The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Samantha A. Lunn

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INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as flash drive or CD that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov..

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner, Husch Blackwell LLP

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

Licensed to practice law in Tennessee in 2011; TN Bar No. 030473; active

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Licensed to practice law in Texas in 2005; TX Bar No. 24050595; active

Licensed to practice law in Tennessee in 2011; TN Bar No. 030473; active

Licensed to practice law in Georgia in 2017; GA Bar No. 303099; active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Partner, Husch Blackwell LLP, January 2018 to Present

Senior Counsel, Husch Blackwell LLP, May 2015 to December 2017

Independent Contractor, legal and office services, Industrial Plating Co., June 2013 to April 2014

Fund Director, Normal Park Museum Magnet Education Fund, August 2012 to June 2014

Associate Attorney, Gibson Dunn & Crutcher LLP, September 2005 to March 2011

During law school, I was a research assistant for both a law professor and a business school professor, law firm clerk for one summer and a babysitter for multiple professors. The summer before law school, I was a waitress at a restaurant. During college, I worked during the year as

a student lifeguard, a live-in nanny, and as an executive assistant for a small business. During my college summers, I worked as a summer camp counselor, a grocery store deli clerk, and as an intern for the City Clerk and Department of Public Works for the City of Napa, California. During high school, I worked as a lifeguard, babysitter, host and table busser at a restaurant and as a coffee shop barista. I began babysitting outside of my family at age 11 and became a certified lifeguard at age 15. Dates and names for employment prior to graduation from law school available on request.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

From March 2011 to July 2012, I managed our family's relocation from Texas to Tennessee and was the primary caregiver to our daughter (Olivia), after my husband purchased a small business in Chattanooga.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The primary areas of law in my current practice are: general complex commercial litigation (30%); class action litigation (including securities) (20%); insurance coverage litigation (15%); white collar and compliance investigations (10%); fiduciary litigation (10%); appellate (10%); and outside general counsel advice (5%).

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I began my career in Dallas, Texas with Gibson, Dunn & Crutcher LLP in their litigation department. The first three years of my career involved antitrust litigation (pharmaceutical companies), antitrust government investigations (valve manufacturer for oil industry), securities litigation (Big 4 accounting firm), securities investigations (Big 4 accounting firm) and

insurance coverage litigation (related to death at amusement park). In these earlier years of practice, I distinguished myself as a careful, thorough researcher and strong writer. I was also regularly commended for my mastery of the relevant facts on client matters. I was the most likely associate to have procedure rules book at hand, as I am meticulous about monitoring and compliance with rules and procedures at both the trial and appellate level. I was also eager to understand and use the latest technology, quickly becoming a go-to attorney for electronic discovery issues. During my fourth and fifth years of practice, I focused almost exclusively on representing accounting firms and underwriters in securities litigation and securities investigations. I was the primary drafter of dispositive motions on my matters and handled the primary drafting of an appellate brief before the U.S. Court of Appeals for the Fifth Circuit. During my fifth and sixth years of practice, I was part of a firm-wide litigation team representing a multinational oil company seeking relief from a $13 billion dollar judgment in Ecuador. I worked on these matters at both the U.S. District Court and U.S. Court of Appeals level. Throughout my legal career in Dallas, I practiced almost exclusively in federal court (primarily in Dallas and New York) and in response to federal agencies (primarily the Securities and Exchange Commission). I had two matters that went through trial preparation to eve-of-trial settlement or dispositive ruling.

In 2011, I elected to pause my legal career as our family transitioned to Tennessee with our infant daughter as my husband bought and began running an industrial plating business. During this period, I provided advice and counsel to the family business and put down our family roots in the community. I also spent nearly two years of this time running the education fund for a magnet school in Chattanooga, Tennessee.

In 2015, I resumed my legal career and joined Husch Blackwell LLP in Chattanooga. Over the last nearly five years, I have worked on a much greater variety of matters than I handled in my time in Dallas. My practice has been more evenly divided between Tennessee state court and federal court. My practice has also been more evenly divided between both plaintiff and defendant work. I have become an acknowledged resource within the firm and the State on electronic discovery issues. I have taken two matters to trial in the last five years, one as first chair in which we obtained a seven-figure jury verdict in Circuit Court for Hamilton County, Tennessee. I represented a creditor client regarding lien priority and the State of Arkansas in front of the Tennessee Court of Appeals. I was a significant team member on both the analysis for and drafting of a petition in the U.S. Court of Appeals for the Eleventh Circuit seeking review of an order on class certification. I have enjoyed the opportunity to take on work related to advising of trust and estate clients and private businesses. The current matters on which I am the lead attorney include: two device warranty disputes; a commission dispute; several lease term disputes; and a matter seeking to pierce the corporate veil.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I was one of two associates on a three-attorney team that successfully pursued a 28 U.S. Code § 1782 proceeding to obtain discovery on behalf of investors in a Russian oil company for use in an international dispute over Russian seizure of assets.

I contributed both research and writing as a junior associate to a motion for summary judgment in a securities class action that was granted. After summary judgment was granted in my client's favor, I was the primary associate and drafter on the successful appeal brief of that summary judgment order.

I was the lead associate and primary drafter on a motion for summary judgment in a securities class action that was granted.

I was one of the lead mid-level associates pursuing 28 U.S. Code § 1782 discovery against the U.S. based law firm that represented the plaintiffs in Ecuador as well as other related entities.

I was primary counsel and drafter on a motion for summary judgment in Circuit Court in Hamilton County, Tennessee that was granted regarding insurance coverage.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

In approximately June 2019, I sat as a special judge in General Sessions Court in Hamilton County, Tennessee, for a civil matter involving a car accident.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

None

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

In addition to my state admissions, I am currently admitted in the following jurisdictions and have represented clients in connection with proceedings in each of these courts: U.S. Courts of Appeal for the Fifth Circuit; Sixth Circuit and Eleventh Circuit; and U.S. District Courts for the Middle District of Georgia, Northern District of Georgia, Eastern District of Tennessee, Middle District of Tennessee, Eastern District of Texas, Northern District of Texas, and Western District of Texas.

I have handled cases in the following federal courts, either by full or *pro hac vice* admission that is not currently active: U.S. District Courts for the Middle District of Florida, Southern District of New York, and Southern District of Texas.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

No prior submissions for judgeship

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Duke University School of Law, 2002 to 2005, Juris Doctorate, cum laude

Academic Scholarship; Business Law Students Association, Phi Delta Phi

Pepperdine University, 1998 to 2002, B.S. Accounting

National Merit Scholar; Dean's Scholarship; Deloitte & Touche Excellence in Accounting Award

Napa Valley Community College, 1996-1997

College level calculus class during junior year of high school, no degree sought/awarded

PERSONAL INFORMATION

15. State your age and date of birth.

39; [redacted], 1980

16. How long have you lived continuously in the State of Tennessee?

8 years, 5 months

17. How long have you lived continuously in the county where you are now living?

8 years, 5 months

18. State the county in which you are registered to vote.

Hamilton County, Tennessee

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Board Member, Boehm Birth Defects Center, 2015-2018

Member, Chattanooga Women's Leadership Institute, 2015-Present

Board Member, Conner Pullen Foundation, 2014-2015

Troop Leader, Girl Scouts of the Southern Appalachians, 2017-Present

Member, Girls Preparatory School Planned Giving Sub-Committee, 2017-2018

Member, Junior League of Chattanooga (2012-2015, 2016-Present)

Vice President, Marketing & Public Relations, 2019-Present

Visitor/Member, St. Peter's Episcopal Church, Chattanooga, Tennessee, 2012-Present

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Member, Attorneys Serving the Community, 2005-2011

Associate, Brock-Cooper Inn of Court, 2015-2017

Barrister, Brock-Cooper Inn of Court, 2018-Present

Member, Chattanooga Bar Association, 2015-Present

Member, Dallas Bar Association, 2005-2011

Member, Federal Bar Association, 2005-2011, 2015-Present

Member, Tennessee Bar Association, 2015-Present

Member, Southeastern Tennessee Lawyers Association for Women (SETLAW), 2015-Present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Mid-South Super Lawyers, Rising Star, 2017-2019

Tennessee Bar Association Leadership Law Program, Class of 2020

30. List the citations of any legal articles or books you have published.

Running the Numbers: Contingent Liability Disclosures & the SEC's Proposed Transition to IFRS
Co-author with Byron Wilder, West Legalworks's Securities Litigation Report (November 2008)

Severance Waivers Become Endangered Species
Co-author with Karl Nelson, Law Firm Partnership and Benefits Report (December 2006)

Safeguarding Confidential Employee Records
Co-author with Seema Tendolkar, Law Firm Partnership and Benefits Report (May 2006)

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

"eTeamwork: Leveraging Paralegals, LSTs and LitSupport for eDiscovery;"
co-presented on December 4, 2019 in Dallas, Texas

"The Hidden Ball Trick: Ethical Obligations in eDiscovery;"
presented on May 8, 2019 in Milwaukee, Wisconsin

"Mediation: Finding the Way In and Out On An Ethical Road;"
co-presented on April 11, 2019 in Chattanooga, Tennessee

"FRCP's Recent Developments and Amendments: What Lies Ahead in 2018;"
co-presented on July 17, 2018 by webinar

"What I Wish I'd Learned in Law School: Observations on Legal Education From the View of the Practicing Attorney;"
presented on July 23, 2015 in Chattanooga, Tennessee

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

A. Brief of Appellee Cornerstone Community Bank; Tennessee Court of Appeals; submitted April 21, 2016; one of two primary authors

B. Defendant Navigators Insurance Company's Reply in Support of Motion for Summary Judgment; Circuit Court for Hamilton County, Tennessee; submitted June 5, 2015; one of two primary authors

C. Appellee Chevron Corporation's Brief; U.S. Court of Appeals, Fifth Circuit; submitted July 26, 2010; one of several primary authors

D. Defendant PricewaterhouseCoopers LLP's, an Ontario Limited Liability Partnership, Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification; U.S. District Court for the Southern District of New York; submitted June 10, 2010; primary author

E. Memorandum in Support of Defendant RBC Capital Markets Corporation's Motion to Dismiss Amended Consolidated Preferred Stock Purchaser Complaint; U.S.D.C. for the Southern District of Texas; submitted March 5, 2010; one of two primary authors

F. Brief in Support of Stark Master Fund's Motion for Summary Judgment; U.S.D.C for the Southern District of Texas; submitted December 18, 2008; primary author

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I have been blessed with strong analytical and legal writing skills and I was very fortunate to have a family and community that nurtured and helped develop these skills into the strengths that I have today. I have enjoyed using these talents on behalf of both billable and pro bono clients and I have greatly enjoyed being a positive mentor for many young attorneys in my practice. Yet I have come to a point in my legal career where I feel called to seek an opportunity to serve my community and take on a public role. Serving as an appellate judge is a natural fit for my writing and analytical talents, while providing a rewarding professional opportunity that is of greater service to my community than the private practice of law. I am humbled by the opportunity to submit my name and my experience for consideration for this position.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

As a young associate, I led the National Adoption Day program for our Dallas Office. This program provided free legal services for adoptions by foster parents. We provided adoptions throughout the year, as well as a single day adoption event in November.

On a pro bono basis, I currently handle and supervise matters related to trust and estate, adoption, and real property referred from the Legal Aid of East Tennessee. I provide outside general counsel advice to two start-up not-for-profit organizations in Chattanooga. Over the last year, I have brought our firm's Human Trafficking clinic program to Chattanooga and I am working with local agencies to connect with trafficking victims in need of legal services.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The Tennessee Court of Appeals is the intermediary appellate court for civil cases (both from trial courts and certain state boards and commissions) in the State. There are 12 members, four from each Grand Division. The judges sit in panels of three. Nominees to the Court of Appeals are selected by the Governor and then confirmed by the General Assembly. Judges on the Court of Appeals are subject to retention elections at the next general election after appointment and at the end of every eight-year term.

If selected to the Court of Appeals, I would bring proximity to trial practice and significant experience practicing in many jurisdictions, including outside of Tennessee. I would also bring my committed work ethic, strong writing and analytic skills, gender diversity, passion for technology, and my willingness to be mentored by the judges currently sitting on the Court of Appeals.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I believe being an active community and Bar member is a duty of a judicial officer.

I am passionate about being a role model for young women. Through my service as a Girl Scout troop leader, which I plan to continue after appointment, I have direct involvement in the lives of young girls. This role has been a joy and an honor. I intend to continue my participation in the Junior League of Chattanooga. JLC is committed to training future women leaders and improving the community. I am proud to be completing my seventh year with JLC and to have served this year as an executive board member. I also intend to continue to be an active volunteer in my daughter's school.

I am passionate about being a role model for young attorneys. As a young attorney, I was active in the Dallas organization of Attorneys Serving the Community, a group of female attorneys that selected and supported a different not-for-profit organization each year. Here in

Chattanooga, I have been an active member of both SETLAW and the Brock-Cooper Inn of Court, having presented CLEs for both groups, and a member of the Chattanooga and Tennessee Bar Associations. I would continue to prepare and present CLEs as a judicial officer.

Additionally, I am a regular blood donor, after being inspired to give on the evening of the Woodmore Elementary bus crash in Chattanooga. I have continued this practice for over three years and would continue after an appointment.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I come before this Commission as a product of my education, law firm experiences in two states, and work as a not-for-profit director of an education fund. I also come before this committee as a mother and as the wife, daughter and sister-in-law of small business owners. I would bring to the bench not only my legal experience but my experience as a private citizen.

Clarity in the law is powerful for decision makers at all levels. The quality of a decision is a reflection of the quality of the available information. Individuals and organizations are hampered when governing law is unclear. Throughout my practice, I have worked to provide clarity on the applicable law for individual and organizational decision makers. Well-reasoned and well-written opinions from the courts are critical for our legal community and society as a whole. I stand ready to serve the State of Tennessee with my commitment to thoughtful interpretation and clear communication of the law. The craft of legal writing has been a passion for me as an advocate and would continue to be a passion as a judicial officer.

While I would bring a depth and breadth of private legal practice to the bench, I also greatly value the experience of others and welcome the opportunity to develop as a judicial officer in the company of the esteemed judges currently on the appellate bench in Tennessee.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will uphold the law even if I disagree with the substance of the law at issue.

In my practice, I have worked with clients whose expectations are diametrically opposed to the clear written instructions of a last will and testament. However, "[i]t is the absolute right of the testator to direct the disposition of his property and the Courts are limited to the ascertainment and enforcement of his directions." *Daugherty v. Daugherty*, 784 S.W.2d 650, 653 (Tenn, 1990). This creates difficult situations when, as I have seen in a practice, one child is disinherited and only discovers this after the passing of the parent. I have sat in my office with clients and listened to the stories of their relationships with the decedent and witnessed their personal anguish. It is difficult to bear witness to these stories. Despite my personal heartache for these clients, I steadfastly counsel them on the realities of the testamentary documents and how the rules apply to those documents. I have had to inform clients after reviewing the facts of their case that there

is no viable action under the clear terms of the document, notwithstanding that person's view, and my personal view, of the unfairness of the outcome. I am confident that, in all cases, I will apply the same standards to my decisions from the bench.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Dr. W. Timothy Ballard, Orthopedic Surgeon, Center for Sports Medicine & Orthopedics
(o): [redacted] (m): [redacted]

B. Alan Cates, Partner, Husch Blackwell LLP
(o): [redacted]

C. Emily Goldberg, President of Hamilton County Pachyderm Club
(m): [redacted]

D. Ashley Jones Johnson, Gibson Dun & Crutcher LLP
(o): [redacted]

E. Nicole Osborne Watson, Counsel and Senior Policy Advisor,
Waller Lansden Dortch & Davis, LLP
(o): [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 3, 2020.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Samantha A. Lunn
Type or Print Name

Signature

February 3, 2020
Date

030473
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

State Bar of Texas, No. 24050595

State Bar of Georgia, No. 303099

2008 WL 6513607 (N.D.Tex.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. Texas,
Dallas Division.

STARK MASTER FUND LTD., Plaintiff,

v.

Wayne R. AUSMUS, Faye L. Ausmus, and John R. Carlew, Defendant.

No. 3:08-cv-1497-P.
December 18, 2008.

Brief in Support of Stark Master Fund Ltd.'s Motion for Summary Judgment

Respectfully submitted, M. Byron Wilder, Lead Attorney, State Bar No. 00786500, Samantha A. Lunn, State Bar No. 24050595, Gibson, Dunn & Crutcher LLP, 2100 McKinney Avenue, Suite 1100, Dallas, Texas 75201, Telephone: (214) 698-3100, Facsimile: (214) 571-2900, Attorneys for Plaintiff Stark Master Fund Ltd.

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I.

PRELIMINARY STATEMENT

To prevail on its claim of breach of guaranty, Stark Master Fund Ltd. (“Stark”) must demonstrate that there is no genuine issue of disputed fact as to the following elements: (1) that the Guaranty is valid and enforceable; and (2) that Defendants Wayne Ausmus, Faye Ausmus, and John Carlew (collectively, “Defendants”) have breached the Guaranty by failing to perform their obligations thereunder. There are two material facts necessary to demonstrate that Defendants have breached the Guaranty -

first, that Defendants became obligated to pay under the Guaranty and second, that Defendants did not make and have not made the required payment.

Defendants' obligation to pay under the Guaranty arose when The Club at Waterford, L.P. (the "Club"), the borrower under the guaranteed promissory note (the "Note"), failed to reduce the principal outstanding under the Note when required and failed to make timely interest payments on the Note. [1] Stark gave prompt notice of the Club's defaults and demanded payment from the Defendant-Guarantors. Nonetheless, as of the filing of this Motion, the Club remains in default under the Note and Defendants have made no payments pursuant to the Guaranty. None of these facts is disputed by Defendants in their Answer.

Therefore, because there is no genuine issue of material fact on any element of Stark's breach of guaranty claim, Stark is entitled to summary judgment against the Defendants, and each of them.

II.

STATEMENT OF UNDISPUTED FACTS

1. The Club at Waterford, L.P., is a limited partnership with its principal place of business at 2734 Sunrise Boulevard, Suite 402, Pearland, Texas. The Club was organized under the laws of the State of Texas on March 16, 2006 and is a wholly-owned subsidiary of Waterford Mgmt, LLC ("Waterford Mgmt").

2. Waterford Mgmt is a limited liability company organized under the laws of the State of Texas on October 27, 2004. Defendant Wayne Ausmus is identified as the sole manager of Waterford Mgmt in its Articles of Organization. Defendants Faye Ausmus and John Carlew are identified as officers and directors of Waterford Mgmt in the 2007 Texas Franchise Tax Public Information Report, filed with the State of Texas, and are identified as members in Waterford Mgmt's operating agreement.

3. On May 19, 2006, the Club executed and delivered the Note to and in favor of First National of America, Inc. ("First National"). [2] First National is a corporation organized under the laws of the State of Florida with its principal place of business at 188 Mount Airy Road, Basking Ridge, New Jersey. The Note evidences indebtedness owed by the Club representing a loan made to the Club in the principal amount of up to Twenty Eight Million Six Hundred Thousand Dollars ($28,600,000) (the "Loan"). The Club promised to repay all of the unpaid principal balance of the Loan, together with all accrued and unpaid interest thereon from and after the date of execution and other fees, expenses and charges as provided in the Note. Concurrently with the execution of the Note, the Club and First National entered into a Construction Loan Agreement (the "Loan Agreement"), the terms and conditions of which were incorporated into the Note. [3]

4. On May 19, 2006, concurrently with the execution of the Note and the other Loan Documents, Wayne Ausmus, Faye Ausmus and John Carlew, jointly and severally, executed and delivered a Guaranty of Payment and Completion (the "Guaranty") to and in favor of First National. [4] Pursuant to the Guaranty, Wayne Ausmus, Faye Ausmus and John Carlew "unconditionally and irrevocably guarant[eed] to Lender, the punctual payment and performance when due, whether at stated maturity or by acceleration or otherwise, of the indebtedness and other obligations of [the Club] to Lender evidenced by the Note and any other amounts that may become owing by [the Club] under the Loan Documents." Guaranty at ¶ 1.

5. The Guaranty further provides that if "this Guaranty is placed in the hands of one or more attorneys for collection or is collected through any legal proceeding ... then Guarantor shall pay to Lender upon demand all fees, costs and expenses incurred by Lender in connection therewith, including, without limitation, reasonable attorney's fees, court costs and filing fees (all of which are referred to herein as 'Enforcement Costs'), in addition to all other amounts due hereunder." Guaranty at ¶ 11.

