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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS & ST. JOHN

\*\*\*\*\*

JEFFREY EPSTEIN, et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. ST-10-CV-443
	)	
FANCELLI PANELING, INC.,	)	
	)	
Defendant.	)	(CARROLL, J.)

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**DEFENDANT'S MOTION TO RECONSIDER  
WITH POINTS AND AUTHORITIES**

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COMES NOW Defendant, by and through its undersigned Counsel, to move this Honorable Court to Reconsider its *Orders dated May 16, 2011*, pursuant to *Fed. R. Civ. P. 1, 12 & 19, LRCi 7.3, Sup. Ct. Rule 7, the Fifth and 14<sup>th</sup> Amendment (due process), The Revised Organic Act of 1954* and the Constitutional considerations embodied therein.

In support of its *Motion to Reconsider*, Defendant states the following facts and circumstances: <sup>1</sup>

**I. RECONSIDERATION OF DEFENDANT'S AMENDED REPLY**

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<sup>1</sup> Defendant herein incorporates by reference all matter previously filed by Defendant as if fully set out herein including, but not limited to Defendant's *Amended Reply to Opposition to Motion to Dismiss and its Exhibits*, reading hereto. Defendant further incorporates Exhibits A-C to *Defendant's Opposition to Motion to Reconsider*.

In its June 22<sup>nd</sup> Order, docketed June 24<sup>th</sup>, granting Defendant's *Motion to Extend Time in which to File (Any) Motion for Reconsideration*, the Court calculated and stated that Defendant's *Motion* was required on, or before June 7, 2011, by operation of *LRCi* 7.3. At the next level up, however, it is respectfully submitted that Defendant should have received an additional three (3) days by operation on *Fed. R. Civ. P. 6(d) & 5(a)(2)(E)* to file its *Motion for Reconsideration*.<sup>2</sup> It is respectfully submitted that it would be in the best interest of the parties prospectively to obtain a clarification from the Court on the applicable interaction of federal, District and Superior Court rules to avoid misunderstandings in the future.

In its *Order* dated May 16, 2011, the Court determined it would consider *Defendant's Reply*, filed March 10, 2011, but not *Defendant's Amended Reply* filed the following day in ruling on Defendant's *Motion to Dismiss*. The Court is asked to reconsider that *Motion* in its entirety. Defendant's Counsel was not cognizant at the time that the rule limiting motion filings to motions, oppositions and replies was equally applicable to the initial responsive pleading of a party. The effort to amend *Defendant's Reply* deprived Defendant of additional exhibits and factors the Court should have had before it in making its decision on the merits of the *Motion*. By rule, the assertion of the Rule justifying exclusion should not have been used against Defendant, only Defendant's Counsel.

Accordingly, Defendant respectfully seeks reconsideration, pursuant to *LRCi* 7.3(2) & (3).

## II. RECONSIDERATION OF SERVICE OF PROCESS

In its *Memorandum Opinion of May 16, 2011, p. 3-4*, the Court found that Plaintiffs' service upon Defendant (corporation) through service upon its employee was adequate and/or

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<sup>2</sup> Defendant did file on June 7<sup>th</sup>.

revised?

sufficient. While the several factors relief upon by the Court in reaching its conclusion may suffice for natural persons, the Court is asked to reconsider that decision in recognition of New York's specific instructions for service of process on corporations. The affidavit of service of Plaintiff's process server states that he delivered a copy of the Summons and First Amended complaint to "Christian Barthod, co-worker, a person of suitable age and discretion."

As noted in the Affidavit of Mr. Christian Barthod, Def. **Exhibit B1**, he holds no special corporate designation for service, is not an officer, or director, is an employee and is not otherwise authorized to accept service on behalf of Defendant corporation.

