defendants"] misrepresented facts and fraudulently induced them to borrow \$10 million to invest in a venture managed by AIG Global Investment Corporation ["AIG"]. The plaintiffs allege that the defendants failed to disclose information and negligently and fraudulently misrepresented facts concerning their relationship with AIG (Counts I, II, III, IV and VI), that the plaintiffs detrimentally relied on these misrepresentations (Counts I, II, III, and VI), and that the defendants breached their fiduciary duty to the plaintiffs (Count V). The plaintiffs seek rescission of the promissory note and punitive damages (Counts VI and VII). (Am. Compl. ¶¶ 45-68.)

In April 1999, Dayle Davison ["Davison"], Vice President of Citibank in New York and Epstein's private banker, and other Citibank employees telephoned Epstein while he was in the Virgin Islands and recommended that the plaintiffs invest through placement agent Salomon Smith Barney ["SSB"], a "subsidiary or affiliate" of the defendants, in a collateralized bond obligation transaction managed by AIG. (Compl. ¶¶ 12, 24; Epstein Decl. ¶¶ 8-10; Davison Aff. ¶¶ 1, 102-18.) According to the plaintiffs, during the negotiations of this deal Davison represented to Epstein that he was "virtually assured of receiving an 18-20% return on [his] investment, with a possible return of as much as 30%" and assured him that Citibank was going to remain actively involved in the investment. (Epstein Decl. ¶ 11.)

After further discussion between Epstein and Davison, Citibank offered to loan Epstein \$10 million on the express condition that the money be used exclusively to fund FTC's investment in the AIG-managed venture. (*Id.* ¶¶ 12-13.) On August 2, 1999, Epstein executed a promissory note in favor of Citibank in the amount of \$10 million [the "1999 Note"]. (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss, Epstein Decl. ¶ 15; Mem. Of Law in Support of Defs.' Mot. To Dismiss, Ex. A.) In addition, Citibank and FTC entered into a hypothecation agreement. (Mem. Of Law in Support of Defs.' Mot. to Dismiss, Ex. B at 7.)

On June 15, 2000, Epstein executed and delivered to Citibank an amended and restated promissory note ["the Amended 1999 Note"] that superseded the 1999 Note. The Amended 1999 Note extended the maturity date of the 1999 Note to August 2, 2001. (*Id.* Ex. D.) In connection with the Amended 1999 Note, Epstein and FTC also signed an agreement entitled "First Amendment to Note and Affirma-

tion of Hypothecation Agreement and Certain Documents Referred to Therein" [the "first Extension Agreement"] in which they reaffirmed the Amended 1999 Note in its entirety, the Hypothecation Agreement, and each document and term thereunder. (*Id.* Ex. E.) Each of these documents—the original 1999 Note, the 1999 hypothecation agreement, the Amended 1999 Note, and the first Extension Agreement—contains clauses stating that New York law would govern the "construction, validity, and performance" of the 1999 Note and the Amended 1999 Note. (*Id.* Ex. A at 8–9; Ex. B at 7–8; Ex. D at 10; Ex. E at 2–3.)

Sometime in the spring of 2001, Epstein and FTC discovered that the AIG Investment was "suddenly and rapidly deteriorating." (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss, Epstein Decl. ¶ 20.) According to the plaintiffs, FTC's advisors contacted Davison and other employees of Citibank, and requested Citibank's help in coordinating the replacement of the AIG fund's manager. (*Id.* ¶ 21; Schantz Decl. ¶ 5.) In May 2001, Davison informed the plaintiffs that, in order to remove AIG as the fund manager, FTC would need sixty-six and two-thirds percent (66⅔ %) of the votes of income note holders. Because the plaintiffs did not know the identities or respective percentages of ownership of the other income note holders, they requested that Davison provide them with that information. The plaintiffs claim that Davison initially assured them that she would provide such information promptly, but later informed them that she was having difficulty obtaining the information from SSB, and recommended that they seek the infor-

mation from Chase Manhattan, the Trustee of the fund. (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss, Schantz Decl. ¶¶ 6–8.) Chase Manhattan, however, referred the plaintiffs back to Citigroup. In June, the plaintiffs learned for the first time that AIG itself owned twenty-eight percent (28%) of the income notes of the AIG investment. Thus, plaintiffs would not need other income note holders with as much of an investment in the income notes as they originally had believed because AIG's interest would not count toward any vote to remove it as manager. In July 2001, the plaintiffs finally received the information they had requested from Citibank. (*Id.* ¶¶ 9–10.)

At this time, Davison and SSB representatives urged the plaintiffs not to attempt to seek to remove AIG as the fund manager. In August 2001, FTC's attorney arranged a telephone conference with representatives from Citibank and SSB. Plaintiffs contend that during this conference they learned for the first time that Citibank could not assist them in seeking to remove AIG because SSB had an investment banking relationship with AIG that might be adversely affected by such an action. (*Id.* at ¶¶ 11–13.)

On June 11, 2002, the plaintiffs filed their complaint in this Court. One month later on July 11, 2002, Citibank sued the plaintiffs in the Southern District of New York, alleging that they had defaulted on both the loan at issue here and a second \$10 million loan.¹ See *Citibank, N.A. v. Epstein*, Index No. 02-CV-5332-SHS (S.D.N.Y.2002). On November 27, 2002, I

1. Sometime in 2000, Davison informed Epstein about a second, similar investment fund to be managed by Mass Mutual [the "Mass Mutual Fund"]. On June 15, 2000, Epstein borrowed an additional \$10 million from Citibank, that Epstein agreed to invest in the Mass Mutual Fund. (Mem. Of Law in Support

of Defs.' Mot. To Dismiss, Ex. D.) Although the plaintiffs have stated an intent to seek to amend the complaint to include claims related to the Mass Mutual Fund, they have not yet done so. (See Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss at 12 n. 12.)

issued an order restraining Citibank and Citigroup from pursuing their New York lawsuit pending decisions on these motions. *Financial Trust Co., Inc.* v. *Citibank, N.A.*, Order, Civ. No.2002-108 (Nov. 27, 2002). In light of subsequent events, however, I *sua sponte* vacated this prohibition. *Financial Trust Co., Inc.* v. *Citibank, N.A.*, Order, Civ. No.2002-108 (Dec. 13, 2002).

The defendants charge that plaintiffs' suit in the Virgin Islands is merely "a transparent attempt to launch a preemptive strike to hamper Citibank's efforts to recover the \$20 million in promissory notes . . . upon which Epstein has defaulted." (Mem. Of Law in Support of Def.'s Mot. To Dismiss at 2.) The defendants move to dismiss this action under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, or alternatively, to transfer this case to the Southern District of New York under 28 U.S.C. § 1404(a). Finally, the defendants aver that the amended complaint fails to state a cause of action upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) and does not allege fraud with the requisite particularity as required by Federal Rule of Civil Procedure 9(b). I address each argument in turn.