6. All right, title, interest, claim, and estate held by First National in the Note and the Loan, together with the Guaranty and each and all of the other Loan Documents, was assigned to Fairway Onshore Loan Fund LLC ("Fairway"), an entity under common management with Stark, concurrently with the closing of the Loan. The transfer of all right, title, interest, claim, and estate held by First National in the Note and the Loan to Fairway, a Delaware limited liability company with its principal place of business at 3600 South Lake Drive, St. Francis, Wisconsin, 53235, was reflected of record by that certain Assignment of Deed of Trust, Assignment of Leases and Rents and Security Agreement (and Fixture Filing) and an Assignment of Assignment of Leases and Rents, each dated as of May 19, 2006, and recorded on May 31, 2006 as Document Nos. 007042 and 007043, respectively in the Official Public Records of Burnet County, Texas (the "Official Records"). [5]

7. On May 7, 2007, Fairway transferred title in and to the Note and the Loan, together with the Guaranty and each and all of all of the other Loan Documents, to Credit Suisse Loan Funding LLC ("Credit Suisse"), a Delaware limited liability company. The transfer was reflected of record by that certain Assignment of Deed of Trust, Assignment of Leases and Rents and Security Agreement (and Fixture Filing), dated as of May 7, 2007, and recorded on May 8, 2007 as Document No. 0705809 in the Official Records. [6] Notwithstanding the transfer of record title to the Note and the Loan by Fairway to Credit Suisse on May 7, 2007, concurrently therewith, Stark and Credit Suisse entered into a Participation Agreement whereby Credit Suisse sold and Stark purchased a 100% participation interest in the Note, the Loan and all of the Loan Documents (the "Participation"). [7] From and after May 7, 2007, all beneficial interest in and to the Note and the Loan has been vested solely in Stark, and at all such times, Stark has held all of the economic interest in the Note and the Loan. Freschl Aff. at ¶ 10. Credit Suisse is not a party herein and has no interest in or claim to the Note or the Loan as of the date hereof. *Id.*

8. On June 27, 2008, Credit Suisse reassigned record title in and to the Note and the Loan, together with the Guaranty and each and all of all of the other Loan Documents, to Stark. Said transfer was reflected of record by that certain Assignment of Deed of Trust, Assignment of Leases and Rents and Security Agreement (and Fixture Filing) and that certain Assignment of Assignment of Leases and Rents, each dated as of June 27, 2008, and recorded on July 16, 2008 as Document Nos. 0807473 and 0807474, respectively in the Official Records. [8]

9. The Note provides that interest will accrue on the principal amount at the "Applicable Interest Rate," defined in Section 1 of the Note as "an interest rate per annum, rounded upwards, if necessary, to the nearest one sixteenth (1/16th) of one percent (1%), equal to the greater of (i) nine and seventy-five hundredths percent (9.75%) or (ii) the Five Year Treasury Index (as hereinafter defined) plus four hundred seventy-five basis points," so long as no Event of Default exists. An Event of Default is defined in §§ 1 and 5 of the Note as:

(i) the failure of the Borrower [the Club] to pay (i) any installment of principal or interest payable pursuant to this Note on the date when due, or (ii) any other amount payable to Lender [First National] under this Note, the Security Instrument or any of the other Loan Documents within five (5) days after the date when any such payment is due in accordance with the terms hereof or thereof; or

(ii) the occurrence of any "Event of Default" under the Security Instrument or any of the other Loan Documents.

10. The Note further provides that, "[u]pon the occurrence and during the continuance of any Event of Default, Lender, at its option and without notice to Borrower, may (i) declare immediately due and payable the entire Principal Amount, together with interest thereon and all other sums due by Borrower under the Loan Documents...." and that "from and after the date of the occurrence of any Event of Default and during the continuance of any Event of Default, interest shall accrue on the Principal Amount at the Default Rate." Note at § 5(b). The Default Rate is defined in § 1 of the Note as "the Applicable Interest Rate plus five percent (5%) per annum."

11. The Note states that the Club "shall be required to pay down the outstanding principal of the Loan to an amount equal to no greater than $ 6,600,000.00 (the "Permanent Loan Amount') by no later than the Permanent Loan Date." Note at § 3(f). The Note

defines the "Permanent Loan Date" as "the date on which the Interim Loan Period ends." Note at § 1(a). The Note defines the "Interim Loan Period" as " the period commencing on the last day of the Construction period and ending on the earlier to occur of (i) the date occurring twelve (12) months thereafter or (ii) the date when the Loan has been paid down to the permanent Loan Amount. *Id.* The Loan Agreement defines the "Construction period" as "the period of time commencing on the Construction Date and ending upon the earlier to occur of (i) the date when the Golf Course has opened for play or (ii) twelve (12) months from the Construction Commencement Date [defined as the date of the Loan Agreement]." Loan Agreement at Art. 1.1.

12. The Club failed to reduce the unpaid principal balance of the Note to an amount no greater than $6,600,000.00 by May 19, 2008, the Permanent Loan Date. Freschl Aff. at ¶ 15. In addition, as of May 13, 2008, the Club had failed to pay $232,336.78 of interest accrued on the Loan as and when required by the Note. Freschl Aff. at ¶ 16. Both the failure to reduce the principal balance of the Loan and the failure to pay all accrued interest as and when due constituted Events of Default under the Note.

13. On June 6, 2008, the Club and Credit Suisse entered into a written forbearance agreement (the "Forbearance Agreement"). [9] In the Forbearance Agreement, the Club "indicated that [it] is unable to presently reduce the outstanding principal balance of the Loan to the Permanent Loan Amount and expressly acknowledges that the failure of [the Club] to (a) reduce the outstanding principal balance of the Loan to the Permanent Loan Amount by May 19, 2008 and (b) pay all interest accrued on the Loan through May 13, 2008 is an Event of Default under the Note and that such Event of Default has not been waived or excused by Lender at any time or in any manner." Forbearance Agreement at ¶ D. Further, the Club "requested that Lender provide an interim period of forbearance that will enable Borrower, at or prior to the expiration of such forbearance period, to modify the Loan Documents with respect to the reduction of the outstanding principal balance of the Loan to the permanent Loan Amount." *Id.* In response, Credit Suisse "agreed to forbear, for the limited periods of time set forth [in the Forbearance Agreement] from the exercise of its remedies under the Loan Documents so long as, and only so long as, no event which, with the giving of notice or the passage of time, or both, would constitute a default or an Event of Default, shall now exist or hereafter occur (except as set forth in Recital 'D') and Borrower is not in default under any of its obligations set forth in this Agreement." Forbearance Agreement at ¶ F. Under the Forbearance Agreement, the Borrower was obligated, during the period of forbearance, to continue making monthly payments of accrued interest pursuant to the terms of the Note. Forbearance Agreement at ¶ 3(b)(i).

14. On June 13, 2008, the Club again failed to pay interest due under the Note. Freschl Aff. at ¶ 17. That failure by the Club to pay the interest when due was a further default under the Note and was a default under the Forbearance Agreement.

15. On June 26, 2008, Stark, as beneficial holder of the Note, provided written notice, in accordance with the terms of the Note and the Guaranty, to each of the Club, Wayne Ausmus, Faye Ausmus and John Carlew of the Event of Default resulting from the Club's failure to pay interest when due and of Stark's election to demand "repayment of the entire principal balance of the Note, all accrued and unpaid interest thereon, and all other sums due thereunder and under the Loan Documents (as defined in the Loan Agreement) no later than July 8, 2008." [10] Neither the Club nor any of the Defendant-Guarantors paid any part of the amount demanded by that date and none has done so as of the date of filing this Motion for Summary Judgment.

16. As of December 18, 2008, the principal amount due and owing from the Club to Stark is Twenty-eight Million Three Hundred Forty-five Thousand Two Hundred Ninety-six Dollars ($ 28,345,296.00), together with attorneys' fees, costs and other expenses in accordance with the Loan Documents. In addition, as of December 18, 2008, there is accrued and unpaid interest owed by the Club to Stark in the sum of Two Million Five Hundred Forty-three Thousand Four Hundred Dollars ($ 2,543,400.00). Interest is continuing to accrue on the unpaid principal (including attorneys' fees and other costs and expenses) at the Default Rate, as defined in Section 1 of the Note (currently fourteen and seventy-five hundredths percent (14.75%) per annum).

III.

ARGUMENT AND AUTHORITIES

A. The Standard for Summary Judgment

Fed. R. Civ. P. 56(a) states that "[a] party seeking to recover upon a claim ... may, at any time after the expiration of 20 days from the commencement of the action ... move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." "The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving part is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Summary judgment is appropriate when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). [11] Once the moving party properly supports its motion for summary judgment by demonstrating the absence of a genuine issue of material fact, the non-moving party bears the burden to establish a genuine issue of material fact to preclude a grant of summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). "The non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Toche Biomedical Labs., Inc.,* 61 F.3d 313, 315 (5th Cir. 1995) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)). The non-movant must come forward with more than "conclusory allegations, speculation, and unsubstantiated assertions" once the moving party has met his or her burden for summary judgment. *Douglass v. United States Auto. Ass'n,* 79 F.3d 1415, 1430 (5th Cir. 1996).

B. Stark Master Fund Ltd. is Entitled to Summary Judgment Because There is No Material Issue of Fact.

To prevail on its claim of breach of guaranty, Stark must demonstrate that there is no genuine issue of disputed fact as to the following elements: (1) that the Guaranty is valid and enforceable; and (2) that Defendants have breached the Guaranty by failing to perform their obligations thereunder. Because there is no genuine dispute as to any element of Stark's breach of guaranty claim, Stark is entitled to summary judgment.

First, it is undisputed that the Guaranty is a valid and enforceable contract and Defendants do not allege otherwise. Nor do Defendants dispute that Stark is the present beneficiary of the Guaranty.

Second, there is no genuine issue of material fact as to whether Defendants have breached the Guaranty. There are two material facts necessary to demonstrate that Defendants have breached the Guaranty - first, that Defendants became obligated to pay under the Guaranty and second, that Defendants did not make and have not made payment as demanded by Stark in accordance with the Guaranty.

By entering into the Guaranty, the Defendants "unconditionally and irrevocably" guaranteed "the punctual payment and performance when due ... of the indebtedness and other obligations" of the Club as "evidenced by the Note and any other amounts that may become owing by [the Club] under the Loan Documents." Guaranty at ¶ 1. By doing so, the Defendants were obligated to "pay such obligations in full immediately upon demand" if, for any reason, the Club failed to pay, punctually and fully, any of the payment obligations under the Loan Documents, as defined in the Note. *Id.* On May 19, 2008, the Club failed to reduce the unpaid principal balance of the Note to an amount no greater than $6,600,000.00. Freschl Aff. at ¶ 15. In addition, as of May 13, 2008, the Club had failed to pay $232,336.78 of interest accrued on the Loan as and when required by the Note. [12] Freschl Aff. at ¶ 16. In the Answer, Defendants admit these facts. Answer at ¶ 19.

The Forbearance Agreement did not cure the Club's defaults and was itself terminated by the Club's failure to pay monthly interest as required on June 13, 2008. Events of Default under the Forbearance Agreement include: "Borrower shall fail to make any payment required under Section 3 hereof." Forbearance Agreement, ¶ 10(a). Among those required payments is monthly interest. *Id.* at ¶ 3(b)(i). Remedies provided for an Event of Default under the Forbearance Agreement are as follows:

Upon the occurrence of an Agreement [sic] Event of Default under Section 10 above, at the sole option and immediately upon declaration by Lender, the forbearance hereunder shall terminate, and all obligations owed to Lender, including, without limitation, all amounts outstanding under the Note and Deed of Trust shall, without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived, be forthwith due and payable, and Lender may immediately, and without expiration of any period of grace, enforce payment of all obligations of Borrower owed to [sic] hereunder and under the Loan Documents, and may exercise any and all other rights, powers and remedies granted to or otherwise available to Lender at law, in equity, or otherwise.

Id. at 11.

Upon the Club's default under the Forbearance Agreement, as evidenced by the June 26, 2008 letter from Dennis Arnold, Stark demanded "repayment of the entire principal balance of the Note, all accrued interest thereon, and all other sums due thereunder and under the Loan Documents." *See* Exh. K to the Freschl Aff. at p. 2. As of the date of this filing, the Club has not paid any part of the amount due and, instead, has filed bankruptcy. Therefore, Defendants, and each of them, were obligated to make good under their Guaranty. Defendants, however, have not paid any part of the amount owed, Freschl Aff. at ¶ 19, and Defendants do not dispute that no payment has been made. Answer at ¶ 22. Therefore, Defendants have breached the Guaranty.

C. No Material Issue of Fact Preventing the Entry of Summary Judgment is Raised by Any of the Defendants' Affirmative Defenses.

In the Answer, Defendants assert five affirmative defenses: (1) waiver and estoppel; (2) Stark's failure to perform under and breach of its agreements with the Club; (3) the doctrine of laches; (4) Stark's negligence and/or negligent performance of its agreements with the Club; and (5) Stark's fraud and misrepresentation to the Club and Defendants.

Defendants' first and third affirmative defenses are merely boilerplate and have no basis in fact. Indeed, in the Forbearance Agreement, the Club acknowledges that the default arising from the failure to reduce principal and pay interest "has not been waived or excused by Lender at any time or in any manner." Forbearance Agreement at ¶ D In addition, the Club "unconditionally and irrevocably acknowledge[d] and agree[d] that there are no claims, demands, offsets or defenses at law or in equity that would defeat or diminish Lender's present and unconditional right to collect the indebtedness evidenced by the Note and to proceed to enforce the rights and remedies available to Lender as provided in the Note and the Deed of Trust or by law." *Id.* at ¶ 1.

With the second, fourth and fifth affirmative defenses, Defendants seek to challenge Stark's breach of guaranty claim by challenging Stark's performance under its agreements with the Club. However, by the very terms of the Guaranty, Stark's performance under its agreements with the Club are irrelevant to the obligations of the Guarantors. Specifically, each Defendant agreed in the Guaranty that "performance of the Obligations by Guarantor ... shall not be released, discharged or affected in any way by any circumstance or condition ... including, without limitation ... any failure, omission, or delay on the part of the ... Lender to conform or comply with the term of any of the Loan Documents ..." Guaranty at ¶ 4(d). Where the terms of a guaranty are clear and unambiguous, the Court enforces the guaranty according to those terms. *See NCNB Texas Nat'l Bank v. Johnson,* 11 F.3d 1260, 1266 (5th Cir. 1994).

The terms of the Guaranty make it absolute under Texas law. An "absolute guaranty" is one made contingent solely upon the default of the principal obligor. *See Universal Metals & Mach., Inc. v. Bohart,* 539 S.W.2d 874, 877-78 (Tex. 1976). Under an absolute guaranty, a guarantor is primarily liable on the underlying obligation; thus the terms of the note must be examined to ascertain the guarantor's obligation under his unconditional guarantee, for by that guaranty the guarantor agrees to pay the instrument according to its terms if it is not paid when due. *Mid-South Telecomm. Co. v. Best,* 184 S.W.3d 386, 391 (Tex. App--Austin 2006, no pet.) (citing *Hopkins v. First Nat'l Bank at Brownsville,* 551 S.W.2d 343, 345 (Tex. 1977)). The terms of the Guaranty are clear: Defendants unconditionally agreed to pay the Club's obligations in case of default.

Therefore, the affirmative defenses set forth by Defendants in the Answer raise no genuine issue of material fact.

IV.

ATTORNEY FEES

As evidenced by Section 11 of the Guaranty, the Defendants are obligated to pay "all fees, costs and expenses incurred" in the collection of this Guaranty in any legal proceeding "including, without limitation, reasonable attorney's fees, court costs and filing fees." Therefore, Stark is entitled to attorney fees incurred in prosecuting this suit. The affidavit of M. Byron Wilder, filed concurrently with this Motion, establishes that Stark is entitled to recover the amount of One Hundred Fifty-nine Thousand, Ninety-eight dollars ($ 159,098) in attorneys' fees, and the amount of Eight Thousand, Five Hundred and Forty-six dollars ($ 8,546) in costs and expenses

V.

CONCLUSION

For the reasons set forth above, Stark respectfully requests that the Court grant this motion and enter summary judgment on all claims in Stark's favor.

DATED: December 18, 2008

Respectfully submitted,

/s/ M. Byron Wilder

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ATTORNEYS FOR PLAINTIFF STARK MASTER FUND LTD.

Footnotes

1 On October 6, 2008, the Club filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Petition") in the District Court for the Western District of Texas, Austin Division, Case No. 08-11925-FM., further evidencing its inability to repay the Note. A true and correct copy of the Petition, without attachments, is attached as Exhibit A to the Affidavit of M. Byron Wilder, filed contemporaneously with the Motion for Summary Judgment and this Brief, and is incorporated herein. Stark respectfully requests that the Court take judicial notice of the Club's bankruptcy filing pursuant to Fed. R. Evid. 201.

2 A true and correct copy of the Note is attached as Exhibit A to the Affidavit of Marc Freschl in Support of Stark Master Fund Ltd.'s Motion for Summary Judgment ("Freschl Aff."), filed contemporaneously with the Motion for Summary Judgment and this Brief, and is incorporated herein.

3 A true and correct copy of the Loan Agreement is attached as Exhibit B to the Freschl Aff. and is incorporated herein.

4 A true and correct copy of the Guaranty is attached as Exhibit C to the Freschl Aff. and is incorporated herein.

5 A true and correct copy of the Assignment of Deed of Trust, Assignment of Leases and Rents and Security Agreement (and Fixture Filing) is attached as Exhibit D to the Freschl Aff. and is incorporated herein.

A true and correct copy of the aforementioned Assignment of Assignment of Leases and Rents is attached as Exhibit E to the Freschl Aff. and is incorporated herein.

6 A true and correct copy of the aforementioned Assignment of Deed of Trust, Assignment of Leases and Rents and Security Agreement (and Fixture Filing) is attached as Exhibit F to the Freschl Aff. and is incorporated herein.

7 A true and correct copy of the Participation Agreement is attached as Exhibit G to the Freschl Aff. and is incorporated herein.

8 A true and correct copy of the aforementioned Assignment of Deed of Trust, Assignment of Leases and Rents and Security Agreement (and Fixture Filing) is attached as Exhibit H to the Freschl Aff. and is incorporated herein.

A true and correct copy of the aforementioned Assignment of Assignment of Leases and Rents is attached as Exhibit I to the Freschl Aff. and is incorporated herein.

9 A true and correct copy of the Forbearance Agreement is attached as Exhibit J to the Freschl Aff. and is incorporated herein.

10 A true and correct copy of the June 26, 2008 Letter from Dennis Arnold, the aforementioned written notice, is attached as Exhibit K to the Freschl Aff. and is incorporated herein.

11 Unless otherwise indicated, all emphasis is added and all internal citations omitted.

12 In the Answer, Defendants "admit that the interest payment was not made by May 13, 2008 because the parties were actively negotiating an extension [but] the interest payment was made."

End of Document

2010 WL 4619497 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

ECUADORIAN PLAINTIFFS, Plaintiffs-Appellants,
v.
CHEVRON CORPORATION, a Delaware corporation Petitioner-Appellee,
and
3TM Consulting, LLC, a Texas limited liability corporation, and 3TM International, Inc., a Texas corporation Respondents-Appellees.

No. 10-20389.
July 26, 2010.

Appeal from the United States District Court for the Southern District of Texas (Houston Division), No. 4:10-mc-00134 (Hon. Gray H. Miller)

Appellee Chevron Corporation's Brief

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*IV *STATEMENT REGARDING ORAL ARGUMENT*

This case involves a straightforward exercise of the District Court's discretion to order discovery under 28 U.S.C. § 1782 and basic discovery principles. However, Appellee Chevron Corporation respectfully suggests that oral argument is warranted in light of Plaintiffs-Appellants' factual misrepresentations and Chevron's critical and urgent need for the discovery to which the District Court held it is entitled.

*i TABLE OF CONTENTS

***iv TABLE OF AUTHORITIES**

CASES

*IX *TABLE OF ABBREVIATIONS FOR CITATIONS OF THE RECORD*

The following abbreviations for citations of the record will be used in Chevron Corporation's Brief:

(i) references to Appellants' Opening Brief (“App.Br.”) will be to the page number, e.g., App.Br.9 = Appellant's Opening Brief at page 9;

(ii) references to sequentially paginated, e-filed documents will be to the page number of the Record (“R”) where specific pages are cited, *e.g.*, R2600 = Record at USCA5 2600;

(iii) references to documents filed under seal will be to the docket number and to page number of the document under seal, *e.g.*, Doc.716:p.4 = Document 716 at page 4; and

(iv) references to documents contained within Appellants' Record Excerpts ("RE") or within Appellees' Supplemental Record Excerpts ("SRE") will be to the Exhibit number of the Document and the sequential record page number, *e.g.*, RE7:R.1517 = Exhibit 7 of the Appellants' Record Excerpts at USCA5 1517 or SRE1:R.675 = Exhibit 1 of the Appellee's Supplemental Record Excerpts at USCA5 675.