The Court is asked to reconsider its prior determination that service was sufficient and/or adequate on Defendant corporation, pursuant to *LRCi 7.3(2)&(3)*

### III. RECONSIDERATION OF AFFIRMATIVE GROUNDS FOR DISMISSAL

Defendant respectfully submits that it presented sufficient facts and circumstances in its *Motion to Dismiss* to demonstrate entitlement to dismissal at this juncture for *Release* and/or *Accord and Satisfaction*. (*Motion, pp. 11-13*). The case law cited to that contention deemed dismissal as an appropriate remedy under *Rule 12(b)(6)* if there is a dispositive legal issue,<sup>3</sup> or if (either) plaintiff lacks statutory standing to bring suit.<sup>4</sup> A court can grant a motion to dismiss for lack of subject matter jurisdiction when the claim is legally insufficient. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408 (3d Cir. 1991).

In its Memorandum Opinion dated May 16, 2011, however, the Court stated:

#### C. The Court Will Not Dismiss the Matter Based on Fancelli's Defense of

<sup>3</sup> See *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)

<sup>4</sup> See *Leuthner v. Blue Cross & Blue Shield of Northeastern Pa.*, 454 F.3d 120 (3d Cir. 2006)(affirming dismissal under *Rule 12(b)(6)* for lack of statutory standing).

Release and Res Judicata at this Stage of the Litigation.

... (release and accord and satisfaction) are defenses that require further factual development and are not proper subjects for this Motion to Dismiss.”

Fancelli argues . . . Plaintiffs and Molyneux have and/or had litigation that resulted in settlement, but that litigation continues between them. Just as with the defense of release, the Court is not prepared to rule on the merit of the *res judicata* defense without further factual development.” *Memorandum Opinion, p.8.*

Defendant asks the Court to reconsider its ruling on point in response to the extensive and, we submit, dispositive nature of irrefutable evidence that was not sufficiently refuted in Plaintiffs' pleadings. Defendant asserts that the two causes of action comprising the complaint cannot be maintained, raising numerous affirmative defenses, including, but not limited to, the defense of release and/or accord and satisfaction founded upon documentary evidence. Defendant did not mean to raise *res judicata*, but claim and issue preclusion based upon the evidence presented at this early juncture in service to the directives of *Fed. R. Civ. P. 1.*

The sole document to which Defendant is a party and pursuant to which Defendant fabricated and installed the subject cabinetry is a Purchase Order #2680 dated June 15, 2006, between “MOLYNEUX” and Defendant, Fancelli Paneling, as replaced by Purchase Order #7106 dated October 14, 2008, the full scope of which is as follows:

Woodworking FABRICATION & INSTALLATION of light oak with waxed finish cabinetry per JPM design. Will include survey, shop drawings, molding of base, lower cabinetry with doors and upper bookshelves, 3 hidden cabinet drawers and interior window shutters, columns with bases and crown. Will include packing insurance and waterproof container to St. thomas (sic) and crew travel. Cost will not include 2 globes, flat base (stone), transportation of goods to St. James, scaffolding, local taxes, customs or workmen's accommodations NOTE THIS PO

REPLACES PO#2680. (PO#2680 annexed as Exhibit "A"; PO#7106 annexed as Exhibit "B").

PO#7106 is in all material respects the same as PO#2680, except that PO#2680 provided for a design based on Escorial to be fabricated in "stained walnut," which was rejected by Plaintiffs and substituted with an Exotic design to be fabricated in light oak. The approval of the substituted design and fabrication in light oak by Molyneux, as well as by Plaintiffs, is confirmed by definitive documentary evidence as set forth below and neither the design, fabrication, stain color, nor installation is subject to further factual development.

#### RELEASE AND/OR ACCORD AND SATISFACTION

While intervening approvals of the substituted design, stain color, and fabrication in light oak are confirmed by numerous e-mail transmissions and letters from and to Molyneux, which will, if necessary, be produced at trial, the ultimate sign-off and approval of Defendant's fabrication in light oak, fabrication design, stain color and installation of the cabinetry in response to the Purchase Order is established by Molyneux's "Little St. James Punch List Report March 22, 2010," produced after a site inspection on March 22-23, 2010 (20 page Report annexed as Exhibit "C").

Molyneux's sign-off and approvals are confirmed by the *First Amended Complaint* in the action formerly pending in the District Court of the Virgin Islands, bearing the Case No. 3:10-cv-00034, captioned *J.P.Molyneux Studio, Ltd. and Juan Pablo Molyneux against Jeffrey Epstein and L.S.J., LLC. (the "Molyneux Action")*, dated June 11, 2010, arising out of the same

transaction or series of transactions as the subject action, in which Molyneux, by Rosh D. Ager, Esq., states under oath that: <sup>5</sup>.