II. DISCUSSION

A. This Court has Personal Jurisdiction over Citibank and Citigroup

The defendants maintain that Citibank discontinued its presence in the Virgin Islands in 1999 and that Citigroup is merely a holding company that "does not have and never has had any assets, offices or employees in the Virgin Islands." In addition, the defendants insist that the events giving rise to this cause of action have no connection with the Virgin Islands. (Mem. of Law in Support of Defs.' Mot. to Dismiss at 6-9.) The plaintiffs counter that

the defendants are currently doing business in the Virgin Islands and that this Court has jurisdiction over the defendants under the Virgin Islands' Long-Arm Statute. The plaintiffs insist that the defendants' depiction of Citigroup as a "holding company" is belied by Citigroup's public disclosures that the plaintiffs claim do not identify Citibank as a separate subsidiary or affiliate of Citigroup. (Pls.' Mem. Of Law in Opp'n to Mot. to Dismiss at 16-24.)

[1, 2] I agree with the plaintiffs and find that this Court has personal jurisdiction over the defendants under the Virgin Islands Long-Arm Statute and that, under the United States Constitution, the defendants have had enough "minimum contacts" with the Virgin Islands to require them to defend a lawsuit in this jurisdiction. This Court sitting in diversity exercises personal jurisdiction over a non-resident defendant pursuant to the forum's long-arm statute and in compliance with the Due Process Clause of the Fourteenth Amendment's "minimum contacts" requirement. See *In re Tutu Wells Contamination Litig.*, 846 F.Supp. 1243, 1264 (D.Vi.1993) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). When a defendant moves under Rule 12(b)(2) to dismiss for lack of personal jurisdiction, the plaintiff must make a *prima facie* showing of sufficient contacts between the defendant and the forum territory to support *in personam* jurisdiction, see *Mellon Bank (East) PSFS Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992), and the court must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff, see *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 143 n. 1 (3d Cir.1992). The nature of these contacts must be such that the defendant should be reasonably able to anticipate being haled into court in the forum state. See *World-*

Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

1. *This Court has Personal Jurisdiction over the Defendants under the Virgin Islands Long-Arm Statute*

The Virgin Islands long-arm statute, 5 [REDACTED] § 4903, provides, in relevant part:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's

(1) transacting any business in this territory;

(3) causing tortious injury by an act or omission in this territory;

(4) causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this territory

5 [REDACTED] § 4903. Under subsection (a)(1), the term "transacting any business" can be satisfied by "only a single act which in fact amounts to the transaction of business within a state or territory." *Guardian Ins. Co. v. Bain Hogg Int'l Ltd.*, Civ. No.1996-180, 2000 WL 1690315, **2-3, 2000 U.S. Dist. LEXIS 17184 at *8 ([REDACTED] October 26, 2000) (quoting *Godfrey v. International Moving Consultants, Inc.*, 18 [REDACTED] 60, 66-67 ([REDACTED] 1980)). It is sufficient, therefore, that Citibank entered into a contract with a Virgin Islands resident, and that the defendants solicited the plaintiffs—while they were in the Virgin Islands—to borrow \$10 million to invest in the AIG-managed fund.

[3] With respect to the relationship between Citibank and Citigroup and the rela-

tionship between the defendants and the plaintiffs, I find that the plaintiffs have established that Citibank and Citigroup are sufficiently linked. For example, Citigroup's website plainly states that it does business through Citibank and other units throughout the world. Indeed, during oral argument on these motions, the defendants presented a letter sent to Epstein concerning the loans, identifying the two as linked together as "Citigroup, private bank" and "The Citigroup Private Bank, Citibank, N.A." At least at this preliminary stage, I find that Citibank and Citigroup are involved in the subject matter of this litigation. Accordingly, I conclude that this Court has jurisdiction under the Virgin Islands Long-Arm Statute over both the defendants.

2. *The Defendants' "Minimum Contacts" in the Virgin Islands Meet the Constitution's Due Process Requirements*

In addition to finding jurisdiction under this forum's long-arm statute, I must also determine whether the defendants' conduct here in the Virgin Islands rises to the level of "minimum contacts" as required by the Constitution. The Due Process Clause of the Fourteenth Amendment requires that a court determine whether a defendant had the "minimum contacts" with the forum necessary for the defendant to have "reasonably anticipated being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. 559. A finding of minimum contacts demands the demonstration of "some act by which the defendant purposely availed itself of the privilege of conducting business within the forum State, thus invoking the protection and benefits of its laws." *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 203 (3d Cir.1998). A plaintiff can meet this burden in one of two ways:

by establishing specific or general jurisdiction over a defendant. *Mesalic*, *Fiberfloat Corp.*, 897 F.2d 696, 699 (3d Cir.1990). A court's general jurisdiction "is based on the defendant's general business contacts with the forum [territory] and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." *Metropolitan Life Ins. Co.*, *Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.1996). Under this test, the plaintiff must establish that the defendant's contacts with the forum jurisdiction are "continuous and systematic." *Id.*

I find that this Court has general jurisdiction over the defendants. Citibank operated bank branches and marketed and provided banking services in the Virgin Islands for years before and after April 1999 and until 2002, just months before the commencement of this litigation. On January 31, 2002, Citibank closed its last remaining bank branch in the U.S. Virgin Islands, and Citibank no longer makes real estate-related loans in the Virgin Islands. (Malins Aff. ¶¶ 3-4.) Citibank, however, continues to process its outstanding loans here via its Puerto Rican offices, and initiates litigation in this Court. (*Id.* ¶ 5.) All of the foregoing plainly demonstrates that Citibank, and Citigroup through Citibank, have continuously and systematically conducted business in the Virgin Islands—including initiating contact with the plaintiffs for the loans that are the subject of this litigation—and therefore, are subject to this Court's general jurisdiction. *See, e.g., Metropolitan Life Ins. Co.*, 84 F.3d at 569 (finding that "our review of general jurisdiction cases reveals that contacts are commonly assessed over a period of years prior to the plaintiff's filing of the complaint" and listing cases). Accordingly, I will deny the motion to dismiss for lack of personal jurisdiction.