*1 I. INTRODUCTION

Plaintiffs-Appellants come nowhere close to surmounting the high hurdle they must meet to overturn the District Court's grant of Chevron's application for discovery under 28 U.S.C. § 1782. [1] The District Court has wide discretion to determine whether discovery is appropriate. It, like *every court* to have ruled on Chevron's related § 1782 applications-*eight* different courts, including the Second Circuit-granted Chevron discovery after weighing the factors that the Supreme Court indicated should guide a district court's discretion under the statute. The District Court's discretionary decision should be affirmed because such discovery is warranted to probe issues vital to a pending, potentially multi-billion-dollar case against Chevron in Ecuador, including the fraudulent collusion between Plaintiffs and their agents, on the one hand, and the Ecuadorian court's supposedly 'neutral' court expert Richard Stalin Cabrera Vega ("Cabrera") and his team, on the other.

Despite Plaintiffs' attempts to obstruct this § 1782 discovery, the process has already uncovered evidence that Plaintiffs committed a fraud on the Ecuadorian court by submitting falsified expert reports, manipulating Cabrera's "special master" report by providing him with the work product of Plaintiffs' U.S.-based ***2** consultants in an undisclosed, *ex parte* fashion, and improperly influencing the supposedly independent investigation that was to underlie Cabrera's report.

In the face of mounting evidence that they have engaged in inappropriate and unlawful conduct, Plaintiffs resort to flagrant factual misrepresentations, ranging from false assertions that the Ecuadorian court "denied" Chevron's requests for the subpoenaed documents, to a misleading description of the status of Plaintiffs' privilege objections in another § 1782 case in the District of Colorado, to baseless, unsubstantiated allegations of witness intimidation. Lacking any evidence to support their false assertions of "fact," Plaintiffs cite their own unverified and previously dismissed complaint and vague, self-serving declarations from their counsel as the sole 'support' for their contentions.

As to the key question of whether the work product or other materials of respondent 3TM Consulting, LLC and 3TM International, Inc. ("3TM") were passed, directly or indirectly, to Cabrera and/or members of Cabrera's team, or otherwise incorporated in Cabrera's reports to the Ecuadorian court (collectively, the "Cabrera Report"), Plaintiffs remain unwilling to provide any statement under oath that no such transfers or incorporation occurred. Instead, Plaintiffs offer only their unsworn "belie[f]" that no 3TM documents were "produced" to Cabrera, SE8:R.2043, and a carefully crafted declaration from a principal of one of ***3** Plaintiffs' other consultants that "3TM's work product was *directly* provided only to Plaintiffs' counsel." R.998 (emphasis added).

This Court should not allow Plaintiffs' mischaracterizations and artful statements to detract attention from the key issue: whether the District Court acted within its broad discretion when it held that discovery is appropriate to determine whether, and to what extent, 3TM's work product was incorporated into the Cabrera Report. Indeed, if anything, the District Court's foundational-deposition order was too protective of Plaintiffs' meritless privilege claims, as it limits the initial inquiry to whether 3TM provided any information to Cabrera or his team and whether 3TM recognizes its work product in the Cabrera Report (which 3TM's counsel has preliminarily indicated 3TM does). RE3:R.2065.

Because the District Court appropriately exercised its discretion to shed "sunlight," "the best of disinfectants," on the illicit relationships between Plaintiffs' counsel and the Ecuadorian court's supposedly 'neutral' expert, *In re Application of Chevron Corp.*, --F. Supp. 2d--, 2010 WL 1801526, at *13 (S.D.N.Y. May 10, 2010) (quoting Louis D. Brandeis, Other People's Money 62 (1933)), this Court should affirm its judgment. And to ensure that Plaintiffs are not able, through delay and meritless arguments,

to render ineffective the District Court's discovery order, Chevron respectfully requests that this Court continue to act swiftly to resolve this appeal.

*4 II. STATEMENT OF FACTS

In their Opening Brief, Plaintiffs trot out an assortment of misrepresentations and half-truths in an attempt to vilify Chevron, and to try to prevent Chevron from obtaining the evidence it needs to prove that Plaintiffs have perpetrated a fraud upon the Ecuadorian court through their collusion with Cabrera. Although Chevron will not address all of Plaintiffs' misstatements, the true facts are very different than what is recited in Plaintiffs' Brief and establish both the necessity and urgency of the discovery the District Court authorized:

(1) 3TM is a U.S. firm whose work product was provided, directly or indirectly, to Cabrera and/or members of his team by Plaintiffs and/or their agents, or otherwise incorporated into the Cabrera Report;

(2) Cabrera was a supposedly 'neutral,' impartial court expert in the Ecuadorian proceeding and Plaintiffs and/or their agents had unlawful *ex parte* contacts with Cabrera; and

(3) The Ecuadorian court has not rejected or denied Chevron's request for materials Plaintiffs provided to Cabrera, or otherwise ruled that Chevron is not entitled to these materials.

Plaintiffs provide no evidence to dispute these key facts and, while they avoid confirming them, they cannot, consistent with Fed R. App. P. 38 and 46 (or Fed. R. Civ. P. 11), deny them.

*5 A. Texaco's Subsidiary, TexPet, Participates in State-Controlled Oil Operations in Ecuador, Remediates, and Enters into Settlement and Release Agreements with the Ecuadorian Government.

Beginning in 1964, Texaco Petroleum Company ("TexPet") held a financial stake in an oil consortium (the "Consortium") in Ecuador. By 1977, Ecuador had acquired a 62.5 percent share in the Consortium and Ecuador's state-owned oil company, Petroecuador, had majority control over key business decisions under the Ecuadorian government's close supervision. R.61-62. TexPet was the operating partner until 1990, and was a minority owner until its contract expired in 1992. *Id*. From 1990 to the present, Petroecuador has been the *sole* operator, and from 1992 to the present, the *sole* owner, of exploration and production operations in the former concession area. *Republic of Ecuador v. ChevronTexaco Corp*. ("*ROE*"), 376 F. Supp. 2d 334, 340-41 (S.D.N.Y. 2005).

Independent auditors commissioned by the Consortium concluded that the parties had generally adhered to standard industry practices but that it would be advisable to remediate certain areas. R.62. Between 1995 and 1998, TexPet spent over $40 million to complete its share of the necessary remediation work, with the Ecuadorian government exercising close oversight and certifying the completion of the work at each site. R.63-64. When the remediation was completed in 1998, Ecuador, Petroecuador, and TexPet signed a final agreement fully releasing TexPet from all future environmental liability. *ROE*, 376 F. Supp. 2d at 341-42; R.64-65. ***6** Petroecuador agreed to complete the remainder of the remediation, in accordance with its share of responsibility for the previous decades of exploration and any environmental impact it caused after 1992, but failed to do so. *Id*. Plaintiffs omit *any* mention of these facts in their brief.

Instead, Plaintiffs' statement of "facts" relating to TexPet's operations in Ecuador is rife with errors and unsupported by anything other than Plaintiffs' own allegations. Indeed, *every* record citation Plaintiffs provide in support of their allegations that Chevron caused environmental damage is to Plaintiffs' unverified complaint to stay arbitration, which the Southern District of New York has dismissed. App.Br.5 (citing R.701-04). Those allegations, of course, are strongly disputed, but as they are irrelevant to the discovery issue before this Court, Chevron need not address them here. [2]

***7 B. After Texaco Merges With a Subsidiary of Chevron, Plaintiffs Initiate the Lago Agrio Proceeding Against Only Chevron.**

In May 2003, Plaintiffs sued Chevron [3] --but not Texaco, TexPet, or Petroecuador--in the Provincial Court of Sucumbios in Lago Agrio, Ecuador (the "Lago Agrio Proceeding"). [4] Partly because Plaintiffs seek to recover for public environmental harms, the primary beneficiary of the Lago Agrio Proceeding will be the Ecuadorian government. In fact, Ecuador's Prosecutor General has stated that the government expects to receive 90% of the judgment. R.130. And the Cabrera Report specifically includes $375 million to upgrade "Petroecuador's infrastructure." RJN, Exh. C at 46.

***8 C. Cabrera's Appointment and the Purportedly "Independent" and "Transparent" Work of His Team**

1. The Ecuadorian Court Orders a Series of Judicial Inspections and Later, at Plaintiffs' Insistence, Abandons That Process.

The Ecuadorian court initially ordered that experts for both Plaintiffs and Chevron were to cooperate in performing a series of "judicial inspections" of oil production sites in the Oriente region of Ecuador. RJN, Exh. A at 1. Plaintiffs engaged in substantial fraud and deception during the inspection process. For example, as Chevron's § 1782 discovery in the Northern District of Georgia revealed, Dr. Charles Calmbacher, an expert nominated by Plaintiffs, found no contamination either requiring remediation or putting anyone's health at risk at particular sites. R.1056-58. But Plaintiffs' counsel filed fraudulent reports in Dr. Calmbacher's name setting forth opinions and conclusions that Dr. Calmbacher has now testified under oath he never held or reached. R.1056-66 ("I did not reach these conclusions and I did not write this report").

Under the Ecuadorian court's original order, any conflicts in the findings of the parties' respective Judicial Inspection experts were to be resolved by a panel of independent, credentialed "Settling Experts." RJN, Exh. A. The first time the Settling Experts resolved conflicts between the parties' experts--at a site known as "Sacha 53"--the Settling Experts did not accept Plaintiffs' expert's findings of ***9** widespread and harmful contamination and risk to health or the environment, and did not find evidence that there was need for additional pit remediation. R.70.

2. Appointment of Cabrera

Shortly after the Settling Experts issued their first and only report, Plaintiffs urged the Ecuadorian court to abandon the judicial-inspection process they had originally requested as the mechanism for proving their case. Over Chevron's objections, the Ecuadorian court eventually agreed, appointing Cabrera, a mining engineer, in March 2007 to provide a "global assessment." The Ecuadorian court conferred broad authority on Cabrera to "evaluate environmental damage, if any," including specifying its origin, and determining necessary remediation work. R.1293. Cabrera was appointed without disclosing what should have been a disabling conflict of interest--namely, his financial stake in one of the companies on Petroecuador's list of vendors available to "perform environmental remediation projects." RJN, Exh. B at 2.

The Ecuadorian court appointed Cabrera "an *auxiliary* to the Court" and required that he and his team "perform [their] duties . . . with complete *impartiality* and *independence* vis-à-vis the parties" and "observe and ensure ... the impartiality of [their] work, and the *transparency* of [their] activities." SRE2:R.1294 (emphases added); SRE3:R.1396 (emphasis added); SRE3:R.1386, 1388 ("***[t]he transparency of the expert's work will be ensured, and the parties *10 shall have access to that work... reiterating that the work of the expert is governed by the principle of the court's actions being open to the public***"). In November 2007, the Ecuadorian court specifically ordered that "all the documents that serve as support or a source of information for the work performed by the Expert must be presented together with the report.... [I]n his report the

Expert is required to cite all of the scientific sources, and analytical and legal documents that he uses to perform his work." SRE5:R.1453. Plaintiffs have repeatedly acknowledged that Cabrera was the Ecuadorian court's "impartial" and "independent" "global assessment" expert, even referring to him as a "special master."[5] R.709; R.1036-37; R.1049; R.1050-51; R.1437; R.1818.

In July 2007, Cabrera told the Ecuadorian court: "I do not have any relation or agreements with the plaintiff, and it seems to me to be an insult against me that I should be linked with the attorneys of the plaintiffs." R.1381. And on October 11, 2007, Cabrera again expressly denied any connection with Plaintiffs:

If I need any technical information in connection with this case, all I have to do is request it from this Court; the idea that the plaintiffs would be helping me with that is unthinkable.... ***Worse still is the accusation of [Chevron's] attorneys that the conduct of the other*** ***11** ***technicians is a "decoy," a ploy to conceal preexisting information provided by the plaintiff that I allegedly will simply attach to my expert report.*** I condemn this assertion because it has no basis and there is no evidence to support it[.]

R.1430 (emphasis added).

3. Plaintiffs' Submission of Documents From "Ecuadorian Public Institutions" to Cabrera

As the Ecuadorian court record makes clear, any communications between Cabrera and the parties, or third parties, were to be conducted through the court. Thus, when Cabrera sought information from third parties, he relayed that request through the Ecuadorian court, and Chevron requested and received a copy of the submitted third-party materials. R.1243. Based on a request from Cabrera, in January 2008, the Ecuadorian court allowed the parties to provide to Cabrera via the court three specific, limited categories of historical documents. SRE4:R.1449. On February 18, 2008, Plaintiffs filed 3,292 pages for the Ecuadorian court to send to Cabrera, all of which Plaintiffs detailed by category and identified as coming exclusively from "Ecuadorian public institutions," *i. e.*, *not* coming from Plaintiffs (or their consultants). SRE6:R. 1487-88.

This February 2008 filing was the sole occasion on which Plaintiffs made a public submission of documents to Cabrera. Chevron was not provided a copy of these documents and the Ecuadorian court did not retain one. Although Chevron requested, on February 27, 2008, that the Ecuadorian court order Plaintiffs to ***12** provide Chevron a copy, the Ecuadorian court deferred ruling on that request and, to date, has not done so. SRE7:R.1504, RE7:R.1517-18. Because the request has never been denied or rejected, it is misleading for Plaintiffs to assert that the Ecuadorian court "declined to grant" this request. App.Br. 11. And Plaintiffs have not identified any other request Chevron has made for the production of documents from Cabrera that has been "denied" or "rejected" by the Ecuadorian court. *Id.*; App.Br.32.

Also, contrary to Plaintiffs' characterization, App.Br.11, the Ecuadorian court's order in response to Chevron's February 27, 2008 request amounts to a confirmation of the January 30, 2008 order (limited to the three narrow categories) and was *issued after* the Cabrera Report was filed and entered into the record. SRE4:R.1449, RE4:1517-18. It was not a post hoc, blanket authorization for either side to provide Cabrera with whatever they wanted to give him, whenever they wanted to do so, let alone on an undisclosed, *ex parte* basis.

4. Cabrera's Report Is Released.

ust over one month after Plaintiffs' February 18, 2008 submission of a limited set of "documents" and ten months after his appointment, Cabrera issued his report on April 1, 2008, parroting Plaintiffs' claims that there was "serious and widespread contamination" in the former concession area, even with respect to the site that the independent panel of Settling Experts had found not to be ***13** contaminated. R.211. Cabrera ultimately asserted that the total damages for the environmental, social, and cultural impacts of the oil production consortium were $19 billion, to which he then added another $8.3 billion for "unlawful profits," for a total of more than $27.3 billion in alleged damages from 335 sites. R.234-36. Cabrera went well beyond his

technical mandate, seeking, in his own words, "to achieve change in the overall economic, political and social paradigm to a new view of equality of entitlements, with economic solidarity that has as its ultimate goal benefiting the population as a whole instead of elitist profiteering...." R.230.

D. The Fraudulent Collusion Between Plaintiffs and Their Agents, on the One Hand, and Cabrera and His Expert Team, on the Other

Contrary to Cabrera's and Plaintiffs' earlier denials and the Ecuadorian court's order that his work be "impartial," "transparent," and the product of his own independent investigations, it is now apparent that much, if not all, of the Cabrera Report was ghostwritten and otherwise prepared by environmental consulting firms hired by Plaintiffs' team, including 3TM, Stratus Consulting ("Stratus"), E-Tech International, and Uhl, Baron, Rana & Associates ("UBR"). Although there is no evidence that Cabrera or any of the members of his team is a native speaker of English, forensic linguist Professor M. Teresa Turell Julià, Ph.D., concluded that significant portions of the Cabrera Report "have definitely NOT been written first hand by a native writer of Spanish" and were actually written in ***14** English and then translated to Spanish, or written in Spanish by a native English speaker. R.50. Furthermore:

• As part of an informal mediation held months before the Cabrera Report's issuance, Plaintiffs provided Chevron a PowerPoint presentation on the provision of potable water and pit-remediation costs that is nearly identical to the Cabrera Report. Docs.4, 5.

• The work of one of Plaintiffs' other U.S.-based consultants, UBR, is clearly reflected in the Cabrera Report at Appendix R, where a map of "Proposed Regional [Water] systems" bears the logo and name of UBR and also states that it is based on the work of Plaintiffs' litigation team, Selva Viva; and

• The movie *Crude* captures images of Plaintiffs' counsel and other representatives collaborating with Carlos Martin Beristain, a key member of Cabrera's "independent" team.

In light of this evidence, Chevron has filed eight applications pursuant to 28 U.S.C. § 1782 in courts across the country, seeking discovery of materials from or related to Plaintiffs' U.S.-based consultants. When these proceedings began, Plaintiffs went along with their U.S.-based consultants' denial that any of the consultants' work product had been passed over to Cabrera and his team, and ***15** Plaintiffs now still attempt to create that impression as to 3TM material--albeit in qualified terms--before this Court. *See, e.g.*, R.l 123; App.Br.16.

However, as the truth has begun to emerge, Plaintiffs have been forced to amend their story and now admit that Cabrera "adopted" the previously undisclosed "proposals, analyses, and conclusions of the Plaintiffs concerning the damages and the valuation." RJN, Exh. D at 7. In the proceeding against Stratus, Plaintiffs now acknowledge not only that there "had been communications between Stratus representatives and Mr. Cabrera," but also that Plaintiffs had *ex parte* "dealings" with Cabrera. RJN, Exh. F at 2, 4 n. 1. Similarly, during a hearing in connection with Chevron's § 1782 application in the District of New Jersey, Plaintiffs' counsel admitted that a member of Cabrera's supposedly 'independent' and 'neutral' team was actually Plaintiffs' litigation consultant. RJN, Exh. G at 33:5-18.

Plaintiffs have employed a similar pattern of misdirection and inconsistency here. Initially, Plaintiffs seemed to acknowledge--without explicitly admitting or denying--that 3TM work product (whether or not altered by Stratus or others) had passed, directly or indirectly, to Cabrera or members of his team. *See, e.g.*, R.670 (discussing Plaintiffs' submission of materials to Cabrera). As the District Court correctly found, "the Ecuadorian plaintiffs basically concede they turned over at least some documents created by 3TM to Cabrera." RE4:R.2036 (citing Plaintiffs' ***16** statements). Indeed, 3TM's counsel stated during the meet-and-confer process that 3TM believes it recognizes 3TM work product in the Cabrera Report. SRE9:R.2061. Only after this case was decided on the basis of Plaintiffs' implicit admissions and 3TM's statements did Plaintiffs first represent, in a carefully crafted, unsworn, and qualified statement, that "no 3TM documents were produced, either directly or indirectly, to Cabrera."

SRE8:R.2043. In light of the evidence of collusion and Plaintiffs' evasions, Chevron needs the source documents from 3TM and others to prove the extent of the fraudulent collusion and fraud on the Ecuadorian court.

Now that Plaintiffs have been forced to admit in other proceedings that they (or their agents) provided Cabrera with materials from their U.S.-based consultants, Plaintiffs claim that undisclosed *ex parte* contact between Cabrera and Plaintiffs was supposedly permissible under Ecuadorian law. R.988-96. This absurd position, that Cabrera could secretly adopt analyses and findings developed by Plaintiffs and pass them off without attribution as his "independent work," cannot be reconciled with the specific orders of the Ecuadorian court or its application of Ecuadorian law to the underlying case. *See, e.g.*, SRE5:R.1453 ("all documents that serve as support or a source of information for the work performed by the Expert ***must be presented*** together with the report. At that time all those documents ***will be provided to the parties***") (emphases added). It also conflicts ***17** with the 1998 Ecuadorian Constitution (in force when Cabrera was appointed), the current Ecuadorian Constitution, and a host of other Ecuadorian authorities. R.1881-1913.

E. Plaintiffs' Efforts To Prevent the Truth From Coming to Light Before the Close of Evidence in the Lago Agrio Proceeding

While delaying and obstructing Chevron's § 1782 efforts whenever possible, Plaintiffs have simultaneously petitioned the Ecuadorian court to close the Lago Agrio Proceeding to any additional evidence, before more incriminating details can come to light. On March 23, 2010, Plaintiffs urged the Ecuadorian court to "dispense with the three [pending] expert investigations" and then order that "there is no more evidence to be taken" and that the case is "ripe for judgment." R.1258. On March 24, 2010, Plaintiffs asked the Ecuadorian court to establish a "one-time non-extendible period of three days" for the submission of all evidence "to prove the presence of essential errors" alleged by Chevron, and afterwards, to order that "the case is ripe for judgment." R.1264, 1266.