Subsequent to the execution of the Design Services Agreement [between Juan Pablo Molyneux, ■■■ Molyneux Studio, Ltd. and Jeffrey Epstein and L.S.J., LLC, dated May 15, 2009], Plaintiffs [Molyneux], with the assistance of an internationally-known woodworking craftsman [Fancelli Paneling, Inc.], undertook to and did perform the Exhibit B Services, thereby satisfying their obligations pursuant to the Design Services Agreement (Molyneux Action, First Amended Complaint, ¶14).

\* \* \*

On March 22, 2010...Plaintiffs [Molyneux] and their representatives...undertook to complete, and did complete, the Punch List items falling under the Design Services Agreement (Molyneux Action, First Amended Complaint, ¶17)

\* \* \*

On March 25, 2010 Defendants' [Epstein's] agent signed off on all items enumerated on the Punch List by signing it and noting that all the woodwork on the list was done with the exception of three minor items, none of which were specified in Exhibit B to the Design Services Agreement (Molyneux Action, First Amended Complaint, ¶15) (First Amended Complaint, the Settlement Agreement, the Design Services Agreement with annexed Exhibits, annexed hereto as Exhibit "D").

Thus, by Punch List Report after the installation had been completed and by sworn Complaint in the Molyneux Action, Molyneux acknowledged and swore under oath, respectively, that the fabrication and installation of the library cabinetry, with the assistance of Fancelli Paneling, satisfied their obligations to Epstein. Implicit in Molyneux's satisfaction of his obligation to Epstein is Fancelli's satisfaction of its obligation to Molyneux under the Purchase Agreement.

Molyneux, however, was not the only source of release and/or accord and satisfaction of Defendant's fabrication and installation of the cabinetry. By e-mail dated March 17, 2010,

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<sup>5</sup> On motion (for judgment on the pleadings), the court may take judicial notice of matters of public record. *United States v. Woods*, 925 F.2d 1580, 1582 (7<sup>th</sup> Cir. 1991). *Fed. R. Evid. 201*

Plaintiff Epstein instructed Juan Pablo Molyneux to communicate only with his agent, Gary Kerney (other than himself or his New York attorney, Darren Indyke) on matters concerning the fabricated work and its installation on Little St. James Island (the March 17, 2010 e-mail annexed as Exhibit "E"). On March 23, 2010, after the site inspection, Gary Kearney, as "Client Representative," signed off and approved the cabinetry Fancelli fabricated and installed pursuant to the Purchase Order, as follows:

The work executed by Fancelli Paneling following the project designed by Molyneux Studio, and corrections executed March 19 -23 are approved and accepted by the client representative and by Molyneux Studio. Balance on completed work is now due.

At 3/25/2010 OPEN ISSUES:

1. Send lite (sic) bulbs
2. Send BAMBOO GRILL 4 big and 4 small
3. Black Board

(March 23, 2010 Approval and Acceptance Letter annexed as Exhibit "F").

It is respectfully submitted that these documents, or either of them, constitute Plaintiffs' (and Molyneux's) waiver and release and/or acknowledgment of accord and satisfaction with the work as contemplated by the Purchase Order (see, *Fed. R. Civ. P. 8(c)(1)*) and each document directly and irrefutably contradicts both the Complaint herein and Molyneux's sworn Affidavit in opposition to Defendant's Motion to Dismiss. A suit can be barred by . . . release. *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1<sup>st</sup> Cir. 1991). The foregoing, together with the attached exhibits to this and Defendant's prior submissions amply document its release. Defendant further meets the requirements to establish its full defense of accord and satisfaction. See *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (3d Cir. 1990)