Having found that minimum contacts exist, I must decide whether compelling these out-of-territory defendants to submit to jurisdiction in the Virgin Islands comports with traditional notions of fair play and substantial justice. *Grand Entm't Group, Ltd.*, *Star Media Sales, Inc.*, 988 F.2d 476, 481 (3d Cir.1993) (citing *International Shoe*, 326 U.S. 310 at 316, 66 S.Ct. 154). Applying these considerations here, I find it reasonable to assert jurisdiction over Citibank and Citigroup. The burden on the defendants to defend this lawsuit in the Virgin Islands is not severe, most of the relevant documents have already been filed in this Court and several airlines make daily flights connecting New York and St. Thomas. The Virgin Islands obviously has a valid interest in protecting its residents from out-of-state financial institutions. Resolving the case in this Court is just as efficient as trying it in New York and there is no evidence that the interests of New York or the Virgin Islands would be better served if this matter were not litigated in this jurisdiction. *See, e.g., Mesalic*, 897 F.2d at 701 (citing *Asahi Metal Indus. Co.*, *Superior Ct.*, 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)). Accordingly, I find that this Court has general jurisdiction over the defendants and that litigating this matter in this forum comports with the Constitution's due process requirements.

B. Venue in this Court is Proper under 28 U.S.C. § 1391(a)

[4] Defendants also argue that this is an improper venue in which to litigate this dispute. (Mem. in Supp. of Defs.' Mot. to Dismiss at 20-21.) I agree with the plaintiffs, however, that the Virgin Islands is a proper choice of venue. (Pls.' Mem. of Law in Opp'n to Mot. to Dismiss at 24-29.) Although the plaintiffs agreed to submit to the jurisdiction of New York courts and to waive the defense of an inconvenient fo-

rum, they did not agree to sue or be sued exclusively in New York. The Amended 1999 Note states that

the undersigned [Epstein] hereby irrevocably submits to the jurisdiction of any New York state or federal court sitting in New York City, and the undersigned hereby irrevocably agrees that any action may be heard and determined in such New York state court or in such federal court. The undersigned hereby irrevocably waives, to the fullest extent he may effectively do so, the defense of an inconvenient forum to the maintenance of any action in any jurisdiction.

(Mem. In Support of Defs.' Mot. To Dismiss, Ex. D at 10.) The Amended 1999 Note, however, does not limit "the undersigned" to a specific forum or bar the plaintiffs from suing the defendants in any forum having personal jurisdiction over the defendants. Moreover, under the federal venue statute, a diversity case such as this can be brought in a "district where any defendant resides, if all defendants reside in the same State." 28 U.S.C. § 1391(a). This statute further provides that "[f]or purposes of venue . . . , a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. 1391(c). Because I have found that both Citibank and Citigroup are subject to this Court's personal jurisdiction and are thus deemed residents of the Territory for venue purposes, venue is proper in the Virgin Islands under section 1391(a)(1). In addition, these claims may be litigated in a "district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2). The solicitation of the plaintiffs while they were in the Virgin Islands and the mailing of documents to the plaintiffs constitute a sufficiently substantial part of the events giving rise to this action to render venue

proper under section 1391(a)(2). Accordingly, I will deny the defendants' request to dismiss this matter for improper venue.

C. This Case Need Not Be Transferred to New York

Anticipating that I might find that jurisdiction and venue are proper in this Court, the defendants have requested that I transfer this case to the United States District Court for the Southern District of New York. They aver that this claim actually arose in New York and that the clauses in the agreements stipulating to the application of New York Law and the plaintiffs' agreement to submit to the jurisdiction of New York courts require that this matter be litigated in New York. (Mem. Of Law in Support of Defs.' Mot. to Dismiss at 22-32.)

[5, 6] Transfer to a new forum under the federal venue statute requires that the transfer be "[f]or the convenience of the parties and witnesses [and] in the interest of justice." 28 U.S.C. § 1404(a). Citibank and Citigroup bear the burden of establishing by a preponderance of the evidence that transfer is necessary. *In re Charles Schwab & Co. Sec. Litig.*, 69 F.Supp.2d 734, 735 (D.Vi.1999) (citing *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970)). Although a trial judge is afforded great discretion in deciding this motion, he or she should not disturb a plaintiff's choice of forum unless the balance of factors strongly weighs in favor of transfer. *Jackson v. Executive Airlines, Inc.*, Civ. No.2000-121, 2001 WL 664673, *2, 2001 U.S. Dist. 8004 LEXIS at *7 (D.Vi. June 7, 2001). A defendant seeking a transfer will not overcome this presumption unless the defendant can prove that the "balance of convenience of the parties is *strongly* in favor of defendant." *Shutte.*, 431 F.2d at 25. Among the factors to be considered in making this determination are:

(1) plaintiff's choice of forum; (2) defendant's preference; (3) where the claim arose; (4) convenience to the parties; (5) convenience to witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; (6) location of books and records; (7) practical considerations that could make the trial easier, more expeditious, or less expensive; (8) congestion of the possible fora; and (9) the familiarity of the trial judge with the applicable state law in diversity cases.

See generally *Jumara* ■ *State Farm Ins. Co.*, 55 F.3d 873, 879–80 (3d Cir.1995).

[7] Considering the totality of the circumstances surrounding this case, I make the following findings. First, Epstein and Financial Trust have selected this forum, and they are residents of the Virgin Islands with strong ties to this community. Epstein owns a seventy-acre island, and he and Financial Trust employ some twenty people. (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss, Epstein Decl. ¶¶ 2, 4–5.) It is important that local plaintiffs with grievances against defendants subject to this Court's jurisdiction be permitted to seek redress here in the Virgin Islands. As already noted, no forum selection clause binds the parties to bring suit in any particular jurisdiction. The defendants contacted the plaintiffs and entered into negotiations concerning the AIG investment while they were in the Virgin Islands, and at least one agreement was addressed to the plaintiffs through transmission to the plaintiffs' attorneys in New York, intending that it be sent to the Virgin Islands. I do not find that the defendants will suffer any great inconvenience by litigating this matter here. As the plaintiffs point out, most of the documents needed to try the case have already been filed in this Court, and the defendants are currently litigating other cases in this Court. Moreover, the defendants have not

stated that their key witnesses are unable to travel to the Virgin Islands. See *Jumara*, 55 F.3d at 879. Finally, it is not at all clear that New York law must be applied to determine the causes of action raised by plaintiffs, but to the extent that another jurisdiction's jurisprudence does apply, this Court is fully capable of applying such law. For the foregoing reasons, I find that the requisite factors weigh in favor of litigating this matter in the Virgin Islands, and thus I will deny the motion to transfer.

D. The Amended Complaint Adequately States Claims upon Which Relief May be Granted Under Federal Rule of Civil Procedure 12(b)(6)

The defendants aver that I should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) because the amended complaint fails to state a claim upon which relief may be granted. In considering a Rule 12(b)(6) motion, I accept all allegations in the complaint as true, and draw all reasonable inferences in favor of the non-moving party. *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d 198, 215 (3d Cir.2002). "The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims." *Id.* (citing *Scheuer* ■ *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds*, *Harlow* ■ *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The defendants raise several arguments in support of their motion, each of which I address in turn. (Mem. of Law in Support of Defs.' Motion to Dismiss at 36–52.)