More recently, on June 21, 2010, after representing to this Court that judgment in the Lago Agrio Proceeding was not imminent (Plaintiffs' Letter Response to Motion to Expedite, 3-4), Plaintiffs requested that the Ecuadorian court order the parties "to submit to the Court, within the term of 30 days," any final evidence regarding the global damage assessment and then provide "a final term of 15 days during which [the parties] may comment on the information ***18** submitted by the opposing party" so that the Ecuadorian court may proceed to "final judgment." RJN, Exh. D at 8. [6] The Ecuadorian court has yet to rule on any of these requests, but could do so at any time.

Plaintiffs' 'run out the clock' stratagem is designed to prevent Chevron from using evidence of Plaintiffs' fraud and collusion with Cabrera to effectively challenge Cabrera's "global" assessment in the Ecuadorian court. Chevron would instead have to try to oppose enforcement of any adverse Ecuadorian judgment in many different courts, given Plaintiffs' promise, "if they succeed, to attempt to enforce such a judgment around the world." *In re Application of Chevron Corp.*, 2010 WL 1801526, at *21.

As the District of New Jersey recently found, echoing the well-reasoned opinion of the Southern District of New York:

[T]here appears to be a race between the parties between obtaining evidence of this nature concerning UBR's relationship and communications to Mr. Cabrera and the presentation of such evidence to both the Ecuadorian court and the arbitration before an ultimate decision with regard to the underlying litigation is reached, and . . . ***19** any substantial delay could result in serious injury to Chevron's interests in this case.

RJN, Exh. I at 23:24-24:6. [7] Thus, the Second and Third Circuits, as well as this Court, have expedited consideration of Plaintiffs' meritless appeals.

F. Chevron's Diligent, Successful Pursuit of § 1782 Discovery in the United States

1. Chevron's Diligent Pursuit of § 1782 Discovery

The timing of Chevron's U.S. discovery proceedings has been dictated largely by Cabrera's failure to properly disclose his sources and the true authors of his reports, as required under Ecuadorian law and the Ecuadorian court's specific orders, and by the web of deception Plaintiffs and Cabrera have orchestrated to mask their fraudulent collusion. Once that fraud became apparent, Chevron diligently brought U.S. discovery proceedings to seek relevant discovery from nonparties subject to the jurisdiction of U.S. courts. The first of these § 1782 proceedings to yield discovery lasted only six weeks, R.571-83, and uncovered indisputable evidence of Plaintiffs' submission of fraudulent expert reports to the Ecuadorian court. R.1053-68.

In this case, 3TM has been prepared to produce documents and sit for deposition since April 20, 2010. R.1039-40. It is only due to Plaintiffs' repeated ***20** requests for delays and extensions that this matter is only now reaching this Court, coupled with Plaintiffs' pleas against the prompt adjudication by this Court of the merits (or lack thereof) of their own appeal. [8] In light of these delays, Plaintiffs are in no position to now complain that these proceedings should have been commenced any earlier than they were.

2. Every Court That Has Ruled on Related § 1782 Applications Has Granted the Kind of Discovery Sought Here.

Every court that has ruled on the merits of Chevron's § 1782 applications for discovery for use in the Lago Agrio Proceeding has granted the kind of discovery sought here. In each case, every court (including the Second Circuit) has found that the statutory prerequisites for discovery under § 1782 were met, and that the discretionary factors all weighed in favor of granting Chevron's petition. Moreover, in each jurisdiction where Plaintiffs have tried to resist discovery, courts have rejected Plaintiffs' efforts. [9] Notably, the District of New Jersey rejected ***21** Plaintiffs' assertion of privilege based, in part, on a finding that Plaintiffs' secret use of consultants to provide information and assistance to Cabrera constitutes a fraud justifying application of the crime-fraud exception to privilege:

In short, the provision of materials and information by consultants on the litigation team of the Lago Agrio plaintiffs in what appears to be a secret and an undisclosed aid of a supposedly neutral court-appointed expert in this Court's view constitutes a prima facie demonstration of a fraud on the tribunal.

RJN, Exh. G at 44:11-16.

The Second Circuit, which is the first Court of Appeals to have reached the merits of Plaintiffs' § 1782 challenges to the type of discovery sought here, summarily rejected them--issuing an order less than one day after oral argument "direct[ing]" the respondent "to comply forthwith with the District Court's order" granting discovery in several enumerated respects. RJN, Exh. K at 1.

***22 G. The District Court's Well-Reasoned Opinion Authorizing Discovery**

The District Court properly granted Chevron's application to seek discovery from 3TM. The District Court correctly concluded that each of the discretionary factors enumerated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), was satisfied, as were all the statutory factors. RE4:R.2035, R.2037. Specifically, the District Court rejected Plaintiffs' contention that Chevron should be limited to obtaining the discovery it seeks here from Cabrera through the Ecuadorian court:

It is apparent that the Ecuadorian plaintiffs provided some or all of 3TM's report to Cabrera and yet it appears Cabrera denies this occurred. Under the circumstances, it seems unlikely the Ecuadorian court would have much success in ordering Cabrera to divulge the 3TM report.

RE4:R.2037. [10] The District Court declined to accept Plaintiffs' representation that the 3TM material was confidential, noting "conflicting evidence" on this point. RE4:R.2037. Finally, the District Court recognized that "the burden on 3TM is ***23** minimal as they have already gathered the information requested and will be compensated for their time." RE4:R.2037-38.

The District Court also correctly rejected Plaintiffs' baseless assertions of privilege. It properly held that "[w]hile 3TM may well have originally been hired to serve only in a consulting expert capacity, as soon as its report was given to the court, or at least an auxiliary of the court, to be used in preparing Cabrera's expert report that shield was lost." RE4:R.2038. The court also held that Plaintiffs had failed to demonstrate that the work-product protection applied and that, in the alternative, their disclosure of the materials at issue to Cabrera waived any such protection. RE4:R.2039. Finally, the court recognized that disclosure to Cabrera also waived any attorney-client privilege that might otherwise exist. *Id*.

In denying Plaintiffs' motion to quash, the District Court found that Plaintiffs "concede they turned over at least some documents created by 3TM to Cabrera," RE4:R.2036, and subsequently ordered Plaintiffs to produce a list of the 3TM documents that were produced, directly or indirectly, to Cabrera. RE4:R.2040. Plaintiffs then submitted an unsworn letter to the District Court, stating, without any explanation or basis, that they "believe that no 3TM documents were produced, either directly or indirectly, to Cabrera." SRE8:R.2043. Unconvinced by Plaintiffs' representation, the District Court granted a foundational deposition to test concerns raised by Chevron "that Plaintiffs are ***24** attempting to evade compliance with the Court's Order by narrowly and improperly construing phrases such as '3TM documents' and 'produced to Cabrera.' " SRE9:R.2061. The foundational-deposition order authorized an inquiry into "(1) whether 3TM collaborated with Cabrera; and (2) the extent to which 3TM recognizes its work in the Cabrera Report." RE3:R.2065.

Chevron promptly noticed the foundational deposition of 3TM to take place eleven days later. R.2068, R.2079. Plaintiffs did not raise any objections until two days before the deposition date, R.2088-90, when it became clear that 3TM was likely to provide testimony that contradicted or cast doubts on Plaintiffs' counsel's unsworn May 24 letter to the court. The District Court denied Plaintiffs' last-minute request to postpone the foundational deposition. R.2091. Plaintiffs then filed a late-night notice of appeal and emergency motion for stay pending appeal, which the District Court granted before Chevron had an opportunity to respond. R.2132-33.

III. STANDARD OF REVIEW

District courts have "broad discretion" to apply the *Intel* factors to the facts of a particular case in deciding whether discovery is appropriate. *E.g.,* *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002); *In re Bayer AG*, 146 F.3d 188, 191 (3d Cir. 1998). *See also In re Sealed Appellant*, 256 F. App'x 688 (5th Cir. 2007) (per curiam) (affirming district court's denial of ***25** discovery under § 1782 "for the reason that there was no abuse of discretion by that court"). "Because Congress has given the district courts such broad discretion in granting judicial assistance to foreign countries, this court may overturn the district court's decision only for abuse of discretion"--a review that is "extremely limited and highly deferential." *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001); *see also Al Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000) ("Section 1782 affords the district courts 'wide discretion' in responding to requests for assistance in proceedings before foreign tribunals.") (citation omitted).

Plaintiffs' attempt to evade the applicable and deferential "abuse of discretion" standard is unpersuasive. *Republic of Kazakhstan v. Biedermann Int'l*, on which Plaintiffs rely, declared only that "[r]eview of the *scope* of § 1782 is *de novo*" 168 F.3d 880, 881 (5th Cir. 1999) (emphasis added). And it did so with respect to a legal determination by the district court that the statutory language of "foreign or international tribunal" did not, pre-*Intel*, apply to private, international arbitrations. *Id*. Here, however, the District Court did not interpret the "scope," or reach, of the statutory language. Thus, *Biedermann* is entirely beside the point.

The District Court's determination that "the *Intel* factors favor [] proceeding with discovery of the 3TM materials" is the type of straightforward application of § 1782 with respect to which courts have determined that district courts have ***26** "broad discretion." RE4:R.2041; *see also App.Br.17*. To apply *de novo* review in any situation where "the public policy underlying the statute" is implicated, App.Br.18, would be to recognize an unprecedented and ill-defined exception that would swallow the general discretionary approach mandated by the Supreme Court.

Whether materials are protected by a privilege " 'is a question of fact, to be determined in light of the purpose of the privilege and guided by judicial precedents.' " *United States v. Seale*, 600 F.3d 473, 492 (5th Cir. 2010) (citation omitted). This Court "review[s] factual findings underlying a privilege ruling for clear error and the application of legal principles *de novo*." *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008).

IV. SUMMARY OF ARGUMENT

Information sought under § 1782 is "presumptively discoverable," as long as it is relevant. *In re Bayer*, 146 F.3d at 196. Indeed, § 1782 embodies the "fundamental policy that states should grant both passive and active assistance in [foreign litigation] with the greatest possible liberality." Hans Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 229 (1994). For these reasons, the District Court's exercise of its "broad discretion" under § 1782 is entitled to substantial deference.

***27** Moreover, the District Court's decision is consistent with the decisions of at least *six* other district courts that have granted Chevron related § 1782 discovery, as well as a recent order of the Second Circuit summarily rejecting the kinds of § 1782 arguments advanced by Plaintiffs here. [11] Plaintiffs cannot make the showing necessary to overturn the District Court's exercise of its discretion. Nor can Plaintiffs demonstrate, in an argument raised for the first time on appeal, that Chevron's discovery is somehow not "for use in" the Ecuadorian court, *App.Br.23*, because Chevron seeks to prove that the purportedly 'neutral' court expert is violating his obligations of neutrality, impartiality, transparency, and independence.

Plaintiffs also fail in their attempt to shield the 3TM materials sought here behind baseless assertions of "privilege," such as work-product protection or the limitations on discovery from non-testifying experts contained in Rule 26. [12] ***28** Neither assertion precludes the requested discovery, as the District Court properly concluded that even if 3TM were originally a non-testifying expert, "that shield was lost" when its materials were provided, whether directly or indirectly, to Cabrera, an auxiliary of the Ecuadorian court, or otherwise incorporated into his reports. RE4:R.2038. Because 3TM has taken on the role of a testifying expert, no work-product or other protection from discovery can remain over documents 3TM considered in preparing work product provided to the Ecuadorian court's auxiliary, expert, and *de facto* special master (Cabrera). Even if 3TM *were* considered a non-testifying expert, the production of its expert opinion or research to Cabrera, who is *at least* a testifying expert, would waive any privilege or other protection from disclosure.

Furthermore, Plaintiffs cannot overcome the entire corpus of well-established U.S. caselaw and basic discovery principles by their vague assertion that the "Ecuadorian [l]egal [c]ontext" somehow alters this otherwise straightforward analysis. *App.Br.33*.

And even if any privilege remained after Plaintiffs' waiver, the District Court's decision can be affirmed on the alternative basis of the crime-fraud exception, which vitiates any privilege or other protection ***29** from discovery, as the District of New Jersey recognized in granting Chevron's similar § 1782 application.

V. ARGUMENT

A. The *Intel* Factors All Favor Discovery Here.

In *Intel*, the Supreme Court set forth four discretionary factors that "bear consideration in ruling on a § 1782(a) request": (1) whether the material sought is present in the foreign jurisdiction or "the person from whom discovery is sought is a participant in the foreign proceeding[,]" such that the foreign tribunal could itself obtain the sought-after information;

(2) the "nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";

(3) whether the § 1782 request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

(4) whether the discovery requests are "unduly intrusive or burdensome[.]"

Intel, 542 U.S. at 264-65. [13]

***30** Plaintiffs are wrong that the District Court "restricted its analysis to one prong of the *Intel* factors (availability in the jurisdiction)." App.Br.19. In fact, the District Court's order granting Chevron's application indicated that Chevron has met *each* of the four factors. R.474. [14] And it denied the motion to quash in an opinion that likewise identified *each* of the four *Intel* factors and concluded that they all favored discovery. RE4:R.2035-38. There was no abuse of discretion.

1. 3TM Is Not a Participant in the Lago Agrio Proceeding.

It is undisputed that 3TM is not a participant in the Lago Agrio Proceeding. *See* SRE1:R.675. Plaintiffs nonetheless assert that this factor somehow militates against discovery here, apparently because *Cabrera* is within the reach of the Ecuadorian court and could, in theory, provide the Ecuadorian court with any communications he received from 3TM directly or indirectly, through Plaintiffs' counsel or otherwise. [15] App.Br.19-20. As the District Court held, however, given ***31** Cabrera's (false) denial that he received any documents from Plaintiffs' consultants, "it seems unlikely the Ecuadorian court would have much success in ordering Cabrera to divulge the 3TM report." RE4:R.2037; *see also* RJN, Exh. G at 45 ("directing Mr. Cabrera to produce documents which he says he did not have would be pointless and fruitless as an exercise by the Ecuadorian court").

Even putting aside this sensible and undisputed finding by the District Court, there is no merit to Plaintiffs' suggestion that Chevron is only entitled to discovery from Cabrera, as the recipient of 3TM's work, and not from the original author, 3TM, or the sender. When the very fact at issue--here, communications between and among 3TM and Cabrera, as well as Plaintiffs' representatives--depends on verifying what documents were exchanged, the discovering party is obviously entitled to seek that information from not just the Ecuadorian *recipient*, but also the U.S. *sender* or original author of the work. *See, e.g.*, *Palm Bay Int'l, Inc. v. Marchesi Di Barolo S.p.A.*, 2009 WL 3757054, at *9 (E.D.N.Y. Nov. 9, 2009) ("The fact that some of the documents are duplicative diminishes their significance but doe[s] not obviate the obligation to produce them. Defendant has the right to obtain the documents from more than one source.").

***32** A contrary rule places the discovering party at the mercy of a single party (Cabrera) who has the incentive and, absent U.S. discovery, the ability to lie. And again, Cabrera has to date refused to be forthcoming with respect to these documents. RE4:R.2037. Thus, it makes no sense to suggest that Chevron may only prove that Cabrera has been defrauding the Ecuadorian court by seeking evidence exclusively from *him* in Ecuador, and not from his accomplices here in the United States. Moreover, Cabrera does not have all of the documents subject to the subpoenas. As addressed below, Plaintiffs' disclosure to Cabrera waived any applicable privilege as to *all* documents considered by 3TM, not just those given to Cabrera. [16] Accordingly, Chevron is entitled to discover documents not available from Cabrera, including documents given by 3TM to the primary ghostwriters of the Cabrera Report.

2. Ecuadorian Courts Are Receptive to U.S. Discovery.

There is no evidence that Ecuadorian courts are generally unreceptive to U.S. aid in the form of discovery of evidence from U.S. sources, as required by this factor. *See, e.g., In re Application of OOO Promnefstroy*, 2009 WL 3335608, at *7 (S.D.N.Y. Oct. 15, 2009) (second factor evaluates "evidence that the [foreign] legal system rejects § 1782 type assistance");

***33** *Kulzer v. Biomet Inc.*, 2009 WL 3642746, at *5 (N.D. Ind. Oct. 29, 2009). [17] The "receptivity" factor asks whether the jurisdiction, as a *general* matter, opposes U.S. assistance. *See Intel*, 542 U.S. at 265-66 (declining to adopt rule prohibiting discovery when foreign jurisdiction has stated it "does not need or want the District Court's assistance[,]" in part because "[i]t is not altogether clear, however, whether the Commission, which may itself invoke § 1782(a) aid, means to say 'never' or 'hardly ever' to judicial assistance from United States courts"). Reducing receptivity to an inquiry into the foreign court's decision on discovery in the particular case would collapse these two distinct factors and result in double-counting a foreign decision adverse to U.S. discovery.

In fact, we have found *no* decision in which any court has found that Ecuadorian courts are unreceptive to U.S. aid under § 1782. To the contrary, at least ten different courts (including eight related to the Lago Agrio Proceeding) have determined that § 1782 discovery is appropriate to aid Ecuadorian courts. *See, e.g., In re Noboa*, 1995 WL 581713, at *2 (S.D.N.Y. Oct. 4, 1995) ("[T]his Court is required to grant the Applicant's request for discovery" where "the courts of Ecuador have not expressed their official views on the need for the proposed discovery or as to whether the evidence sought would be rejected . . . Nor has this

***34** Court received any indication that such discovery would be offensive to the Ecuadorian courts or traditions."); *In re Campania Chilena de Navegacion*, 2004 WL 1084243, at *4 (E.D.N.Y. Feb. 6, 2004); *In re Application of Chevron Corp.*, 2010 WL 1801526, at *6 ("District courts have granted Section 1782 applications routinely in connection with matters pending in Ecuadorian courts, including the Lago Agrio Litigation.").

Moreover, "receptivity" disfavors discovery only when the foreign court has provided a "clear directive" or "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782[,]" in the form of "judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures," not a "battle-by-affidavit of international legal experts." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099-1100 (2d Cir. 1995).

The Ecuadorian court has indisputably not issued any such directive, generally or otherwise. *See supra* Section U.C.3; *infra* Section V.A.3; *see also Minatec Fin. S.à.r.l. v. SI Group Inc.*, 2008 WL 3884374, at *7 (N.D.N.Y. Aug. 18, 2008) (failure to meet "authoritative proof" standard where producing party offered "no dispositive German authority objecting to federal court ordered discovery"); RJN, Ex. E (accepting into the record evidence Chevron gathered through § 1782 proceedings).

***35** It is *Plaintiffs'* burden to prove the Ecuadorian court is unreceptive, *not* Chevron's burden to show receptivity. *In re Bayer*, 146 F.3d at 196. And Plaintiffs have not demonstrated--as they cannot--that the Ecuadorian court has "authoritatively" stated that it does not wish to receive any assistance from U.S. courts. To the contrary, Plaintiffs characterize the Ecuadorian court as unreceptive because "Chevron has not been able to procure the alleged documents relied on by Mr. Cabrera in Ecuador."

App.Br.22. Under this construction, however, the receptivity factor would be indistinguishable from the type of "generally applicable foreign-discoverability rule" that the Supreme Court rejected in *Intel*. 542 U.S. at 259-63. Plaintiffs' argument therefore fails. [18]

3. The Discovery Sought Here Would Not Impermissibly Circumvent Any Foreign Proof-Gathering Restrictions.

Plaintiffs' primary argument on appeal depends on their false representation that the Ecuadorian court has "denied" Chevron's request for the documents subpoenaed from 3TM. Ap.Br.32. It indisputably has not.

***36** Plaintiffs cite the declaration of one of their lawyers, Pablo Fajardo Mendoza, in support of this representation, but Fajardo is deliberately vague on this point. He indicates that, on February 27, 2008, Chevron requested "all materials submitted by Plaintiffs to Mr. Cabrera." R.994. In actuality, Chevron requested copies of only a narrow and limited group of documents, specifically, the materials allegedly submitted by Plaintiffs in a February 18, 2008 submission, which Plaintiffs described as containing *exclusively* materials from "Ecuadorian public institutions." SRE6:R.1488; SRE7:R.1504. [19] In light of this description, none of *those* materials could include documents created by Plaintiffs' U.S.-based consultants (or other agents). Moreover, even that request was not "denied," *App.Br.32*; instead, the court declared that Chevron's request "shall be addressed at the proper stage of the proceedings." RE7:R.1518.