PLAINTIFFS AS THIRD PARTY BENEFICIARIES

The Court's finding that Plaintiffs' are "third-party beneficiaries" of the Purchase Order, not only confirms the absence of direct contractual obligation of Fancelli to Plaintiffs, but also limits Plaintiffs' rights of enforcement to the "promised performance" due Molyneux under the Purchase Order, *i.e.*, Fancelli's compliance with the terse description of the work reflected on the face of the Purchase Order and nothing further. However, Plaintiffs' third-party beneficiary enforcement rights are rendered irrelevant by Molyneux's Punch List Report March 22, 2010, which confirms Fancelli's completion of the punch list items and Molyneux's approval and acceptance of Fancelli's obligations arising from the Purchase Order. In short, the benefits due Molyneux were accepted and approved by Molyneux. If Fancelli satisfied its obligation to Molyneux under the Purchase Order, then there is no unfulfilled "promised performance" to be enforced by Plaintiffs, as third-party beneficiaries.

Interestingly, by correspondence from Jay Goldberg, Esq., Molyneux's New York counsel, dated May 10, 2010, addressed to Darren Indyke, Plaintiffs' New York counsel, Mr. Goldberg addresses the punch lists, as follows:

As the record will show, two punch lists were given to Mr. Molyneux and Mr. Fancelli. Both were satisfied by checkmarks and a signature of a person with authority to bind Mr. Epstein. If there are additional items which your client believed warranted Mr. Fancelli's attention, your client should have been on the island and not "laid back in the grass", claiming there are new problems which were overlooked when your client's personnel prepared the punch list.

Mr. Fancelli traveled from Italy and had one of his craftsmen journeyed from Moscow, but still your client did not appear.... Mr. Molyneux has said that despite the fact that the Design Services Agreement gives him the authority to judge whether the color of the paneling is consistent with the overall ambiance of the library, he is willing...to have Mr. Fancelli return to the island to finish the cabinetry as you wish....But the responsibility must be your client's to arrange for Mr. Fancelli and his craftsmen to appear, pre-pay their expenses and that of Mr. Molyneux... and to pay for the expense of refinishing the cabinetry with the color your client finds desirable (Goldberg Letter dated May 10, 2010 annexed as Exhibit "G").

Thus, even Molyneux's counsel contradicts his client's sworn affidavit filed on Plaintiffs' behalf in opposition to Defendant's Notice to Dismiss.

Given the foregoing, it is respectfully submitted that Defendant is entitled at this early juncture to dismiss on the theory of written evidence of release. See Geraghty v. Insurance Services, Inc., (Unpublished) 369 Fed. Appx. 402, 2010 WL 746420 (3d Cir. 2010); Cuchara v. GAI-Tronics Corporation, (Unpublished) 129 Fed. Appx. 728, 2005 WL 1030466 (3d Cir. 2005). Defendant further invested additional time, money and effort in consideration of the release and as accord and satisfaction of Plaintiffs' claims in full.

Plaintiffs fully recognize and acknowledge that any claims Defendant has/had against Molyneux are applicable to them in their alleged third party status as well. See *Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Reconsideration*, p. 11. It is respectfully submitted that Molyneux's release and acceptance of Defendant's work fully bars Plaintiffs' claims herein. A *Fed. R. Civ. P. 12(b)(6)* claim may be granted only if, accepting all well-pleaded allegations in the as true and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief. Oatway v. American Int'l Group, Inc., 325 F.3d 184, 187 (3d Cir. 2003). The attached and referenced exhibits evidencing release and satisfaction come from Plaintiffs' mouth and hand; the releases and satisfactions come from Molyneux's mouth and hand through which Plaintiffs portent these inconsistent claims through third party status. They are at this juncture, party admissions upon which dismissal should be granted.

**WHEREFORE, Defendant respectfully requests:**

- A. **That this Honorable Court DENY Plaintiffs' Motion to Reconsider** its requirement that Plaintiffs' join Molyneux Design;

- B. That the Court further require the additional joinder of Molyneux as well; and
- C. For such other and further relief as the Court deems just and proper.

Dated this 8<sup>th</sup> day of July, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of July, 2011, a copy of the foregoing was served by first class mail, postage prepaid, upon Denise Francois, Esquire, Hodge & Francois, #1340 Taarneberg, St. Thomas, V.I. 00802.



A handwritten signature in dark ink, appearing to be 'R. H. Hodge', is written over a horizontal line.