1. Virgin Islands Law Governs this Lawsuit

[8] Throughout their brief, the defendants rely on New York law to support

their 12(b)(6) motion. Their reliance on New York law, however, is misplaced. In the Amended 1999 Note, the parties stipulated only that

[t]his note shall be governed by, and construed in accordance with, the laws of the State of New York, including matters of construction, validity and performance, without giving effect to principles of conflicts of law

(Mem. Of Law in Support of Defs.' Mot. To Dismiss, Ex. D at 10.) The issues raised by the plaintiffs, however, do not involve the "construction, validity and performance" of the note; rather, they involve allegations of fraud, misrepresentation, misinformation, and breach of a fiduciary duty of the defendants in advising the plaintiffs about the AIG-managed fund. Accordingly, I find that New York law does not govern these claims, and instead shall look to Virgin Islands law to determine whether the plaintiffs have stated claims cognizable in this jurisdiction.

2. *New York's Martin Act Does Not Apply to this Lawsuit*

The defendants aver that the Martin Act, New York General Business section 352 *et seq.*, bars the plaintiffs' claims for negligent misrepresentation (Count IV) and breach of fiduciary duty (Count V) because, under the Act, only New York State's Attorney General has the power to bring such claims resulting from the sale

2. The Martin Act is New York's blue sky law. General Business Law section 352-c prohibits various fraudulent and deceitful practices in the distribution, exchange, sale and purchase of securities. The Martin Act vests exclusive authority in the New York Attorney General to investigate and prosecute violations of the Act. The Martin Act does not, however, provide for a private cause of action. See *Nairobi Holdings Ltd. v. Brown Bros. Harriman & Co.*, Civ. No.2002-1230, 2002 WL 31027550, *4, 2002 U.S. Dist. LEXIS 16995 at *10 (S.D.N.Y. Sept. 10, 2002) ("[I]t is well estab-

lished that there exists no private right of action for claims that are within the purview of the [Martin] Act."); *Granite Partners, L.P. v. Bear, Stearns, & Co., Inc.*, 17 F.Supp.2d 275, 291 (S.D.N.Y.1998) (same); *Deutsch v. Integrated Barter Int'l, Inc.* 700 F.Supp. 194 (S.D.N.Y.1988); *CPC Int'l, Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 276, 519 N.Y.S.2d 804, 514 N.E.2d 116 (N.Y.1987) (noting that "[a] majority of this court now holds that there is no cause of action impliedly created under [the Martin Act]").

or negotiation of any securities or commodities, and that there is no private right of action. (Defs.' Mem. Of Law in Support of Mot. To Dismiss at 44-46.) The plaintiffs counter that New York's Martin Act does not apply to nor bar their claims. (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss at 48-49.)

The plaintiffs correctly assert that New York law does not govern their claims. In Count IV of the amended complaint, the plaintiffs allege that the defendants failed to disclose that they or their affiliates had a pecuniary interest in the AIG Investment "despite mismanagement" of the AIG fund. The plaintiffs contend that they relied on the information and advice given by defendants, and suffered a substantial pecuniary loss as a result. (Am. Compl. ¶¶ 56-57.) In Count V, the plaintiffs accuse the defendants of breaching a fiduciary duty owed to them. (*Id.* ¶¶ 59-61.) Neither of these claims involves the "construction, validity and performance" of the Amended 1999 Note, and therefore, they are not governed by New York law.²

3. *The Amended Complaint's Nondisclosure Allegations are Factual Issues to be Determined at Trial*

Citibank and Citigroup claim that every count in the amended complaint is premised upon their alleged failure to disclose a conflict of interest. They aver, however, that SSB's relationship with AIG was dis-

lished that there exists no private right of action for claims that are within the purview of the [Martin] Act.); *Granite Partners, L.P. v. Bear, Stearns, & Co., Inc.*, 17 F.Supp.2d 275, 291 (S.D.N.Y.1998) (same); *Deutsch v. Integrated Barter Int'l, Inc.* 700 F.Supp. 194 (S.D.N.Y.1988); *CPC Int'l, Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 276, 519 N.Y.S.2d 804, 514 N.E.2d 116 (N.Y.1987) (noting that "[a] majority of this court now holds that there is no cause of action impliedly created under [the Martin Act]").

closed to the plaintiffs both in the "pitch book" and in the Offering Circular used to market the AIG investment. Accordingly, therefore, the defendants assert that each count of the amended complaint should be dismissed to the extent that it is premised on the defendants' alleged failure to disclose the relationship between AIG and SSB. (Mem. Of Law in Support of Defs.' Mot. To Dismiss at 36-39.) The plaintiffs challenge the defendants' reliance on these documents and the propriety of considering them under Rule 12(b)(6). Alternatively, they claim that these documents confirm the defendants' failure to disclose the existence of a continuing investment banking relationship with AIG that would render the defendants unable to advise the plaintiffs in an impartial, objective manner. (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss at 32-36.)

[9] Although generally, a district court may not consider matters extraneous to the pleadings, I may consider "a document integral to or explicitly relied upon in the complaint . . . without converting the motion to dismiss into one for summary judgment." *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir.2002) (emphasis added) (quoting *In re Burlington Coat Factory Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997)). Because the parties dispute whether the document in question is the actual "pitch book" referenced in the amended complaint, however, I find that whether the defendants disclosed SSB's relationship to AIG to the plaintiffs is a disputed fact that precludes a Rule 12(b)(6) dismissal.

4. *The Complaint Adequately Alleges that the Defendants' Wrongful Conduct Caused the Plaintiffs' Losses*

[10] Citibank and Citigroup argue that the plaintiffs have failed to allege adequately that the defendants' actions caused

the plaintiffs' losses under New York law. (Mem. Of Law in Supp. of Defs' Mot. to Dismiss at 40-44.) As noted above, Virgin Islands law governs these claims. The plaintiffs maintain that they have adequately stated causation by alleging that the defendants did not disclose their relationship with AIG and did not promptly assist them in understanding how to remove AIG as fund manager—presumably because of a conflict of interest or loyalty owed to AIG. But for this delay, the plaintiffs complain that they could have obtained a new fund manager or reduced their losses in some other fashion. Accordingly, the amended complaint adequately alleges that the defendants' wrongful conduct caused their financial losses.