Plaintiffs have not identified any order by the Ecuadorian court that actually denies or rejects a request by Chevron for documents originally authored by Plaintiffs' U.S.-based consultants and ultimately given to Cabrera (or his team). *See supra* Section U.C.3. Moreover, the Ecuadorian court has not manifested hostility to the subpoenaed evidence as it previously ordered Cabrera to disclose all supporting materials himself, which he indisputably has not done. *See supra* ***37** Section II.C.2. In fact, the Ecuadorian court has accepted evidence that Chevron has obtained through its § 1782 proceedings into the record of the Lago Agrio Proceeding. RJN, Ex. E.

Even if the Ecuadorian court had held that these documents may not be discovered, that would not erase Chevron's entitlement to relief under § 1782. Again, the Ecuadorian court has jurisdiction over only Cabrera, and not Plaintiffs' U.S.-based consultants. And, given Cabrera's false denials of any dealings with Plaintiffs, requesting discovery from him is likely a futile endeavor, at least insofar as the prompt discovery of the truth is concerned. RE4:R.2037; *see also* RJN, Exh. G at 45:6-8. Whether the Ecuadorian court ultimately requires Cabrera to produce documents that he has (falsely) contended never existed has no bearing on the issue of whether to require discovery from a different party--namely, one that might actually produce the damning documents. *Intel*, 542 U.S. at 261-62 ("A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a).").

Plaintiffs' speculative focus on a potential, ultimate decision by the Ecuadorian court is also misguided because it runs counter to the Supreme Court's holding in *Intel* that "§ 1782(a) does not impose ... a foreign-discoverability requirement." *Intel*, 542 U.S. at 253. As the Court explained, "[a] foreign nation ***38** may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions-reasons that do not necessarily signal objection to aid from United States federal courts." *Id*. at 261. [20] Accordingly, even if the Ecuadorian court *had* denied Chevron this discovery (which it has not), that denial would not be dispositive. *See* *Intel*, 542 U.S. at 265-66; *Marubeni Am. Corp. v. LBA Y.K.*, 335 F. App'x 95, 97 (2d Cir. 2009) ("But even if we assume that the court in Japan . . . would not permit discovery ... the District Court's exercise of discretion [to grant discovery] was not error."). Because Plaintiffs have failed to present any evidence that the discovery requested here would circumvent an Ecuadorian restriction, this factor squarely weighs in favor of granting the discovery.

4. The Requested Discovery Is Not Intrusive or Burdensome.

Plaintiffs no longer dispute that the final *Intel* factor--whether the discovery is intrusive or burdensome--supports the District Court's grant of discovery here. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument."); *Acevedo*, 600 F.3d at 522 n.3 (same). Moreover, 3TM has informed Chevron that it has gathered all of the materials it considers responsive to the ***39** subpoenas and placed them on two DVDs and its representative stands ready to appear for deposition. R.1039-40; R.2039. This factor thus counsels in favor of the District Court's sound exercise of its discretion in granting the discovery sought here.

B. Chevron Has Properly Requested Discovery "For Use In" a Foreign Tribunal.

Plaintiffs argue, for the first time on appeal, that the evidence sought by Chevron is "intended to undermine or prove the bias of a foreign court" and thus is not evidence " 'for use in a proceeding in a foreign . . . tribunal.' " App.Br.23 (quoting 28 U.S.C. § 1782(a)).

Plaintiffs have waived this statutory argument because, as the District Court recognized, "[P]laintiffs d[id] not contest that... the discovery is for use in the Lago Agrio litigation." RE4:R.2035. *See also, e.g.,* *Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006). Moreover, even if the argument had any merit in the abstract, it would be inapposite here, because the assertion that Chevron is supposedly seeking to "attack" the foreign court is a straw man. App.Br.23-24. Chevron is seeking to demonstrate that the Ecuadorian court's expert, auxiliary, and *de facto* special master--rather than the court itself-- is biased and has been improperly colluding with Plaintiffs' agents. Indeed, discovering evidence of whether a court expert is faithfully serving the foreign court could only be regarded as "in aid of' and for proper "use in" any reasonably fair system of justice, which ***40** would then exclude the evidence, rather than a supposed "attack" on the foreign tribunal. Plaintiffs do not--and cannot--deny this. This conclusion does not change simply because the evidence may also be relevant to the question whether the Ecuadorian court itself has denied Chevron due process.

Finally, Judge Levai, during oral argument a few days ago before the Second Circuit, presciently posited the following hypothetical to demonstrate the fundamental flaw in Plaintiffs' argument, which the Second Circuit subsequently rejected. Judge Levai asked Plaintiffs' counsel whether discovery would be "for use" in a foreign court if the discovery elicited evidence that the foreign trial court had corruptly taken bribes, and the foreign appellate court had denied the discovering party's allegations of corruption because it lacked relevant evidence that was in the United States. RJN, Exh. M at 19-20. Plainly, in such a circumstance, as here, the discovery would *aid* (rather than "attack") the foreign court in evaluating the evidence before it and the integrity of the lower court (or, in this case, of the court expert). [21]

***41 C. No Privilege Shields the Subpoenaed Documents.**

Plaintiffs' invocation of the protections of work product and of Rule 26's general shield of non-testifying experts fails because the record offers no support for Plaintiffs' assertion that any privileges can supposedly be preserved, despite the disclosure of some or all of 3TM's work product to Cabrera and his team. To begin with, the carefully crafted statement that "3TM's work product was *directly* provided only to Plaintiffs' counsel," App.Br.27 (emphasis added), and Plaintiffs' representation to the District Court that "Plaintiffs believe that no 3TM documents were produced, either directly or indirectly, to Cabrera," SER8:R.2043, stop short of representing that *no* 3TM work product was considered, reviewed, or relied upon by Cabrera or by the true authors of the Cabrera Report. Indeed, Plaintiffs never define the scope of "3TM documents" at all, much less in a way that would ensure that a document drafted by Stratus, but based on the work of 3TM, would fall within the definition of a "3TM document[]." Moreover, because 3TM is a testifying expert, its work is unprotected by Plaintiffs' asserted privileges, and is subject to full discovery.

1. Ample Grounds Exist for the Discovery Ordered by the District Court to Probe the Collaboration Between Plaintiffs' Consultants and Cabrera.

As outlined in more detail above, ample grounds exist for the discovery ordered by the District Court into the nature and extent of the improper collusion ***42** between Plaintiffs' U.S.-based consultants (including 3TM) and Cabrera's team, given that 3TM's work was clearly provided in some form, directly or indirectly, to Cabrera. The facts supporting this conclusion include:

• 3TM worked directly for Stratus Consulting, as Plaintiffs concede, App.Br.27, and a PowerPoint presentation presented by Stratus at an informal mediation contains material essentially identical to that later appearing in the Cabrera Report. Doc.4, Doc.5.

• 3TM's counsel has informally advised Chevron's counsel that 3TM believes that it recognizes its work in the Cabrera Report, SRE9:R.2061.

• Plaintiffs have admitted that Cabrera "adopt[ed] . . . their findings," App.Br.13, and, in a recent submission to the Ecuadorian court, admitted that Cabrera "adopted the proposals, analyses, and conclusions of the Plaintiffs concerning the damages and the valuation." RJN, Exh. D at 7.

• Chevron's other successful § 1782 proceedings have uncovered further evidence of wrongful conduct by Plaintiffs' agents, particularly in the Second Circuit (affiliates of Plaintiffs participated in work of Cabrera's team); the District of New Jersey (Plaintiffs' consultant was engaged in fraud on the tribunal); and the Northern District of Georgia (Plaintiffs submitted falsified expert reports). *See supra* Section II.F.2 n. 9.

• Chevron's forensic linguistics expert has concluded that significant portions of the Cabrera Report "have definitely NOT been written first hand by a native writer of Spanish . . .," but instead were written in Spanish by a native English speaker or written in English, then translated to Spanish. R.50. There is no evidence that any of Cabrera's disclosed team members is a native speaker of English.

In light of this evidence, Plaintiffs cannot meet their burden of establishing that they have not waived any protection applicable to 3TM's work product. *United States v. Mass. Inst, of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) ("Where privilege is claimed and the opponent alleges a specific disclosure, the burden of ***43** proof is upon the claimant to show nondisclosure wherever that is material to the disposition of the claim."); *see also* *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) (attorney-client privilege). This is particularly true in light of the "liberal intent to provide judicial assistance" that animates § 1782. *John Deere Ltd.*, 754 F.2d at 135.

Moreover, the District Court scheduled a foundational deposition precisely to allow 3TM to address whether, in fact, its work is in the Cabrera Report. That deposition, if allowed to go forward, would provide much-needed evidence with respect to the transmission of documents or other materials from Plaintiffs' U.S.-based consultants, directly or indirectly, to Cabrera and/or members of his team, or the incorporation of same into the Cabrera Report.

This evidence is "relevant to [Chevron's] claim" that § 1782 permits discovery here, and thus the foundational deposition is authorized under Rule 26. *See also* *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."). Given the limited scope of the foundational deposition, it is unclear how Plaintiffs could be prejudiced by such a deposition if, as they now appear to suggest (but still shy away from representing without qualification), 3TM's work product (whether subsequently modified or ***44** not) was never given to Cabrera or a member of Cabrera's team, directly or indirectly, or otherwise incorporated into the Cabrera Report.

In response to this substantial evidence that collusion occurred, Plaintiffs note that a principal of Stratus, Douglas Beltman, stated that "3TM's work product was *directly* provided only to Plaintiffs' counsel." App.Br.27 (emphasis added). This statement is transparently weak and qualified. If 3TM wrote a report, "directly provided" it only to Plaintiffs' counsel, and Plaintiffs' counsel then provided it to Cabrera, for example, a waiver-inducing disclosure has occurred no less than if the transfer occurred directly. In short, ample grounds exist to support an inference that Plaintiffs or their counsel orchestrated a disclosure to Cabrera that is sufficient to waive any potentially applicable privileges or other protection.

2. Because 3TM's Work Was Provided to an Auxiliary of the Court, 3TM Is Subject to the Broad Discovery Applicable to Testifying Experts.

Plaintiffs attempt to portray 3TM as a consulting expert, to try to invoke the privilege applicable to such experts under Fed. Rule Civ. P. 26(b)(4)(B). But this argument fails: Plaintiffs' own admissions demonstrate that 3TM was not "employed only for trial preparation," as required by the rule. Instead, 3TM became a testifying expert when its documents, analyses, and/or work product were provided, directly or indirectly, to Cabrera, an Ecuadorian court "auxiliary" and *de facto* special master.

***45** As the District Court correctly explained, "[w]hile 3TM may well have originally been hired to serve only in a consulting expert capacity, as soon as its report was given to the court, or at least an auxiliary of the court, to be used in preparing Cabrera's expert report that shield was lost." RE4:R.2038. That 3TM's role was as a testifying expert is clear from Plaintiffs' own description of the contacts they and their consultants and agents had with Cabrera: Plaintiffs now concede that they "advocate[d] their own findings, conclusions, and valuations before Cabrera for him to consider their potential adoption." RJN, Exh. D at 7.

Moreover, Plaintiffs themselves assert that Cabrera, for all intents and purposes, *is* the Ecuadorian court: "Mr. Cabrera is a resident of Ecuador, and even more importantly, a Court-appointed expert in service of, and directly subject to the supervision of, the Lago Agrio court." SRE1:R.675. Submission of an expert opinion to an auxiliary of a court in support of the submitting party's litigating position, with the intent that the auxiliary adopt that position, plainly constitutes testimony given to the factfinder. *Cf.* *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) (characterizing as "testimonial hearsay" work of an expert that is passed along to a testifying expert to be transmitted to the jury). *See also* RE4:R.2036 (citing *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1998)).

***46** Because 3TM is a testifying expert, "fundamental fairness requires disclosure of all information supplied to [it] in connection with [its] testimony." *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001). *See also* *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 750 (7th Cir. 2005) ("A litigant is required to disclose to his opponent any information 'considered' by the litigant's testifying expert. . . ."). This extends to materials that would otherwise be protected by any kind of privilege, including work product. *See* *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) ("the work product privilege is waived . . . when the attorney discloses the information to the court voluntarily . . . ."). Indeed, "the 'overwhelming majority' of courts" have held "that Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts." *Regional Airport Auth. v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) (citation omitted); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d at 1375.

Plaintiffs' analysis of whether disclosure to Cabrera would suffice to waive work-product protection is thus inapt. Because 3TM is a testifying expert, the material on which it relies is discoverable *regardless of whether that material was ever disclosed to anyone*, whether an adversary or otherwise. Moreover, because 3TM is not a non-testifying expert, the "exceptional circumstances" threshold that ***47** must be met before discovery is appropriate from a non-testifying expert is inapplicable. Fed. R. Civ. P. 26(b)(4).

3. Even if Cabrera Were Considered to Be Only a Testifying Expert Here, Any Privilege Would Still Be Waived With Respect to Any Documents Given to Him, Directly or Indirectly.

Because Cabrera is an "auxiliary" to the court for purposes of reaching a "global assessment" on damages and issuing a recommendation on the ultimate merits to the Ecuadorian court, he is more akin to a special master, magistrate, or technical advisor to the court, than to one side's testifying expert. But even if 3TM is not considered a testifying expert, at the very least Cabrera himself functions as one. Cabrera has characterized himself as an "Expert Witness" and already has filed with the Ecuadorian court his "Expert Report" (and his response to written questions on his report), which constitute at least testimony that that court will consider. Moreover, he has stated that he "must observe and comply with the legal provisions and authorities in effect in Ecuador as related to *expert witness status and testimony*." RJN, Exh. C at 2 (emphasis added).

To the extent 3TM's work product was forwarded (directly or indirectly) to Cabrera (who is at least a testifying expert) or members of his team, or otherwise ended up being incorporated into the Cabrera Report (which is at least testimony), it is clearly discoverable. *See, e.g.,* *Fast Memory Erase, LLC v. Sponsion, Inc.*, 2009 WL 4884091, at *2 (N.D. Tex. Dec. 16, 2009); *United States v. City of* ***48** *Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995). When a testifying expert offers the opinion of a non-testifying expert, the non-testifying expert's work is also relevant and subject to full discovery. *See* *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty."). Moreover, disclosure of work product "waive[s] the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed." *Martin Marietta Corp. v. Pollard*, 856 F.2d 619, 625 (4th Cir. 1988). *See also Industrial Clearinghouse, Inc. v. Browning Mfg. Div.*, 953 F.2d 1004, 1007 (5th Cir. 1992) (recognizing subject-matter waiver to attorney-client privilege).

Cabrera's use of 3TM work product accordingly makes those materials (and 3TM) subject to discovery. *See, e.g.,* *Dura Auto. Sys. of Ind., Inc.*, 285 F.3d at 614. This rule must apply regardless of whether disclosure to the testifying expert increases the likelihood that an adversary will receive the information, App.Br.30, because otherwise parties could circumvent the discovery obligations on testifying experts by simply having all of the actual work done by a non-testifying expert, and then using the general non-testifying expert shield to block the taking of discovery from that primary author.

***49** Plaintiffs are also wrong that Chevron must show "exceptional circumstances" under Rule 26(b)(4)(B), before discovery from 3TM may be taken. App.Br.26-27. That assertion finds no support in the caselaw, and courts regularly allow parties to depose non-testifying experts who contributed to testifying experts' reports. *See, e.g, Estate of Manship v. United States*, 2008 WL 1776579, at *5-6 (M.D. La. Apr. 16, 2008); *Long Term Capital Holdings v. United States*, 2003 WL 21269586, at *5 (D. Conn. May 6, 2003); *Derrickson v. Circuit City Stores, Inc.*, 1999 WL 1456538 (D. Md. Mar. 19, 1999)).

Even if Chevron had to show "exceptional circumstances," which it does not, the incorporation of 3TM's work into Cabrera's report itself constitutes an "exceptional circumstance" justifying the discovery ordered here. *See* *Long Term Capital Holdings*, 2003 WL 21269586, at *2 ("exceptional circumstances under Rule 26(b)(4)(B) may exist. . . when there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert").

Plaintiffs' contention that Cabrera is not the functional equivalent of a testifying expert because, unlike typical testifying experts, he is allegedly not subject to any required disclosures and is supposedly permitted to keep information confidential, is absurd. Cabrera was a "special master" charged with acting independently and transparently; thus, Plaintiffs' advocacy for secrecy cannot be squared with any conception of due process. First, the Ecuadorian court does not ***50** have the confidentiality norms that Plaintiffs attribute to it. *See supra* Section U.C.2; *infra* Section V.C.7. Second, Plaintiffs' argument--that "[i]f Chevron were entitled under Ecuadorian law to any work-product of Plaintiffs' consultants that may have been reviewed by Mr. Cabrera, it

would already have them," App.Br.32--is no more than a foreign-discoverability requirement by another name. Yet again, the Supreme Court squarely rejected such a requirement in *Intel*, 542 U.S. at 261-62.

4. 3TM Is Subject to Discovery Even if Cabrera Is Not Considered a Testifying Expert.

Even if Cabrera is not considered a testifying expert, and Plaintiffs' disclosure is viewed as nothing more than a disclosure to an ordinary third party, any work-product protection would still be waived. Because the Ecuadorian court's order directed Cabrera to present with his report copies of all the documents he relied upon, SRE5:R.1453, disclosure to Cabrera should necessarily have resulted in disclosure to Chevron. Moreover, finding waiver from production to Cabrera is consistent with the purpose of the work-product doctrine, which is to "promote[] the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) (citing *Hickman*, 329 U.S. at 510-11); *see also* *Shields*, 864 F.2d at 382 (same).

***51** Here, the disclosure that is alleged to constitute waiver does not further this goal, because the disclosure is not just for purposes of preparing Plaintiffs' case, but to attempt to persuade Cabrera, the Ecuadorian factfinder's "auxiliary" and *de facto* special master. Where disclosures "were not made to further the goal underlying the doctrine," they waive the protection of work product. *Westinghouse Elec. Corp.*, 951 F.2d at 1429; *see also* *In re Columbia/HCA Healthcare Corp. Billing Practices Litig*, 293 F.3d 289, 306-07 (6th Cir. 2002) ("[W]aiver of the protections afforded by the work product doctrine is a tactical litigation decision. . . . [T]here is no reason to transform the work product doctrine into another 'brush on the attorney's palette,' used as a sword rather than a shield").

Moreover, as addressed above, Plaintiffs' waiver of work-product protection extends beyond the documents produced to all documents related to the same subject matter. *See supra* Section V.C.3. No showing of exceptional circumstances is necessary, as even a non-testifying expert is subject to discovery with respect to opinions that it disclosed to a third party.

5. The Crime-Fraud Exception Also Vitiates Any Potentially Applicable Privilege Here.

Because the crime-fraud exception plainly vitiates any potentially applicable privilege here, this Court should affirm on this alternative ground. *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 378 (5th Cir. 2010) (this Court "may affirm on any grounds supported by the record"); *see also* ***52** *In re EEOC*, 207 F. App'x 426, 434 (5th Cir. 2006) (considering crime-fraud argument that was not decided in the district court because it was raised at both the district-court and appellate levels).

As the District of New Jersey recognized in granting Chevron's application for similar discovery under § 1782, "the concept of an employee of a party covertly functioning as a consultant to a court-appointed expert in the same proceeding can only be viewed as a fraud upon that tribunal." RJN, Exh. G at 43:23-44:1.3TM's work product is invoked in support of just such a fraud. 3TM is indisputably a litigation consultant paid by Plaintiffs; simultaneously, 3TM prepared work product that was directly or indirectly given to Cabrera and his team, or otherwise incorporated into the Cabrera Report.

Moreover, the discovery sought in this case, like that in New Jersey, is relevant to proving that Plaintiffs are engaged more generally in an extensive fraud upon the Ecuadorian court, in furtherance of which Plaintiffs and/or their agents secretly submitted proposed findings and ghostwritten excerpts to Cabrera, and those findings and analyses were incorporated wholesale into the Cabrera Report. As a result, any documents or other information passed between Plaintiffs' consultants and Cabrera, even indirectly, and any other documents relevant to or in furtherance of such collusion, are discoverable because of the crime-fraud exception.

***53 6. Plaintiffs Have Waived Their Meritless and Ill-Defined Claim for Some Kind of Confidential Mediation Privilege Here.**

For the first time on appeal, Plaintiffs appear to assert that because 3TM documents were used at a confidential mediation, a protection akin to privilege supposedly applies. App.Br.25. Although Plaintiffs challenged Chevron's application below because the Stratus/3TM presentation that was similar to the Cabrera Report was produced at a confidential mediation, they identified this fact as relevant *only* to whether the discovery was "unduly intrusive or burdensome," a factor they have abandoned on appeal. SRE1:R.676-77; *see also* SRE1:R.678-79 (identifying attorney-client privilege, work-product, and non-testifying expert privilege as applicable privileges).