5. *Plaintiffs' Claims of Breach of Fiduciary Duty and Negligent Misrepresentation Need Not Be Dismissed*

Citibank and Citigroup argue that the claim of breach of fiduciary duty should be dismissed because the Subscription Agreement between AIG and the plaintiffs explicitly states that they did not owe the plaintiffs such a duty. Moreover, they assert that New York law does not recognize a fiduciary duty owed by a bank to its customer or by a broker to its customer. Finally, the defendants argue that the plaintiffs' negligent misrepresentation claim must also be dismissed because the defendants owed the plaintiffs no fiduciary duty. (Mem. Of Law in Supp. of Defs.' Mot. to Dismiss at 46-50.) The plaintiffs counter that, even under New York law, the issue whether a fiduciary duty exists requires a fact-specific analysis of the totality of the circumstances surrounding the relationship between the plaintiffs and the defendants. The plaintiffs contend, however, that under the controlling Virgin Is-

lands law, they have stated claims for breach of fiduciary duty and negligent misrepresentation. They argue that the defendants owed them a fiduciary duty because they "cultivated a relationship of trust over a fifteen-year span as their private banker" and then used this trust to market new and inherently risky investment opportunities which became even more risky because of defendants' tortious conduct. (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss at 41-46.)

a. The Amended Complaint Adequately States a Claim for Breach of Fiduciary Duty

In Count 1 of the amended complaint, the plaintiffs allege that the defendants cultivated a relationship of trust with the plaintiffs over fifteen-years as their private banker, and that the defendants breached their fiduciary duty owed to the plaintiffs by failing to disclose a conflict of interest and effectively "forced" the plaintiffs to keep their funds in a failing investment. The plaintiffs claim that the defendants "served as [their] financial investment advisor and broker, as well as providing other financial and banking services to [p]laintiffs, and thereby formed a fiduciary relationship with [p]laintiffs and other investors." (Am.Compl.¶¶ 10, 59-60.)

[11] In typical lender-borrower relationships, there is a presumption that the parties operate at arms-length and in their own interest. *Jo-Ann's Launder Ctr., Inc. v. Chase Manhattan Bank, N.A.*, 854 F.Supp. 387, 392 (D.Vi.1994). A fiduciary relationship may arise, however, depending upon the particular circumstances of the financial relationship. This may occur, for example, when a lender has substantial control over the borrower's business affairs. *Id.* Here, the plaintiffs have alleged that their relationship with Citibank and Citigroup was not the "garden-variety" at

arms-length banking relationship. They claim that they and the defendants have a fifteen-year relationship and that the defendants acted as their financial advisor. I find that, for purposes of surviving a Rule 12(b)(6) motion, the amended complaint adequately states a claim for breach of fiduciary duty.

[12] In addition, I find that the defendants' argument that the Subscription Agreement between AIG and the plaintiffs bars these claims against them is without merit. A fair reading of the Subscription Agreement compels the conclusion that its main purpose is to protect AIG's interests in its dealing with Epstein and FTC. The agreement discusses at length the process by which AIG, through its agent, Citibank, will deliver income notes to Epstein, the purchaser. The Subscription Agreement contains a clause stating that neither AIG, SSB, nor Citibank

is acting as a fiduciary or financial or investment adviser for the Purchaser and the Purchaser is not relying on any written or oral advice, counsel or representations of the Company, the Investment Manager, the Placement Agent [SSB], the Agent or any of their respective affiliates . . . [and that] [t]he Purchaser has consulted with its own legal, regulatory, tax, business investment financial, and accounting advisers to the extent it has deemed necessary, and has made its own investment decisions based upon its own judgments and upon any advice from such advisers as it has deemed necessary and not upon any view expressed by the Company, the Investment Manager, the Placement Agent, the Agent or any of their respective affiliates.

(Mem. In Supp. of Defs.' Mot. To Dismiss, Ex. C. at 10-11, ¶ i.) Although this document alludes to Citibank's role in this one transaction, the agreement does not speak

to the fifteen-year relationship between the defendants and the plaintiffs that is the gravamen of the amended complaint. Moreover, Citibank is not a party to nor did it sign the Subscription Agreement. I find, therefore, that the Subscription Agreement does not dispose of the plaintiffs' breach of fiduciary duty claim as a matter of law.

b. *The Amended Complaint Adequately States a Claim of Negligent Misrepresentation*

[13] In the Virgin Islands, the elements of negligent misrepresentation are:

[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

RESTATEMENT (SECOND) OF TORTS § 552 (1977). Count IV of the amended complaint alleges that the defendants negligently failed to disclose that they or their affiliates had a pecuniary interest in the AIG investment and that the plaintiffs relied upon the information and advice provided by the defendants to their detriment. (Am.Compl.¶¶ 55-56.) I find that Count IV thus adequately states a claim of negligent misrepresentation.

6. *The Rescission and Punitive Damages Counts are not Causes of Action*

The defendants contend that this Court should dismiss Counts VI and VII—for rescission of the note and for punitive damages—because each claim seeks specific relief without asserting any claim for relief. (Mem. Of Law in Supp. of Defs.' Mot. to Dismiss at 51-52.)

Whereas the plaintiffs, in their amended complaint, have set out their request for rescission of the Amended 1999 Note and punitive damages in the form of additional causes of action, I will require them to reframe them as part of the *ad damnum* clause.

D. *Counts I, II, III, and VI of the Plaintiffs' Amended Complaint Fail to Meet Federal Rule of Civil Procedure 9(b)'s Heightened Pleading Standard for Claims of Fraud*

Finally, the defendants argue that Counts I, II, III, and VI should be dismissed due to the plaintiffs' failure to plead fraud with the requisite particularity as required under Federal Rule of Civil Procedure 9(b). They aver that the amended complaint is "rife with sweeping conclusory allegations but fatally short on detail" and that the fraud claims fail to explicitly reference Citigroup, do not state any dates on which the alleged conduct occurred, and do not name any specific employees of the defendants. The defendants contend that the complaint simply does not put them on notice of what exactly each is accused. (Mem. of Law in Supp. of Mot. to Dismiss at 32-35.) The plaintiffs counter that, although the amended complaint does not specify who within Citigroup or Citibank recommended the AIG investment, the defendants are aware of which of their employees are implicated in this matter. Moreover, the plaintiffs submit that the defendants are responsible for the "universal fungibility" of the Citigroup and Citibank names. The plaintiffs ask that this Court find that the amended complaint meets Rule 9(b)'s requirements, or, alternatively, permit them to replead their allegations of fraud under Federal Rule 15(a). (Pls.' Mem. Of Law in Opp'n to Mot. To Dismiss at 30-32, 39-41.)