Because Plaintiffs did not give the District Court the opportunity to evaluate whether a mediation privilege should exist or what the scope of the privilege should be, this argument is waived. *Belt*, 444 F.3d at 408 ("If a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, [the court] will not address it on appeal.").

In any event, Plaintiffs' notion of a mediation privilege-which this Court has declined to recognize, *see In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 492-93 (5th Cir. 1998)-would have to be a privilege of ***54** unprecedented scope to reach all of the documents Chevron is entitled to, many of which were not themselves produced at the mediation. Moreover, Plaintiffs have waived any claim to the confidentiality of the documents relating to this mediation, as they have themselves given those documents to Cabrera. In addition, Chevron has filed these documents in several related actions without placing them under seal, without objection by Plaintiffs.

7. The "Ecuadorian Legal Context" Adds Nothing to This Appeal.

In a last-ditch effort to obstruct the discovery ordered by the District Court, Plaintiffs vaguely allude to the "Ecuadorian [l]egal [c]ontext" as a factor that supposedly defeats discovery here. App.Br.33. But Plaintiffs themselves concede that the Federal Rules of Civil Procedure "generally" govern under § 1782. App.Br.24 n.5. Indeed, other than one brief snippet of legislative history suggesting that courts may have some discretion to consider foreign *privileges* in some cases, Plaintiffs offer no support for the relevance of foreign legal context to the discoverability of evidence under § 1782.

Even if foreign privileges could, in some circumstances, be taken into account, the District Court did not abuse its discretion by declining to do so here. At most, § 1782 might, in circumstances not present here, allow district courts to consider, in their discretion, such privileges. However, it certainly does not *require* courts to do so. *See* S. Rep. No. 88-1580, at 8-9, *reprinted in* 1964 ***55** U.S.C.C.A.N. 3782, 3789-90 (the recognition *vel non* of a foreign privilege, let alone the weight to accord it, lies within the "complete discretion" of U.S. courts "to develop [] by case law," and it is a discretion that "permits, *but does not command*, following the foreign or international practice") (emphasis added).

Any potential discretion to consider such foreign privileges would exist only where, unlike here, the producing party has "authoritative proof" of the existence of such a privilege. *In re Application for an Order Permitting Metallgesellschaft AG to Take Discovery*, 121 F.3d 77, 80 (2d Cir. 1997). A contrary rule would place U.S. courts in the untenable position of having to engage " 'in a speculative foray into legal territories unfamiliar to federal judges[,]' " resulting in " 'unduly expensive and time-consuming fight[s] about foreign law' " that undermine §1782's utility as an "efficient means of assistance to participants in international litigation in our federal courts. . . ." *Id*. at 79, 80 (citations omitted). [22]

Here, Plaintiffs have not identified the foreign "privilege" that would apply, much less proven its existence. The closest they come is their repeated assertions that Ecuadorian law requires communications such as these to be "in confidence" or

"confidential." App.Br.2, 29, 32. But even were this true, " '[c]onfidential' does not necessarily mean 'privileged.' " ***56** *In re Grand Jury*, 148 F.3d at 492 (collecting cases). To the extent Plaintiffs seek to assert a general privilege that would protect materials submitted to an auxiliary of a court in furtherance of the merits of the submitting party's litigating position, no rational system of justice would ever recognize such a privilege. Such a privilege would be directly contrary to any concept of due process, as it would conceal the type of unjust collusion between Cabrera and Plaintiffs that Chevron has discovered.

D. Because No Privilege Is Applicable to the Subpoenaed Documents or Testimony, Production Should Be Required Without Further Inquiry.

The District Court did not squarely address the scope of the documents that should be produced under Chevron's subpoenas. However, it suggested that if some of the subpoenaed documents were not turned over to Cabrera, "one or more privileges *may* apply." RE4:R.2040. Based on Plaintiffs' representation that "no 3TM documents were produced" to Cabrera, SRE8:R.2043, and in light of 3TM's conflicting representation that its employees recognized their work in the Cabrera report, the District Court ordered a foundational deposition of 3TM to inquire whether 3TM collaborated with Cabrera and the extent to which 3TM recognizes its work in the Cabrera Report. RE3:R.2065.

As explained above, the crime-fraud exception renders all of the subpoenaed documents discoverable, regardless of whether they were turned over to Cabrera. Chevron has made more than a prima facie showing that Plaintiffs are engaged in a wide-ranging fraud on the Ecuadorian court, and accordingly Plaintiffs are not ***57** entitled to the protection of any privilege over their consultants' documents. This Court could and should thus clarify that Chevron is entitled to the discovery sought in the subpoenas without the need for a foundational deposition to first be conducted. Because such clarification would substantially accelerate the ultimate production of the discoverable material, it would serve the interests of justice by preventing Plaintiffs from 'running out the clock' on discovery until after the close of evidence in the Lago Agrio Proceeding. *See supra* Section II.E.

Even if this Court prefers to rest its holding on Plaintiffs' waiver of privilege by producing documents to Cabrera, this Court should make clear that its reasoning precludes Plaintiffs' assertion of privilege as to *any* of the subpoenaed documents, not simply as to the documents that were provided to Cabrera. As explained above, the transfer of 3TM work product or materials to Cabrera (or incorporation of same into the Cabrera Report) renders 3TM a testifying expert, subject to broad discovery.

There is thus no need to preliminarily inquire into what materials were produced to Cabrera, or to consider whether documents not produced to Cabrera remain privileged. As long as any 3TM work product was produced to Cabrera (or members of his team) or incorporated into the Cabrera Report, 3TM is a testifying expert.

***58** VI. CONCLUSION

Because each of the *Intel* factors favors granting discovery here, the District Court's grant of Chevron's § 1782 application falls within its broad discretion. Moreover, Plaintiffs' direct or indirect transmission or passing of materials from 3TM to Cabrera waives any work-product or other protection over 3TM's materials, and transforms 3TM into a testifying expert subject to full discovery.

Accordingly, this Court should affirm, as expeditiously as possible, the District Court's sound exercise of its discretion in granting Chevron the discovery to which it is entitled, so that the truth of the fraudulent collusion underlying a potential ongoing injustice against an American corporation in Ecuador can come to light before the close of evidence there.

****59 STATEMENT OF RELATED CIVIL CASES PENDING IN THIS OR ANY OTHER COURT OF THE UNITED STATES***

Appellee Chevron Corporation, through its counsel, hereby notifies this Court of the following related cases of which they are presently aware, pending in this or any other court of the United States of America:

1. *Republic of Ecuador v. Chevron Corp. and Texaco Petroleum Co.*, No. 09 Civ. 9958-LBS (S.D.N.Y.);

2. *Republic of Ecuador v. Chevron Corp.*, No. 10-1020 (2d Cir.);

3. *Chevron Corp. v. Cristobal Bonifaz*, No. C 09-05371 EMC (N.D. Cal);

4. *Chevron Corp. v. Stratus Consulting, Inc*. No. 10-cv00047-JLK (D. Colo.);

5. *In re Application of Chevron Corp.*, Misc. No. M-19-111 (S.D.N.Y.);

6. *Chevron Corp. v. Berlinger*, No. 10-1918-cv, 10-1966-cv (2d Cir.);

7. *In re Application of Chevron Corp.*, No. 10-cv-2675 (SRC) (D.N.J.);

8. *In re Chevron Corp.*, No. 10-2815 (3d Cir.)

9. *In re Application of Chevron Corp.*, No. 10-cv-1146IEG (WMC) (S.D. Cal.);

10. *In re Application of Chevron Corp.*, No. l:10-mc-00371-CKK (D.D.C.);

11. *In re Application of Chevron Corp.*, No. 1:10-MI-0076-TWT-GGB (N.D. Ga.); and

12. *Chevron Corp. v. Quarles*, No. 3:10-cv-00686 (M.D. Tenn.).

Footnotes

1 The same group of plaintiffs suing Chevron in Ecuador has brought the instant appeal. The term "Plaintiffs" thus refers to both the plaintiffs in the Ecuadorian proceeding and Appellants here.

2 Plaintiffs also make irrelevant and unsupported assertions about the Ecuadorian proceeding. Their allegations that Chevron attempted to "intimidate" Cabrera and interfere with his work, and "menac[ed] and threaten[ed] witnesses and their families," App.Br.8, are false and outrageous, and Chevron has already responded to such accusations in the Lago Agrio Proceeding. Request for Judicial Notice ("RJN"), Exh. L. Tellingly, Plaintiffs cite no support for this allegation other than a declaration by one of their lawyers providing a hearsay account of concerns Cabrera allegedly raised with the Ecuadorian court, and even that declaration never mentions witnesses' families. App.Br.8 (citing R.993). And the police escort given to Cabrera was simply a function of the proximity of some of the inspection sites to the Colombian border. Nothing in the Lago Agrio Proceeding suggests that such protection was a result of any findings by the Ecuadorian court crediting any of these false allegations of intimidation.

3 In October 2001, one of Chevron's subsidiaries merged with Texaco Inc. ("Texaco"). R.66. Texaco retained and to this day maintains a separate legal identity and substantial assets. *Id*.

4 This was *not* a re-filing of *Aguinda v. Texaco, Inc.*, an earlier case against Texaco that was dismissed on *forum non conveniens* grounds. 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002). Instead, the Lago Agrio Proceeding is a new case premised on different legal theories and seeking different relief from a different defendant. R.66. The plaintiffs in the two actions are not identical (although there is overlap), and unlike the plaintiffs in *Aguinda*, Plaintiffs here do not seek damages for private injuries to persons or property, but instead seek to retroactively apply a 1999 Ecuadorian law that purports to authorize citizen suits to enforce "collective environmental rights."

5 As the equivalent of a special master, Cabrera has "powers that [are] quasijudicial," such as fact-finding, and "[g]iven these sweeping powers . . . must perform his duties objectively." *Alberti v. Klevenhagen*, 790 F.2d 1220, 1229 (5th Cir. 1986) (internal quotations

omitted). The role of special masters is characterized by "transparency and completeness." *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 232 n.18 (5th Cir. 2008).

6 Plaintiffs' assertion that the "evidentiary phase" in the Ecuadorian proceeding has already closed, App.Br.9, is yet another example of the misleading nature of Plaintiffs' statement of the facts. The "evidentiary phase" to which they refer is simply a six-day period at the outset of the litigation when the parties outline the evidence to be adduced and presented; it is not analogous to what an American lawyer might understand that term to mean. *See* Ecuadorian Code of Civil Procedure, Art. 836, RJN, Exh. H. Moreover, this "evidentiary phase" closed three-and-a-half years before Cabrera's appointment.

7 *See also* RJN, Exh. J at 14:10-11 ("What [Plaintiffs] want to do is ... tie the legs of the competing horse in the race.").

8 *See, e.g.*, R.516-24; R.545-48; R.606-10 (request for extension, filed after close of business on due date for opening brief); R.1914-29; R.2066-67 (eleventh-hour letter request to court to postpone deposition which Plaintiffs had received notice of eleven days earlier).

9 R.437-38, R.2050-59; 2010 WL 1801526, at *22; RJN, Exh. K; *In re Application of Chevron Corp.*, No. 10-cv-2675 (SRC), Order (D.N.J. Jun. 15, 2010). *See also* R.452-63 (N.D. Ga.) (unopposed); *In re Application of Chevron Corp.*, No. 10-cv-1146IEG (WMC), Order (S.D. Cal. Jun. 23, 2010) (opposition pending); *In re Application of Chevron Corp.*, No. l:10-mc-00371-CKK (D.D.C.) (application granted at hearing; minute order forthcoming). Not surprisingly, Plaintiffs fail to mention all but one of the relevant rulings in the related § 1782 proceedings. And that one ruling is taken out of context and unavailing to Plaintiffs. Plaintiffs characterize the District of Colorado's decision as holding "that the Ecuadorian Plaintiffs may assert 'privilege objections' " over the subpoenaed documents. App.Br.9 n.3. But saying that Plaintiffs may initially *assert* such objections is a far cry from saying such objections have any merit. Indeed, all the magistrate did in the order on which Plaintiffs rely is clarify his earlier order, in which he had *denied*, as time-barred, Plaintiffs' attempt to assert, on an across-the-board basis, the same kinds of arguments for work-product protection, attorney-client privilege, and non-testifying expert privilege that Plaintiffs assert here. R.2072-73, R.2054-59. *See also* R.1117 ("[C]ommunications between Stratus and any of its agents and Cabrera are not privileged and confidential, so they should be produced.").

10 From the outset, Plaintiffs refused to confirm or deny the existence of 3TM work product in the Cabrera Report and obstructed efforts to obtain confirmation from 3TM directly. On April 20, 2010, for example, Chevron's counsel asked Plaintiffs' counsel to provide a sworn declaration that none of the 3TM work product at issue was provided to Cabrera or his team by anyone acting on behalf of or at the behest of Plaintiffs. R.1044. To date, Plaintiffs have refused to accede to this simple request, even though they now misleadingly try to create the impression, through carefully crafted and qualified language, that that is the case.

11 By ordering immediate production and upholding the Southern District of New York's order granting discovery in large part, the Second Circuit necessarily rejected Plaintiffs' attempts to categorically preclude § 1782 discovery whenever that discovery might "attack" the court by demonstrating bias on the part of a court expert. RJN, Exh K.

12 Although Plaintiffs made a baseless assertion of attorney-client privilege in the District Court, they fail to argue it in this Court, invoking it only in their statement of issues. App.Br. 1. *See Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 522 n.3 (5th Cir. 2010) (per curiam) (holding that appellants waive an argument when they "only raise [an] issue obliquely in their opening brief, if at all, and do not provide any briefing in support of [the] argument until their reply brief").

13 Although *Intel* nowhere suggests timeliness is a relevant factor-and Plaintiffs do not squarely contend that it is-they do criticize Chevron's application as "extremely untimely." App.Br.4. But Chevron did act diligently once sufficient evidence of Plaintiffs' fraud came to light. And any attempt to impose additional obligations of timeliness upon § 1782 applicants would be contrary to the "liberal intent to provide judicial assistance" that animates § 1782. *See, e.g., John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985). Courts have repeatedly rejected requests that they "read extra-statutory barriers to discovery into section 1782." *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993). *See also, e.g., In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992) (rejecting quasi-exhaustion requirement). Plaintiffs' proposed threshold issue of diligence or timeliness is similarly unsupported by the text of the statute, and undermines its effectiveness. *See also supra* Section II.F.l.

14 Indeed, it is *Plaintiffs* who primarily focus on a single point-- whether the requested discovery was "denied" by the Ecuadorian court, Ap.Br.32--and virtually ignore facts relevant to the other *Intel* factors, including 3TM's presence in the United States, the general receptivity of Ecuadorian courts to U.S. aid, and the absence of an intrusive or burdensome discovery request.

15 Although Plaintiffs incorrectly contend this factor supports discovery because Chevron allegedly is trying to obtain a "second bite at the apple" in Ecuador, App.Br. 19-20, that argument is irrelevant to whether 3TM or its documents are present in Ecuador, and thus is addressed *infra*, Section V.A.3.

16 *See also infra* Section V.C.II (Cabrera as testifier); *infra* Section V.C.5 (crime-fraud exception).

17 Although the foreign court's decision to deny discovery in a particular case is relevant under *Intel*, it is relevant to the third factor--whether the requested discovery would impermissibly circumvent foreign proof-gathering restrictions.

18 Even if political pressures were to drive the Ecuadorian court to express opposition to U.S. § 1782 proceedings, that opposition would hardly be dispositive. Both the circumstances surrounding that opposition and the fact that the Ecuadorian court "can simply refuse to consider any evidence . . . gather[ed] by what might be-under [Ecuadorian] procedures-an unacceptable practice" would counsel against a finding of lack of receptivity here. *Euromepa*, 51 F.3d at 1101.

19 Based on Plaintiffs' description of their submission, it also contains substantial materials *not* included in the categories of documents the Ecuadorian court had told the parties to file. SRE6:R.1488.

20 And, as Plaintiffs concede, "[t]he Federal Rules of Civil Procedure generally guide the production of evidence under Section 1782." App.Br.24 n.5.

21 Plaintiffs' attempt to distinguish this hypothetical by assuming that the appellate court would have expressly indicated that it wanted the discovery cannot bear the weight Plaintiffs place on it. Unless the Ecuadorian court is participating in the collusion, it should (and *any reasonably fair court* would) want to consider evidence of potential corruption or impropriety by its expert and auxiliary.

22 For this Court to attempt to inquire not just into foreign privilege, but into the entire foreign legal context, particularly based on the thin reed offered by Plaintiffs here, would be all the more speculative, inefficient, and inadvisable.

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2010 WL 1974915 (S.D.Tex.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. Texas.
Houston Division

In re FRANKLIN BANK CORP. Securities Litigation.

No. 4:08-cv-01810.
March 5, 2010.

Memorandum in Support of Defendant RBC Capital Markets Corporation's Motion to Dismiss Amended Consolidated Preferred Stock Purchaser Complaint

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CLASS ACTION

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CASES

Defendant RBC Capital Markets Corporation ("RBC") respectfully submits this memorandum in support of its motion to dismiss the Amended Consolidated Preferred Stock Purchaser Complaint (the "Amended Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(6) and states as follows:

I.

PRELIMINARY STATEMENT

The Harold Roucher Trust ("Roucher"), purportedly acting on behalf of purchasers of preferred stock issued by Franklin Bank Corporation ("Franklin") in May 2006, alleges that RBC violated Section 11 of the Securities Act of 1933 ("Section 11") in its role as underwriter of the preferred stock offering. In classic "fraud by hindsight" fashion, Roucher bases its Section 11 claim against RBC on an offering that took place *years* before Franklin first announced that its Audit Committee had commenced an internal investigation into accounting and disclosure issues related to its single-family residential mortgage and Real Estate Owned ("REO") business. Without a scintilla of evidence, Roucher contends that RBC "knew of or should have known of Franklin's existing financial and accounting issues," and "knew or should have known that the complained of statements were misleading when made. . . ." Amended Complaint at ¶¶ 19, 21. [1] As discussed more fully below, such generic and baseless allegations of securities fraud must be rejected, and the Amended Complaint dismissed, on several grounds.

First, Roucher's Section 11 claim against RBC is barred by the applicable one-year statute of limitations, based, *inter alia*, on Roucher's own judicial admission that "the truth was *fully revealed* after the close of business on May 1, 2008," more than one year prior to the filing of the Amended Complaint first naming RBC as a defendant. [2]

Second, Roucher fails to state a claim for violations of Section 11 under the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. Where, as here, a plaintiff alleges that an underwriter "*knew or should have known*" of the alleged fraudulent misstatements by Franklin, and otherwise alleges the existence of a fraudulent course of conduct, the Section 11 claim must be pled with particularity, notwithstanding Roucher's glib disclaimer that "this claim does not sound in fraud."

Amended Complaint at ¶ 113. Under Rule 9(b), Roucher is *required* to allege the facts constituting the misrepresentations in the May 2006 registration statement with specificity and utterly fails to do so.

Finally, Roucher's Section 11 claim is erroneously based on allegations relating to the alleged falsity of Franklin's historical financial statements. The Section 11 claim cannot be based on the contention that any of Franklin's year-end financial statements violated Generally Accepted Accounting Principles ("GAAP") since none of the audited financial statements incorporated into the Registration Statement were ever restated and Roucher fails to allege any facts suggesting that those financial statements were materially misstated. The remainder of Roucher's financial statement claim is slender in the extreme, and subject to dismissal based on the allegations in the Amended Complaint and other judicially noticeable facts. [3]

The sole attack on the remaining financial statements is limited to the unaudited financial statements for the first quarter of 2006, which were incorporated by reference into the Registration Statement. Roucher asserts that those quarterly financial statements must have been false because, *more than two years later*, Franklin announced that it intended to restate its 2006 year-end financial statements, which included the first quarter results. But Roucher does not allege with specificity any GAAP violations in connection with the first quarter results and fails to allege any "red flags" that put RBC on notice of any material GAAP violations in those financial statements at the time of the offering. Moreover, the judicially noticeable facts demonstrate that if there were any GAAP violations, they were immaterial as a matter of law. Accordingly, the Section 11 claim against RBC based on these few months of unaudited interim financial statements is groundless.

Notwithstanding the fact that Franklin admittedly suffered tremendous business reversals in 2008 and was seized by the FDIC in September 2008, those facts cannot be used retrospectively to support the conclusion that Roucher posits here -- namely, that the Registration Statement issued in *early 2006* contained material misstatements for which RBC should be held to account. The Supreme Court has consistently admonished trial courts to apply rigorous analysis to allegations of fraudulent conduct such as those set forth in the Complaint. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). RBC respectfully submits that under those Supreme Court standards, this lawsuit must be dismissed.

II.

BACKGROUND

A. The Parties and the Preferred Stock Offering

Franklin was a Texas-based bank holding corporation headquartered in Houston. Amended Complaint at ¶ 10. On May 5, 2006, Franklin offered 3.45 million shares of preferred stock to the public (the "Preferred Offering"). These preferred shares were issued pursuant to a registration statement initially filed with the SEC on April 20, 2006 and amended on May 1, 2006 and May 4, 2006 (the "Registration Statement") and the prospectus initially filed with the SEC on April 20, 2006 and amended on May 1, 2006 and May 4, 2006 (the "Prospectus," and together with the Registration Statement, the "Offering Documents"). Amended Complaint at ¶ 1. RBC underwrote the Preferred Offering. *Id*. at ¶ 18. Deloitte & Touche LLP ("Deloitte") was the Bank's outside auditor and audited the 2004 and 2005 year-end financial statements that were incorporated into the Offering Documents. *Id*. at ¶ 22.

By the spring of 2008, however, the news about Franklin was, to say the least, adverse -- and purchasers of Franklin's preferred stock were put on notice of their claims no later than May 1, 2008. The drumbeat of bad news commenced on March 14, 2008, when Franklin announced that it had discovered issues relating to its accounting practices and internal controls and had launched an internal investigation. [4] The March 14 Press Release disclosed that Franklin would delay filing its Annual Report on Form 10-K for 2007 (the "2007 10-K") due to "possible accounting disclosure and other issues related to single-family residential mortgages and residential real estate owned that could affect Franklin's 2007 financial statements." *Id*. at ¶ 72. Franklin also

disclosed that its "[a]udit committee commenced an independent internal investigation into [those] issues with the assistance of independent legal and accounting advisors." *Id*. at ¶ 72.

In addition to the March 14, 2008 press release, on that same day Franklin filed a Form 12b-25 notice of late filing stating that it "expects to report a net loss for the year ended December 31, 2007 . . . [and s]ubject to completion of the Audit Committee's investigation . . . Franklin expects to record an impairment of goodwill for the year ended December 31, 2007 of approximately $65.0 million and an increase in the allowance for loan losses of over $23.0 million." [5]

Franklin's adverse disclosures continued on March 26, 2008, when it disclosed that it was not in compliance with American Stock Exchange ("AMEX") Rules 134 and 1101 due to the delayed filing of its 2007 Annual Report. [6] On April 4, 2008, Franklin announced that it had submitted a plan to the AMEX suggesting that it intended to be in compliance with AMEX rules by June 17, 2008. [7] The April 4 Press Release also disclosed that if the plan is accepted, "the plan will continue to be subject to periodic review to determine whether Franklin is making progress consistent with the plan," and if the plan is not accepted or Franklin does not make progress, "the AMEX may initiate delisting procedures as appropriate." *Id*. On April 22, 2008, Franklin announced that the AMEX approved Franklin's compliance plan and granted the Bank until June 30, 2008 to file its 2007 10-K, and until July 31, 2008 to file its Quarterly Report on Form 10-Q for the period ending March 31, 2008. [8]

Finally, on May 1, 2008, Franklin announced that it had amended the call reports it submitted to the FDIC for the periods ended September 30, 2007 and December 31, 2007. [9] As Roucher admits in the Amended Complaint, the May 1 Press Release disclosed that the Bank's September 2007 Form 10-Q should no longer be relied upon, as a result of the incorrect call reports, and as a result of the fact that Franklin had determined that its past accounting for delinquent single family loans being serviced by third parties, other REO, and Franklin's loan modification programs all needed to be revised. Amended Complaint at ¶ 73. The May 1 Press Release also contained detailed information on the extent to which Franklin's loan portfolio was non-performing. *Id*. at ¶ 73.

Roucher itself described the above disclosures of Franklin's ills in its Original Complaint as follows:
50. For example, the Company's preferred stock closed at $10.95 per share on Friday, March 14, 2008. That evening, Franklin issued a press release disclosing that it would be unable to timely file its 2007 10-K. On the next day of trading, before the markets opened, the Bank filed an 8-K with the SEC attaching the March 14th press release as an exhibit. Reacting to this news, the preferred shared dipped to $7.50, a decline of over 30%.

51. *The truth was fully revealed after the close of business on May 1, 2008*, and Franklin's common stock plunged in value when the markets reopened. While shares ended the day at $1.72 on May 1st, they had fallen to $1.03 -- a decline of over 40% -- in just the next two days of trading. The Bank's preferred shares suffered a similarly steep decline: they retreated from $7.55 to $4.85 per share on May 2nd alone, a decline of over 35%.

Original Complaint at ¶¶ 50-51.

B. Nature and Stage of the Proceedings

Between June and July 2008, several plaintiffs filed complaints on behalf of investors who held common or preferred stock in Franklin, asserting violations of sections 10(b) and 20(a) of the Securities Exchange Act against Franklin and Individual Directors Anthony Nocella and Russell McCann (the "Original Action"). Roucher filed its original complaint on June 6, 2008 and its corrected complaint on June 10, 2008 on behalf of purchasers of common and preferred stock of Franklin. After briefing on the matter by all plaintiffs, this Court appointed the Franklin Investor Group as lead plaintiff on November 19, 2008. On March 6, 2009, the Franklin Investor Group filed a consolidated amended complaint on behalf of only the common stock holders.

Roucher then filed a motion with this Court in the Original Action for relief from the order naming the Franklin Investor Group lead plaintiff and seeking to be appointed lead plaintiff for preferred stock purchasers. RBC was not named by Roucher, the Franklin Investor Group, or any other putative lead plaintiff as a defendant to the Original Action.

This ongoing litigation notwithstanding, on May 4, 2009, Roucher filed a separate action against RBC and the Individual Defendants alleging Section 11 and Section 15 claims on behalf of preferred stock holders (the "Roucher Trust Action"). This was the first time that RBC had been sued in connection with the Franklin preferred stock offering. On July 17, 2009, this court consolidated the Original Action and the Roucher Trust Action, and on July 27, 2009, this Court appointed Roucher as the lead plaintiff for the Preferred Stock Purchaser Class in the Consolidated Action. On August 11, 2009, Roucher filed a consolidated preferred stock purchaser complaint, adding Deloitte as a defendant. On December 22, 2009 Roucher filed the operative Amended Complaint.

III.

STATEMENT OF THE ISSUES

1. The Section 11 claim against RBC is time-barred because Roucher failed to bring such claims within one year after discovery of the alleged misstatements should have been made by the exercise of reasonable diligence. 15 U.S.C. § 77m.

2. The Section 11 claim against RBC should be dismissed as deficient under Rule 9(b) of the Federal Rules of Civil Procedure for failure to plead with particularity.

3. The Section 11 claim against RBC should be dismissed because Roucher fails to allege facts suggesting that there were material misstatements in the Offering Documents, as required under Section 11.

IV.

STANDARD OF REVIEW

A complaint filed after the applicable statute of limitations period should be "dismiss[ed] under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred" and where the plaintiff does not plead any tolling of the limitations period. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003). Moreover, a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) "is appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001); *see Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (affirming in part dismissal of Section 10(b) claim under Rule 12(b)(6)). In deciding RBC's motion, while assuming the truth of all factual allegations in the Amended Complaint, the Court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004).

V.

ARGUMENT

A. The Section 11 Claim Against RBC is Time-Barred.

Claims brought under Section 11 are governed by the one-year statute of limitations in Section 13 of the Securities Act: "[n]o action shall be maintained to enforce any liability created under section 77k . . . of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of

reasonable diligence . . . .” 15 U.S.C. § 77m. The one-year limitations period begins to run on the date a putative plaintiff is placed on inquiry notice: “when the plaintiff has actual knowledge of the facts giving rise to his claims *or* has notice of facts that in the exercise of reasonable diligence should have led to such knowledge.” *In re Dynegy, Inc. Sec. Litig.*, 339 F.Supp.2d 804, 845 (S.D. Tex. 2004). “The requisite knowledge that a plaintiff must have to begin the running of the limitations period is merely that of the *facts* forming the *basis* of his cause of action . . . not that of the existence of the cause of action itself.” *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988). “An investor does not have to have notice of the entire [wrong] being perpetrated to be on inquiry notice.” *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 352 (2d Cir. 1993).

Resolution of the issue of inquiry notice is appropriate at the motion to dismiss stage. *Dodds*, 12 F.3d at 352; *see also Kansas Reinsurance Co., Ltd. v. Cong. Mortgage Corp. of Tex.*, 20 F.3d 1362, 1366-70 (5th Cir. 1994) (dismissing claim as time barred under Rule 12(b)(6)). “[W]here facts alleged in plaintiff's pleading make clear that a claim is barred, dismissal under Rule 12(b)(6) may be granted.” *In re Dynegy*, 339 F.Supp. at 804.

Here, Roucher did not sue RBC until May 4, 2009 and no other investor sued RBC before that date. However, Roucher itself has admitted, and public disclosures of which this Court may take judicial notice fully confirm, that the truth about Franklin was “fully revealed” no later than May 1, 2008. Roucher's Section 11 claim against RBC is, therefore, time-barred.

As Roucher acknowledged in the Original Complaint, the facts disclosed by Franklin leading up to and in the May 1 Press Release were sufficient to put a shareholder on notice of misstatements concerning Franklin. For example, the March 14 Press Release not only revealed that Franklin would be unable to file its 2007 Form 10-K on time, it explicitly disclosed that the Bank's internal controls and accounting mechanisms may be deficient. Those disclosures relate directly to the Plaintiff's claim that the Registration Statement failed to advise investors that the Bank's “accounting practices and internal controls were materially deficient.” Amended Complaint at ¶ 32. Also, the March 14 Press Release references the publicly-available SEC filing of the same day that revealed that, in anticipation of the findings from the Audit Committee investigation, the Bank expected to record an impairment of goodwill for 2007 and an increase in the allowance for loan losses. The May 1 Press Release contained equally harsh news, and sent Franklin's preferred stock spiraling down. The May 1 Press Release revealed that (a) Franklin's non-performing loans at the end of 2007 were actually $176.6 million (versus $86,031 million previously reported); (b) its REO was $51.1 million (versus $38,538 million previously reported); and (c) its net loss for 2007 was actually $52.1 million (versus $45.2 million previously reported). From these two press releases, a reasonable investor would have been on notice that Franklin's previous financial statements may not be reliable and that the Bank may not have reserved adequately for loan losses.

Market reaction to Franklin's disclosures demonstrates that investors were, indeed, put on notice of Franklin's problems. As set forth by Roucher in the Amended Complaint,

> Franklin's preferred stock closed at $10.95 per share on Friday, March 14, 2008. That evening, Franklin issued a press release disclosing that it would be unable to timely file its 2007 10-K. On the next day of trading, before the market opened, the Bank filed an 8-K with the SEC attaching the March 14th press release as an exhibit. *Reacting to this news*, the preferred shares dipped to $7.50, a decline of over 30%.

Amended Complaint at ¶ 109. [10] In response to the May 1 Press Release, the price of the Preferred Stock sank over 35%. *See id.* at ¶ 110. The multiple sharp drops in the price of the Preferred Stock during the period March 14 to May 2, following Franklin's corrective disclosures, dramatically underscore that holders of the Preferred Stock were on notice of their claims. What else can rationally explain the massive sell-off of those securities, if not that investors were made aware of pervasive issues concerning Franklin's financial statements?

Moreover, Roucher itself captured the essence of these disastrous announcements by Franklin when it alleged that "the truth was fully revealed" by May 1:

50. For example, the Company's preferred stock closed at $10.95 per share on Friday, March 14, 2008. That evening, Franklin issued a press release disclosing that it would be unable to timely file its 2007 10-K. On the next day of trading, before the markets opened, the Bank filed an 8-K with the SEC attaching the March 14th press release as an exhibit. Reacting to this news, the preferred shared dipped to $7.50, a decline of over 30%.

51. *The truth was fully revealed after the close of business on May 1, 2008*, and Franklin's common stock plunged in value when the markets reopened. While shares ended the day at $1.72 on May 1st, they had fallen to $1.03 -- a decline of over 40% -- in just the next two days of trading. The Bank's preferred shares suffered a similarly steep decline: they retreated from $7.55 to $4.85 per share on May 2nd alone, a decline of over 35%.

Original Complaint at ¶¶ 50 & 51. There can be no question that Roucher has characterized these two press releases as both corrective and highly material to investors and cannot now be allowed to argue that such announcements did not place a reasonable investor on notice.

The foregoing amply demonstrates that Roucher was on notice of its Section 11 claim arising out of the preferred stock offering no later than May 1, 2008 -- and probably months earlier than that. Therefore, Roucher's Section 11 claim against RBC, filed on May 4, 2009, is barred by the statute of limitations and must be dismissed.

B. The Section 11 Claim Against RBC Should be Dismissed as Deficient Under Rule 9(b) of the Federal Rules of Civil Procedure for Failure to Plead With Particularity.

Roucher's Section 11 claim against RBC must meet the heightened pleading standard of Rule 9(b). "When § 11 claims sound in fraud instead of negligence, the plaintiff is required to plead the circumstances constituting the alleged fraud with particularity to satisfy Rule 9(b)." *In re Dynegy Sec. Litig*. 339 F.Supp.2d at 827; *Melder v. Morris*, 27 F.3d 1097, 1100 n.6 (5th Cir. 1994) (holding that Rule 9(b) applies to Securities Act claims grounded in fraud). The Fifth Circuit has held that Rule 9(b) in a securities case requires a plaintiff to specify the time, place, and contents of the fraud, the identity of the defrauding party and what that party received by its fraudulent conduct. *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993); *see also Tuchman v. DSC Communications Corp.*, 14 F.3d 1061 (5th Cir. 1994). "[B]oilerplate disclaimers of fraud are not dispositive of whether a claim under the 1933 Securities Act sounds in fraud." *Kurtzman v. Compaq Computer Corp.*, 2002 WL 32442832 at *24 (S.D. Tex. March 30, 2002). A securities fraud allegation requiring the application of Rule 9(b) generally uses words such as "inaccurate," "misleading," "untrue," and "false." *Rombach v. Chang*, 335 F.3d 164, 174 (2d Cir. 2004).

Roucher's allegations against RBC clearly sound in fraud. Roucher alleges that RBC "knew or should have known of Franklin's existing financial and accounting issues" and "that the complained of statements were misleading when made." Amended Complaint at ¶¶ 19, 21. Roucher further alleges that "[a]ll of the foregoing statements concerning financial condition and internal controls . . . were materially false and misleading because *defendants* knew or recklessly disregarded that" Franklin overstated its revenues and earnings, Franklin's credit loss reserves were not adequate, Franklin's method of identifying real estate risks was inadequate, and Deloitte's audit of Franklin's 2006 financial statements was not made in accordance with generally accepted accounting standards. Amended Complaint at ¶ 48. Roucher also claims "Defendants" knew of or recklessly disregarded Franklin's internal control and accounting deficiencies and undercapitalization as a result of the FDIC investigation and the whistle-blower letter; and due to RBC's constant communication with the Bank principals, RBC knew or should have known of the issues at Franklin. Amended Complaint at ¶¶ 19, 21, 82-84.

What Roucher alleges in support of its Section 11 claim, it then alleges again to support its Section 10(b) claim for fraud. Amended Complaint at ¶¶ 112, 131. In *Melder*, plaintiffs argued that their Securities Act claims were inappropriately subjected to the heightened pleading standards of Rule 9(b). But the court found that "argument [ ] untenable in light of the complaint's

wholesale adoption of the allegations under the securities fraud claims for purposes of the Securities Act claims." *Melder*, 27 F.3d at 1100 n.6. As in *Melder*, Roucher applies the whole of its Section 10(b) fraud allegations to the Section 11 claim against RBC.

Despite making allegations against RBC that sound in fraud, Roucher fails to specify the particulars of its Section 11 claim as required by *Shushany*. Nowhere does Roucher allege who at RBC acquired the alleged knowledge of misstatements by Franklin, when or from whom it was acquired or even what facts RBC supposedly learned. This failure to allege specifically the who, what, when, and where of its allegations against RBC is fatal to its claims under Rule 9(b). *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009) (requiring plaintiff to plead "the time, place and contents of the false representation, as well as the identity of the person making the misrepresentation and what that person obtained thereby.").

C. The Section 11 Claim Against RBC Should be Dismissed Because Roucher Fails to Allege Facts Suggesting That There Were Material Misstatements in the Offering Documents.

In assessing the adequacy of Roucher's allegations, it is necessary to distinguish between allegations of fact, on the one hand, and unsupported inferences and conclusory allegations, on the other. It is only allegations of fact that must be accepted on a motion to dismiss; the rest may be rejected. *Twombly*, 550 U.S. at 546-47 (2007) (plaintiff must rely on "more than labels and conclusions, and a formulaic recitation of a cause of action's elements" to state a plausible claim for relief); *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006) (holding that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

Here, Roucher has sued RBC solely under Section 11 for supposed material misstatements in the Offering Documents for Franklin's May 5, 2006 preferred stock offering. Roucher, however, has pled no *facts* suggesting that the Offering Documents contained any material misstatements. Instead, Roucher relies upon alleged misstatements made after the preferred stock offering, in documents not contained within or incorporated into the Offering Documents, and seeks to draw the impermissible inference that those somehow demonstrate that the Offering Documents contained material misstatements. The documents Roucher cites to support that impermissible inference, however, the July 2009 FDIC Office of Inspector General Report ("OIG Report") [11] and Franklin's August 6, 2008 Form 8-K, [12] actually provide no such support.

Roucher alleges that the Offering Documents were false because they failed to disclose that: (1) Franklin's accounting function and internal controls were materially deficient; (2) the Bank had inadequate loan loss reserves; (3) Franklin accounted for loan loss reserves improperly; (4) Franklin's accounting for delinquent loans, REO, loan modifications, investment securities and Bank owned life insurance was improper; (5) the Bank's Allowance for Loan and Lease Losses ("ALLL") methodology was a "subject of concern;" (6) the Bank failed to implement suggestions made by its examiners; and (7) the Bank engaged in high-risk subprime lending. Amended Complaint at ¶ 32. In addition, Roucher alleges that, because of the foregoing, the financial statements contained in the Offering Documents were misstated.

The Preferred Offering took place in May 2006. The only financial statements contained within or incorporated into the Offering Documents were Franklin's 2004 and 2005 year-end financial statements and its quarterly statement for the first quarter of 2006. [13] In August 2008, Franklin made clear that the investigation it had undertaken embraced all time periods dating back to 2004. Franklin's financial statements for 2004 and 2005, however, were never called into question. And nowhere in the Amended Complaint does Roucher allege any specific accounting violation as to the unaudited financials for the first quarter of 2006. The Amended Complaint is entirely devoid of any factual allegation pointing to errors, much less material errors, in any of the financial statements incorporated into the Offering Documents. Indeed, the Amended Complaint's silence on this point is deafening.

Roucher does allege that Franklin admitted, in the August 6, 2008 8-K, that its interest income for 2006 was misstated. Amended Complaint at ¶ 36. As an initial matter, the 2006 year-end financial statements were not included in the May 2006 Offering

Documents and Roucher nowhere alleges that the bank's first quarter 2006 financial statements were materially misstated as to interest income. Second, the preliminary estimates of errors in reported interest income for the full year were immaterial as a matter of law. The reported errors reduced 2006 total interest income by $1,325 million out of $291.6 million, or 0.46%, and reduced net interest income by $1.36 million out of $92,718 million, or 1.47%. Either is clearly immaterial. *See, e.g*. SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (1999) [14] ("the misstatement or omission of an item that falls under a 5% threshold is not material in the absence of particularly egregious circumstances, such as self-dealing or misappropriation by senior management."); *Krim v. Banctexas Group, Inc.*, 989 F.2d 1435, 1446 (5th Cir. 1993) (understatement of loans by 7% not material as a matter of law); *ECA v. JP Morgan Chase Co.*, No. 07-1786-cv, 2009 WL 129911 at *11 (2d Cir. Jan. 21, 2009) ("The five percent numerical threshold is a good starting place for assessing the materiality of the alleged misstatement."); *Taubenfeld v. Hotels.com*, 385 F. Supp. 2d 587, 593-94 (N.D. Tex. 2004) (understatement of revenue by 1.5% and of reserves by 1.0% immaterial).