Federal Rule of Civil Procedure 9(b) requires parties alleging fraud to describe the circumstances constituting fraud "with particularity." Rule 9(b) requires that the plaintiff "give[] defendants notice of the claims against them, provide[] an increased measure of protection for their reputations, and reduce[] the number of frivolous suits brought solely to extract settlements." *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d at 215 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1418). "Rule 9(b) requires a plaintiff to plead (1) a specific false representation of material fact; (2) knowledge by the person who made it that it was false; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage." *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir.1992). Although the rule does not require a recitation of "every material detail" of the alleged fraud, it does require, at a minimum, "that plaintiffs support their allegations of fraud with all of the essential factual background that would accompany 'the first paragraph of any newspaper story'—that is, the 'who, what, when, where and how' of the events at issue." *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d at 217 (quoting *In re Burlington*, 114 F.3d at 1422).

In Count I, plaintiffs allege that the defendants' conduct "constituted the making of fraudulent misrepresentations . . . regarding the AIG Investment" that the defendants knew were materially misleading "because of their failure to state or disclose the additional or qualifying information regarding the investment banking relationship" of SSB with AIG. (*Id.* ¶ 46.) Count II vaguely states that the defendants' "statements and conducts . . . included the expression of opinions which

[the defendants] did not, in fact, truthfully hold." (*Id.* ¶ 50.) Count III claims that the defendants are liable to the plaintiffs for their failure to disclose this information, "because they knew that their non-disclosure would justifiably induce the Plaintiffs to proceed with the proposed investment." (*Id.* ¶ 52.) Finally, Count VI again claims that the defendants' conduct "constituted the making of fraudulent misrepresentations to, and/or fraudulent concealment and non-disclosure of material facts." (*Id.* ¶ 63.)

[14] I agree with the defendants' assertions that Counts I, II, III, and VI do not meet Rule 9(b)'s heightened pleading requirements. First, nowhere does the complaint state *who* made the alleged misrepresentations to the plaintiffs. See *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d at 218 (finding that complaint failed to comply with Rule 9(b) because the allegation failed to identify the speaker, and "there is no indication that the speaker had the authority to speak on behalf of [the defendant] or that the employee was in regular contact with the [defendant]"). Second, the complaint fails to allege exactly *what* false statement or representation was made. Instead, it claims that the defendants' failure to inform them of SSB's relationship with AIG was fraudulent. This does not meet Rule 9(b)'s requirement that there be a false statement that the defendants *knew* was false. In addition, the plaintiffs' allegation that the defendants misrepresented their claims that they aspired to "the highest standards of moral and ethical conduct" is vague. Accordingly, I find that Counts I, II, III, and VI do not meet Rule 9(b)'s heightened pleading requirement, and, therefore, I will dismiss them. I shall, however, grant the plaintiffs thirty days within which to amend the

complaint to comport with Rule 9(b).³ See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434 (noting that ordinarily, when a complaint is dismissed under Rule 9(b) for failure to plead fraud with the requisite particularity, leave to amend the complaint is granted).

III. CONCLUSION

For the foregoing reasons, I will deny Citibank's and Citigroup's motions to dismiss for lack of personal jurisdiction, to dismiss for improper venue, and to transfer this matter to the United States District Court for the Southern District of New York. I find that the amended complaint adequately states claims of breach of fiduciary duty and negligent misrepresentation, and therefore, will deny the defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. Finally, because I find that Counts I, II, III, and VI fail to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for claims of fraud, I will dismiss these claims and grant the plaintiffs leave to amend the complaint.

ORDER

For the reasons given in the Memorandum Opinion of even date, it is **HEREBY ORDERED** that the defendants' motion to dismiss for lack of personal jurisdiction under Federal Rule 12(b)(2), motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and motion to transfer this matter are **DENIED**. Counts I, II, III, and VI fail to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for claims of fraud and are hereby **DISMISSED WITHOUT PREJUDICE**. The plaintiffs, however, shall have THIR-

3. Citibank and Citigroup also argue that Count II, alleging fraud, is impermissibly based on the defendants' unspecified alleged false "expression of opinions." (Mem. Of

TY DAYS within which to file an amended complaint with respect to these counts.



Elizabeth A. REEVES, et al., Plaintiff,

ST. MARY'S COUNTY
COMMISSIONERS, et
al., Defendants.

No. CIV.A.AW-02-2449.

United States District Court,
D. Maryland,
Southern Division.

June 13, 2003.

Landowner brought action against county commissioners and individuals for violations of due process rights and a taking under the Fifth Amendment related to county's denial of her application for a conditional use permit to construct an Alzheimer's facility on her land. On cross motions for summary judgment, the District Court, Williams, J., held that: (1) takings claims were not ripe for adjudication, and (2) even if claims were ripe, they were barred by res judicata.

Motion granted.

1. Eminent Domain ⇌ 277

Federal courts cannot adjudicate takings claims premised on use restrictions until the relevant state or state agency has

Law in Supp. of Defs.' Mot. to Dismiss at 50-51.) Because I will dismiss this claim under Rule 9(b), I need not address this issue at this time.

FINANCIAL TRUST COMPANY, INC.
and Jeffrey E. Epstein, Plaintiffs,

CITIBANK, N.A. and Citigroup, Inc.
d/b/a "Citigroup," Defendants.

No. CIV.2002-108.

District Court, Virgin Islands,
Appellate Division,
D. St. Thomas and St. John.

Dec. 30, 2004.

Background: Borrowers brought action against bank, alleging that false statements or statements where material facts were omitted were made by bank pursuant to a course of conduct to fraudulently induce them into a series of investments and related loans. Bank moved to dismiss the complaint for failure to meet heightened pleading requirement for fraud and for failure to state a claim upon which relief could be granted.

Holdings: The District Court, Moore, J., held that:

- (1) borrowers' specific factual allegations were sufficient to plead fraud claim with the requisite particularity, and
- (2) borrowers stated fraud claim against bank.

Motion denied.

1. Fraud \S 41

In order to state a viable fraud claim, plaintiff is required to plead (1) a specific false representation or omission of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damages. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

2. Federal Civil Procedure \S 636

Courts should apply heightened pleading requirement for fraud with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

3. Federal Civil Procedure \S 636

Although heightened pleading requirement for fraud does not require a recitation of every material detail of the alleged fraud, it does require that plaintiffs support their allegations of fraud with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is the "who, what, when, where and how" of the events at issue; requirements may be satisfied if the complaint describes the circumstances of the alleged fraud with precise allegations of date, time or place or by using some means of injecting precision and some means of substantiation into their allegations of fraud. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

4. Federal Civil Procedure \S 636

Borrowers' specific factual allegations were sufficient to plead fraud claim against bank with the requisite particularity; borrowers, who alleged that false statements or statements where material facts were omitted were made by bank pursuant to a course of conduct to fraudulently induce them into a series of investments and related loans, alleged that bank vice president made specific false representation and omissions of material facts of the relationship between investment corporation and bank in April and May of 1999, that vice president and others at bank knew of the relationship between bank and investment corporation and that borrower was unaware of that relationship, and that borrower acted upon the information and but for bank's actions he would not have been

injured. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

5. Banks and Banking ⇌228

Jury question was presented as to whether preliminary offering circular ("pitch book"), which was allegedly given to investor, disclosed ongoing business relationships between bank and company in which investor invested funds borrowed from bank, and therefore whether "be-speaks caution" doctrine precluded investor from stating fraud claim against bank.

6. Banks and Banking ⇌226

Borrowers stated fraud claim against bank based on allegations that false statements or statements where material facts were omitted were made by bank pursuant to a course of conduct to fraudulently induce them into a series of investments and related loans; claims alleging fraud relating to each investment would not be treated separately since such claims were predicated on allegations that bank fraudulently induced borrowers into believing they had a preferred relationship with bank where bank was acting in borrowers' best interest in all of their transactions.

Maria Tankenson Hodge, Esq., Hodge & Francois, St. Thomas, VI, for plaintiffs.

Gregory H. Hodges, Esq., Dudley, Topper and Feuerzeig, LLP, St. Thomas, VI, for defendants.

MEMORANDUM OPINION

MOORE, District Judge.

Defendants have moved to dismiss the second amended complaint for failure to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement for fraud and for failure to state a claim upon

which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Factual and Procedural History

In their second amended complaint, Jeffrey E. Epstein and Financial Trust Company, Inc. ["FTC"] allege that Citibank, N.A. and Citigroup, Inc. [collectively "Citibank"] misrepresented facts and fraudulently induced them to borrow \$10 million to invest in a venture managed by AIG Global Investment Corporation ["AIG"] and another \$10 million to invest in a venture managed by Mass Mutual. The plaintiffs allege that the defendants failed to disclose information and negligently and fraudulently misrepresented facts concerning their relationship with AIG, that the plaintiffs detrimentally relied on these misrepresentations and omission, and that the defendants breached their fiduciary duty to the plaintiffs. The plaintiffs seek rescission of the promissory notes and punitive damages.

Previously, I ruled that this court has personal jurisdiction over Citibank and Citigroup, venue in this court is proper under 28 U.S.C. § 1391(a), this case need not be transferred to New York, the amended complaint adequately states claims upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) for the breach of fiduciary duty and negligent misrepresentation claims, and counts I, II, III and VI of the first amended complaint failed to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. I did, however, grant the plaintiffs leave to amend the complaint. *Financial Trust Co. v. Citibank*, 268 F.Supp.2d 561 (D.Virgin Islands 2003).

II. LEGAL ANALYSIS

A. Federal Rule of Civil Procedure 9(b)

[1-3] In order to state a viable fraud claim, Rule 9(b) requires a plaintiff to

plead (1) a specific false representation or omission of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damages." *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d 198, 215 (3d Cir.2002). Courts should apply Rule 9(b) with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants. *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644 (3d Cir.1998). Although the rule does not require a recitation of "every material detail" of the alleged fraud, it does require "that plaintiffs support their allegations of fraud with all of the essential factual background that would accompany 'the first paragraph of any newspaper story'—that is the 'who, what, when, where and how' of the events at issue.'" *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d at 217 (quoting *In re Burlington*, 114 F.3d at 1422). However, the Third Circuit Court of Appeals has held that the "requirements of Rule 9(b) may be satisfied if the complaint describes the circumstances of the alleged fraud with 'precise allegations of date, time or place' or by using some means of 'injecting precision and some means of substantiation into their allegations of fraud.'" *Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 173 n. 10 (3d Cir.2002) (internal citations omitted).

[4] Plaintiffs allege that false statements or statements where material facts were omitted were made pursuant to a course of conduct to fraudulently induce plaintiffs into a series of investments and related loans. Plaintiffs allege that Citibank's actions did not conform to the representations in the statements, that defendants were acting in plaintiffs' best

interests. For example, it is alleged that in conversations between April 29, 1999 and May 2, 1999, Dayle Davison, a Vice President of Citibank in the Private Banking Division, called Epstein to introduce him to an "exceptional investment opportunity." (Compl.¶ 13.) In follow-up telephone conversations during that same two week period, Davison and her associates made additional specific representations about the AIG Investment, without disclosing Citibank and AIG's relationship. Davison also during that period represented that Citibank had "done their due diligence" and would remain actively involved in the deal. (Compl.¶ 14.) In August 2001, in an effort to dissuade Epstein from seeking to remove AIG as the manager of the AIG Investment, John Purcell, a Citibank representative, told Jeffrey Schantz, a lawyer for Epstein, that Citibank was acting in Epstein's interests and that Epstein should trust Citibank rather than talk about actions which would run counter to Citibank's undisclosed interests. (Compl.¶ 37.) These facts all allege that defendants failed to state or disclose "additional or qualifying information regarding" their relationship with AIG.

These specific facts are enough to plead fraud with the particularity required by Rule 9(b). The plaintiffs have alleged that Davison, Epstein's primary contact at Citibank, made specific false representation and omissions of material facts of the relationship between AIG and Citibank in April and May of 1999. The complaint has also alleged that Davison, and others at Citibank, knew of the relationship between Citibank and AIG and that they knew Epstein was unaware of this relationship. Finally, as I had previously ruled, the complaint also alleges that Epstein acted upon this information and but for Citibank's actions he would not have been injured.

The basic purpose of Rule 9(b) has been fulfilled—plaintiff has alleged enough information, including specific names and dates, to put Citibank on notice of the fraudulent actions it has alleged to have committed. Moreover, since some of the misrepresentations were alleged to be omissions, Rule 9 does not require specification of time, place, and nature of misrepresentation for these statements; rather, it requires only that the plaintiff identify the facts not communicated. See *Golden Trade, S.r.L.* [Jordache], 143 F.R.D. 504 (S.D.N.Y.1992); *Cottman Transmission Sys. Inc.* [Dubinsky], 95 F.R.D. 351, 353 (E.D.Pa.1982) (“Conduct which never occurred cannot be described with greater particularity other than to state that it did not occur.”)

The information contained in the second amended complaint is enough for counts I, II, III, and VI to survive this motion to dismiss for failure to plead fraud with particularity pursuant to Federal Rule of Civil Procedure 9(b).

B. Federal Rule of Civil Procedure 12(b)(6)

The defendants also argue that 12(b)(6) mandates dismissal of the complaint for failure to state a claim upon which relief can be granted. To the extent that plaintiffs are attempting to reargue their previous motion to dismiss, I reiterate my ruling that Virgin Islands law governs this case, that the complaint adequately alleges that the defendants' wrongful conduct caused the plaintiffs' losses, and that plaintiffs' claims of breach of fiduciary duty and negligent misrepresentation should not be dismissed. *Financial Trust Co.*, 268 F.Supp.2d at 576. The only claims left to be decided are the fraud claims.

In order to state a claim for fraud, the plaintiff must prove “(1) a specific false representation of material fact; (2) knowl-

edge by the person who made it that it was false; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage.” *Financial Trust Co.*, 268 F.Supp.2d at 575 (quoting *Shapiro* [UJB Fin. Corp.], 964 F.2d 272, 284 (3d Cir. 1992)).

[5] The defendants base their argument that plaintiffs have failed to state a claim upon which relief can be granted for fraud on their allegation that the alleged omission of the relationship between AIG and defendants was disclosed and thus the “bespeaks caution” doctrine applies to the case. Under this theory, when some risks are disclosed in documents, the documents “bespeak caution” to the investor and the investor cannot later premise a fraud claim on the events of which he has been warned. *Kline* [First Western Gov't Sec., Inc.], 24 F.3d 480, 482 (3d Cir.1994). The defendants' claim that the Preliminary Offering Circular [the “pitch book”], which was allegedly given to Epstein, disclosed ongoing business relationships between Citibank and AIG and should invoke the “bespeaks caution” doctrine.

I have previously ruled that whether the “pitch book” referenced in the amended complaint is the document that plaintiffs rely on is a disputed fact that precludes a Rule 12(b)(6) dismissal. *Financial Trust Co.*, 268 F.Supp.2d at 572. Nothing in any of the briefs have convinced me that the parties do not dispute which pitch book Epstein received, what disclosures were made in any such pitch book, and whether those disclosures revealed the alleged conflict. As such, a ruling on the “bespeaks caution” doctrine is not appropriate at this juncture in the case because it involves deciding issues of disputed fact.

[6] Plaintiffs have alleged all necessary elements of fraud. They have alleged that defendants intentionally misrepresented material facts, through omissions and statements assuring the plaintiffs that they were acting in Epstein's personal best interest. They have also alleged that the person who made these misrepresentations, Davison, knew of the relationship between AIG and Citibank and that Epstein and FTC did not know of this relationship. Finally, plaintiffs have also alleged that "but for" defendants misleading statements and omissions, plaintiff would not have proceeded with their loan and investment programs and would not have suffered these damages. Plaintiffs have thus alleged enough information to survive a Rule 12(b)(6) motion on their fraud claims.

C. The Mass Mutual Investment Claims

Although it is unclear from the second amended complaint which counts concern the Mass Mutual Fund, it is clear that at least some of the causes of actions allege that Citibank defrauded Epstein in relation to his loans and investment in the Mass Mutual Fund. Separately, defendants argue that the court should dismiss the claims alleging fraud relating to the Mass Mutual Fund for failure to plead fraud specifically under Rule 9(b) and failure to state a claim upon which relief can be granted under Rule 12(b)(6). The plaintiff's basic allegation is that "because of Defendants' false assurances and omissions of true statements concerning their relationship with AIG and the AIG Investment, Plaintiffs made the investment in the Mass Mutual Fund and suffered significant losses." (Compl. ¶ 65.)

1. This opinion is supported by the structure of the second amended complaint which does not differentiate the counts between the Mass

Defendants essentially argue that plaintiff's loans and investment in the AIG and Mass Mutual funds should be viewed as two separate transactions. This view, however, belies the alleged conduct of Citibank. The underlying conduct alleged in the second amended complaint is that Citibank fraudulently induced plaintiffs into believing they had a preferred relationship with Citibank where Citibank was acting in Epstein's best interest in all of their transactions, including investing in the AIG and the Mass Mutual funds. Essentially, plaintiffs argue they were induced into a high stakes relationship with Citibank based on fraudulent statements and omissions, and but for these statements, they would not have enjoyed the type of relationship with Citibank to be in the position either for Citibank to present them an offer to loan them large sums of money to invest in the Mass Mutual fund or for plaintiffs to trust Citibank's investment advice. I believe that whether the underlying complained about conduct was two separate transactions or whether the conduct should be viewed as Citibank's relationship as a whole with Epstein is a matter of fact that goes to the issue of damages and is not appropriate for a Rule 12(b)(6) motion.¹ Therefore, I rule that the fraud claims should not be separated into two different types—AIG and Mass Mutual—and thus my previous analysis of the applicability of Rule 9(b) and Rule 12(b)(6) apply equally to all claims for damages alleged to occur because of Epstein's investments in the AIG and Mass Mutual funds.

III. CONCLUSION

For the foregoing reasons, I will deny defendants' motion to dismiss.

Mutual and AIG funds as defendant attempts to do.

ORDER

For the reasons given in the accompanying memorandum of even date, it is hereby

ORDERED that the defendant's motion to dismiss is hereby **DENIED**.



**In re ROYAL AHOLD
SECURITIES & ERISA
LITIGATION.**

No. CIV.1:03-MD-01539.

United States District Court,
D. Maryland.

Dec. 21, 2004.

Background: Investors brought consolidated securities fraud actions arising out of an approximately \$ 1.1 billion restatement of earnings, together with a \$24.8 billion reduction in revenue, announced by Netherlands company involved in supermarket and food service business in the United States. Named as defendants were the company, its American subsidiaries, auditors, underwriters, and individual executives. Defendants filed multiple motions to dismiss.

Holdings: The District Court, Blake, J., held that:

- (1) subject matter jurisdiction existed over securities fraud claims asserted by foreign purchasers of shares on foreign exchanges;
- (2) plaintiffs stated securities fraud claims against chief officers of Dutch company;
- (3) allegation in complaint were sufficient to state market manipulation claims against chief officers; and

(4) plaintiffs failed to state securities fraud claim against auditors.

So ordered.

1. Federal Courts ⇐71

Personal jurisdiction extends to the limits of the due process clause of the Fifth Amendment. U.S.C.A. Const. Amend. 5.

2. Constitutional Law ⇐305(5)

There are two primary factors to consider in evaluating personal jurisdiction under the due process clause of the Fifth Amendment: (1) whether the defendant has sufficient minimum contacts with the United States and (2) whether the exercise of jurisdiction over the defendant would offend traditional notions of fair play and substantial justice. U.S.C.A. Const. Amend. 5.

3. Federal Courts ⇐86

To satisfy the minimum contacts test for personal jurisdiction over a foreign defendant, a plaintiff must demonstrate that the defendant either: (1) engages in systematic or continuous activities in the United States, and thus general jurisdiction exists; or (2) purposefully directs his actions at the United States and the litigation arises from or is related to those actions, and thus specific jurisdiction exists.

4. Federal Courts ⇐76.10

In determining whether specific personal jurisdiction exists, district court considers: (1) the extent to which the defendant has purposefully availed himself of the privilege of conducting activities in the state; (2) whether the plaintiff's claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.