Roucher also seeks to rely on the Office of Inspector General Report ("OIG Report") in asserting falsity of the Offering Documents. However, there is nothing in that report that challenges the financial statements incorporated by reference into the May 2006 public offering documents. It simply does not speak to the time period at issue. And any conclusions within the OIG Report as to financial statements *not* incorporated into the Offering Documents are irrelevant. It simply does not follow as a matter of law or logic--and therefore courts and litigants are not permitted to make the inference--that a company's financial statements in year one were incorrect merely because the company later restated financial statements for year two or three or thereafter. *See, e.g., Southland Sec. Corp.*, 365 F.3d at 383 ("fraud cannot be proved by hindsight"); *Arazie v. Mullane*, 2 F.3d 1456, 1468 (7th Cir. 1993).

In short, Roucher's *factual* allegations pertain to time periods that post-date the Preferred Offering and, therefore, shed no light on what, if anything, was misstated in the Offering Documents. That leaves only unsupported, conclusory allegations of falsity and those are insufficient to state a claim. *Twombly*, 550 U.S. at 546-47.

VI.

CONCLUSION

Roucher's Amended Complaint against RBC is time-barred and, in addition, fails to state a claim against RBC for the reasons set forth above. Therefore, RBC respectfully requests that the Court enter an order dismissing all claims against RBC Capital Markets Corporation and grant such other and further relief as the Court deems just and proper.

DATED: March 5, 2010

Footnotes

1 Unless otherwise indicated, all internal quotations and omissions have been omitted and all emphasis added.

2 *The Harold Roucher Trust U/A DTD 09/21/72 v. Franklin Bank Corp., et al.*, Civil Action No. 4:08-cv-1810, filed June 6, 2008 (Corrected Complaint filed June 10, 2008) (the "Original Complaint") at ¶ 51. RBC respectfully requests this Court take judicial notice of Roucher's previous filings pursuant to Fed. R. Evid. 210.

3 RBC is entitled to rely upon materials documents or reports relied on in the Amended Complaint and on other facts that the Court may judicially notice, including documents filed with the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also R2 Investments LDC v. Phillips*, 401 F.3d 638, 640 n.2 (5th Cir. 2005). RBC respectfully requests that the Court take judicial notice of the documents attached as Exhibits A-H to the Declaration of Samantha A. Lunn ("Lunn Decl."), filed concurrently herewith.

4 The March 14, 2008 Press Release is attached to the Lunn Decl. as Exh. A.

5 The March 14, 2008 Form 12b-25 is attached to the Lunn Decl. as Exh. B.

6 The March 26, 2008 Press Release is attached to the Lunn Decl. as Exh. C.

7 The April 4, 2008 Press Release is attached to the Lunn Decl. as Exh. D.

8 The April 22, 2008 Press Release is attached to the Lunn Decl. as Exh. E.

9 The May 1, 2008 Press Release is attached to the Lunn Decl. as Exh. F.

10 That the preferred stock had dropped from the offering price of $25.00 per share (Amended Complaint at ¶ 1) to $10.95 per share by March 14, 2008, a loss of more than half its value, suggests that enough negative news about Franklin had entered the market to put an investor on inquiry notice by that time -- if not earlier.

11 *See, e.g.* Amended Complaint at ¶ 38. A true and correct copy of the OIG Report is attached to the Lunn Decl. as Exh. G.

12 *See, e.g.* Amended Complaint at ¶ 36. A true and correct copy of the August 6 Form 8-K is attached to the Lunn Decl. as Exh. H.

13 Since the 2004 and 2005 year-end financial statements were audited (expertised) by Franklin's independent auditors, RBC was entitled to rely upon those financial statements without more as Roucher has alleged no facts suggesting that RBC should have known the auditor's opinions were not correct. 15 U.S.C. § 77k(b)(3).

14 A true and correct copy of SEC Staff Accounting Bulletin No. 99 is attached to the Lunn Decl. as Exhibit I.

End of Document

2010 WL 3054784 (S.D.N.Y.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. New York.

In re IMAX CORPORATION SECURITIES LITIGATION.

No. 106CV06128.
June 10, 2010.

Portions Redacted

Defendant Pricewaterhousecoopers LLP's, an Ontario Limited Liability Partnership Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification

Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166, Telephone: (212) 351-4000, Facsimile: (212) 351-4035.

Gibson, Dunn & Crutcher LLP, 2100 McKinney Avenue, Suite 1100, Dallas, TX 75201, Telephone: (214) 698-3100, Facsimile: (214) 698-3400, Attorneys for Defendant Pricewaterhousecooper LLP, An Ontario Limited Liability Partnership.

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Defendant PricewaterhouseCoopers LLP ("PwC-Canada"), an Ontario limited liability partnership, respectfully submits this memorandum of law in opposition to Plaintiffs Motion for Class Certification. [1]

I

I. PRELIMINARY STATEMENT

Lead Plaintiff Snow Capital Investment Partners, L.P. ("Snow Capital") seeks the Court's certification of a single class of "those persons who acquired the common stock of defendant IMAX Corporation ("IMAX or the "Company") between February 27, 2003 and July 20, 2007, inclusive (the "Class Period"), and were damaged thereby." (Dkt. 125 at p. 1.) As the party seeking class certification, Snow Capital has the burden of demonstrating by a preponderance of the evidence that it meets all of the requirements of Federal Rule of Civil Procedure 23 ("Rule 23").

Snow Capital has failed to meet its Rule 23 burden. First, Snow Capital does not satisfy the typicality and adequacy requirements of Rule 23(a) because (i) Snow Capital is atypical and cannot adequately represent the proposed class because Snow Capital is subject to a unique defense based on its investment strategy; (ii) Snow Capital, due to the timing of its purchases of IMAX stock, has an economic incentive to minimize the impact of the majority of alleged misstatements, creating an intra-class conflict that renders Snow Capital an inadequate class representative; (iii) Snow Capital's relationship with its counsel, Al Yates, creates an impressible economic interest that conflicts with those of the absent class members; and (iv) Snow Capital has failed to monitor and vigorously prosecute this class action.

Second, Snow Capital cannot establish that common issues predominate over individual issues under Rule 23(b). Although Snow Capital seeks to establish the reliance element of its claims under Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") through the "fraud-on-the-market" presumption, it cannot do so because Snow Capital has not established the causal link between the alleged misstatements and their alleged losses by a preponderance of the evidence.

Third, if certification is granted, the class period should end no later than August 9, 2006 because the curative disclosure alleged by Snow Capital was made on that date and, indeed, Snow Capital sold all its IMAX stock the following day.

Fourth, if certification is granted, in-and-out shareholders who bought and sold prior to August 9, 2006 should be excluded because such shareholders will not be able to show loss causation as a matter of law because of the absence of any alleged corrective disclosure prior to August 9, 2006.

Finally, if certification is granted, foreign purchasers of IMAX stock traded on the Toronto Stock Exchange (the "TSE") should be excluded from the class because the Court does not have subject matter jurisdiction over those claims.

II. ARGUMENT

A. Standards Applicable To Class Certification

A class action may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *In re Initial Pub. Offering Sec. Litig.,* 471 F.3d 24, 33 (2d Cir. 2006) ("In re IPO"). [2] Rule 23(a) states that a class may be certified "only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). A party seeking class certification must also satisfy at least one of the subparts of Rule 23(b). Snow Capital seeks certification

here under Rule 23(b)(3) which requires a plaintiff to show "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

On a motion for class certification, a plaintiff bears the burden of producing sufficient admissible evidence, beyond the mere allegations in the complaint, to demonstrate that it satisfies all of the requirements of class certification under Rule 23. *See In re IPO,* 471 F.3d at 41 ("[T]he district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met."); *Freeland v. AT&T Corp.,* 238 F.R.D. 130, 140 (S.D.N.Y. 2006). It is insufficient for a plaintiff merely to make "some showing" that the requirements of Rule 23 have been satisfied. In re IPO, 471 F.3d at 42. Rather, a plaintiff must prove by a preponderance of the evidence that the requirements of Rule 23 have been met. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.,* 546 F.3d 196, 202 (2d Cir. 2008); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008, as amended January 16, 2009).

"[A] district judge may not certify a class without making a ruling that each Rule 23 requirement is met." In re IPO, 471 F.3d at 27. "Such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established." *Id.* at 41. A district court's ruling on class certification must be the result of a "definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues." Id. "[T]he fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met." *Id.* at 27.

B. Class Certification Should Be Denied Because Snow Capital Does Not Satisfy The Typicality And Adequacy Requirements Of Rule 23(a)

1. Because Snow Capital Is Subject To A Unique Defense, Snow Capital's Claims Are Atypical Under Rule 23(a)(3) And Snow Capital Cannot Adequately Represent The Proposed Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement of Rule 23(a)(3) is not satisfied, and therefore class certification is inappropriate, "where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Baffa v. Donaldson,* 222 F.3d 52, 59 (2d Cir. N.Y. 2000) (citing *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 903 F.2d 176, 180 (2d Cir. 1990)).

Snow Capitals distinctive investment strategy gives rise to a unique defense, thus defeating typicality. [text redacted in copy]

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In other words, Snow Capital relied on the belief that the market for IMAX stock did not correctly incorporate information about the stock and that Snow Capital could profit from that market *inefficiency. See Basic v. Levinson,* 485 U.S. 224, 248 (1988) ("Any showing that severs the link between the alleged misrepresentation and ... [plaintiffs] decision to trade at a fair market price will be sufficient to rebut the presumption of reliance."). [4] Further, Snow Capital's stance that the market is inefficient will color any argument that it makes that the market for IMAX stock immediately absorbs all public information - an argument that will need to be asserted on behalf of less sophisticated class members who intend to rely on the fraud-on-the-market presumption of reliance available under *Basic.*

This unique defense against Snow Capital, and the time Snow Capital will need to devote to attempting to rebut it, "may have the ultimate effect of prejudicing members of the proposed class." *Weintraub v. Texasgulf, Inc.,* 564 F.Supp. 1466, 1471 (S.D.N.Y. 1983). Because a unique defense makes Snow Capitals claims atypical under Rule 23(a) and prevents Snow Capital from adequately representing the remainder of the class, Snow Capital cannot serve as class representative.

2. Snow Capital Cannot Satisfy The Adequacy Requirements Of Rule 23(a) (4) Because Its Economic Interests Conflict With Those Of Absent Class Members

Rule 23(a)(4) provides that, to obtain class certification, a plaintiff must show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This rule requires courts to inquire whether the proposed class representatives interests "are antagonistic to the interest of other members of the class." *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 142 (2d Cir. 2001) (citing *Amchem Prods. v. Windsor,* 521 U.S. 591, 625-26(1997)).

a. Snow Capitals Economic Interests With Respect To Its Individual Claim Impermissibly Conflict With Those Of Absent Class Members

Snow Capital alleges in the Complaint that, as a result of inflation caused by the alleged misrepresentations, the purported class members purchased stock at artificially high prices. (Dkt. 46 at ¶230.) At the damages stage, Snow Capital will be required to show the inflationary impact of each of the alleged misstatements - and will only be able to recover damages for artificial inflation that was incorporated into the stock price at the time of purchase. *See generally Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 341-43 (2005).

Snow Capital purchased all of its IMAX stock between December 14, 2004 and November 3, 2005. (Exh. B to the Lunn Dec. (Corrected Certificate of Named Plaintiff).) Snow Capital, therefore, will only be able to recover for damages suffered as a result of alleged misstatements made before November 3, 2005. Thus, Snow Capital has a strong incentive to pursue a legal strategy that maximizes the inflationary impact of pre-November 3, 2005 statements and minimizes the impact of post-November 3, 2005 statements. The Complaint, however, focuses heavily on the alleged misstatements regarding IMAX's 2005 financial results - which were not announced until February 17, 2006. [5] (Dkt. 46 at ¶¶ 95-114.)

Because of Snow Capital's economic interests, its best legal strategy would be to downplay these later, but proportionally significant, alleged misrepresentations embracing a weaker strategy for class members who purchased IMAX stock after February 17, 2006. Such economic conflicts are at the heart of the intraclass conflict problem described by Amchem and its progeny- "their anticipated recoveries depend on and are maximized by different theories and economic assumptions; those theories and assumptions are incompatible or (at best) incoherent when advanced at once; there are winners and losers in the class; and the distribution of those competing interests creates a problem that cannot be resolved by subclass representatives." *In re Visa Check/MasterMoney,* 280 F.3d at 158 (Jacobs, J. dissenting). Therefore, Snow Capital does not satisfy the adequacy requirements of Rule 23(a) and cannot be appointed as a class representative.

b. Snow Capital's Relationship With Its Counsel Creates An Impermissible Economic Interest That Conflicts With Those Of Absent Class Members

The Private Securities Reform Act of 1995 (the "PSLRA") demands that "competent plaintiffs, rather than lawyers, direct" a securities class action. *Berger v. Compaq Computer Corp.,* 257 F.3d 475,484 (5th Cir. 2001). "[T]he possibility that plaintiff may benefit when his attorneys benefit - either directly by receiving business from [its counsel] or indirectly by helping a business associate at the expense of the class - casts doubts on whether plaintiff will fairly and adequately protect the interests of the class." *Shields v. Washington BanCorp.,* No. 90-1101, 1991 WL 221940, at *2 (D.D.C. Oct. 10, 1991). [6]

In October 2006, Snow Capital represented to this Court that it "ha[d] selected [Robbins Geller's predecessor firm] to represent it and the class. (Dkt. 14 at 3.) [text redacted in copy] [text redacted in copy]

Snow Capital's selection of Mr. Yates as counsel creates an impermissible conflict with the interest of other members of the class, [text redacted in copy] The class' interests are in maximizing recovery while minimizing costs; Richard Snow, however,

as Mr. Yates business associate and friend, has an interest in "maximizing the return to his counsel," even if that comes out of the pockets of the other class members. *Susman v. Lincoln Am. Corp.,* 561 F.2d 86, 95 (7th Cir. 1977). Under such circumstances, Snow Capital is not an adequate class representative and the motion to certify should be denied. See Susman, 561 F.2d at 93; Shields, 1991 WL 221940, at *2; *Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing and Securitization,* 616 F. Supp. 2d 461, 464 (S.D.N.Y. 2009); *Jaroslawicz v. Safety Kleen Corp.,* 151 F.R.D. 324, 329-30 (N.D. Ill. 1993); *In re Quintus Sec. Litig.,* 201 F.R.D. 475, 481-82 (N.D. Cal. 2001).

3. Snow Capital Cannot Satisfy The Adequacy Requirements Of Rule 23(a)(4) Because It Has Failed To Vigorously Prosecute The Class Claims

A court should deny class certification "where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys. *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1077 (2d Cir. 1995); *see also Rolex Employees Ret. Trust v. Mentor Graphics Corp.,* 163 F.R.D. 658, 665 (D. Or. 1991) (plaintiff "must check the otherwise unfettered discretion of counsel in prosecuting the suit"); *Berger,* 257 F.3d at 484; *Jaroslawicz,* 151 F.R.D. at 328 (class representative must "vigorously pursue the litigation").

Here, Snow Capital has not been monitoring the progress of this case, has not been vigorously prosecuting this case and has effectively abdicated its fiduciary role in this litigation to its counsel, Al Yates and Robbins Geller, from the very start of this litigation.[7] [Text redacted in copy] weeks later, and only after defendants requested the identifying information, counsel for Snow Capital admitted that they did not have the information. (Ex. D (Reich May 26, 2010 Letter).) Given that Snow Capital has demonstrated that it has neither the interest or ability to "monitor counsel's performance," *Iron Workers,* 616 F.Supp.2d at 464, Snow Capital is an inadequate class representative and its motion to certify should be denied. *See Shiring v. Tier Technologies, Inc.,* 244 F.R.D. 307, 316 (E.D. Va. 2007) (denying class certification in part because plaintiff "effectively abdicated his supervisory role ... in contravention of the PSLRA's stated goals.").

C. Class Certification Must Be Denied Because Snow Capital Fails To Prove That Common Issues Predominate Over Individual Issues As Required By Rule 23(b)(3)

1. Because Snow Capital Seeks To Establish Predominance By The Fraud-on-the-Market Presumption, It Must Make A Showing of Loss Causation By A Preponderance Of All Admissible Evidence At The Class Certification Stage

To satisfy the predominance requirement of Rule 23(b)(3), Plaintiffs seek to rely on the "fraud-on-the-market" presumption of reliance set forth in *Basic, Inc. v. Levinson,* 485 U.S. 224 (1988). The fraud-on-the-market theory creates a presumption that investors purchased stock in reliance on the integrity of the market, thus establishing reliance as a common issue as contemplated by Rule 23(b)(3). As the Fifth Circuit recently explained in Oscar *Private Equity Invs. v. Allegiance Telecom, Inc.,* 487 F.3d 261, 266 (5th Cir. 2007), a lead plaintiff is required to demonstrate loss causation, by a preponderance of the evidence, at the class certification stage before it can "trigger" the fraud-on-the-market presumption. Because the Fifth Circuit opinion in Oscar is based directly on the Supreme Court's ruling in *Basic* and is consistent with the principles set forth by the Second Circuit in *In re IPO and Teamsters Local,* Oscar is persuasive and should be followed here.

In Oscar, the Fifth Circuit held that loss causation is "a fraud on the market prerequisite" that "must be established at the class certification stage by a preponderance of all admissible evidence." 487 F.3d at 266, 269. This is because loss causation provides "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Lattanzi v. Deloitte & Touche LLP,* 476 F.3d 147, 157 (2d Cir. 2007). To establish loss causation, a securities fraud plaintiff must prove a direct causal connection between the alleged misrepresentation and the decline in the company's share price. *Dura Pharm.,* 544 U.S. at 341-43. Where the alleged misrepresentation is a false opinion, plaintiffs must prove that a corrective disclosure, and not

some other contemporaneously released information, revealed the truth and resulted in the decline of the company's share price. *See In re Initial Pub. Offering Sec. Litig.,* 399 F. Supp. 2d 298, 307 (S.D.N.Y. 2005) (*"In re IPO II").*

In holding that loss causation must be proven by a preponderance of the evidence at the class certification stage, the Fifth Circuit relied on the Supreme Court's holding in Basic that the fraud-on-the-market presumption could be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and... the price received (or paid) by the plaintiff." Oscar, 487 F.3d at 265 (*quoting Basic,* 485 U.S. at 248). Specifically, the presumption would be rebutted if Defendants "could show... that the market price would not have been affected by their misrepresentations." Oscar, 487 F.3d at 265. Thus, where, as here, Snow Capital cannot establish that its losses were caused by any alleged misstatement by PwC-Canada, the Basic link is severed and the fraud-on-the-market presumption is rebutted. Because "Rule 23 mandates a complete analysis of fraud-on-the-market indicators" and a showing of loss causation is a prerequisite to the fraud-on-the-market theory, the Fifth Circuit held that plaintiffs must prove loss causation by a preponderance of the evidence at the class certification stage. *Id.* at 267.

The Fifth Circuit's holding in Oscar is consistent with the Second Circuit's holdings in In re IPO, 471 F.3d at 41-42, Teamsters Local, 46 F.3d at 202, and *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 574 F.3d 29, 39-40 (2d Cir. 2009), and is persuasive. Although recent decisions in the U.S. District Court for the Southern District of New York have rejected the reasoning of Oscar as non-binding precedent,[8] the Second Circuit itself has not addressed the issue of whether loss causation must be established by a preponderance of the evidence at the class certification stage to trigger the fraud-on-the-market presumption. However, in line with Oscar, the Second Circuit specifically rejected the notion that inquiry into a merits-related issue, such as loss causation, would be inappropriate at the class certification stage. *In re IPO,* 471 F.3d at 41. The Second Circuit's recent trend towards higher scrutiny at the class certification stage, as reflected in *In re IPO and Teamsters Local,* suggests that the Second Circuit would find the reasoning in Oscar persuasive and would likely adopt the preponderance of the evidence standard once presented with the opportunity to consider the issue. Furthermore, having now held, in In re Flag Telecom, 574 at 39-40, that a plaintiff must make a showing of loss causation, by a preponderance of the evidence, to establish typicality and adequacy of the class representative at the class certification stage, it stands to reason that the Second Circuit will require this same standard when it squarely addresses the loss causation requirement for predominance under Rule 23(b)(3).

2. Snow Capital Is Not Entitled To The Fraud-on-the-Market Presumption Of Reliance Because It Fails To Make The Requisite Showing Of Loss Causation

Here, Snow Capital cannot invoke *Basic's* fraud-on-the-market presumption because they have failed to establish loss causation by a preponderance of the evidence. Snow Capital does not provide any evidence demonstrating that the price declines occurring on the alleged corrective disclosure dates resulted from the revelation of fraud as opposed to "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions or other [non-litigation related] events." *Dura Pharm.,* 544 U.S. at 343. In addition to Snow Capital's lack of evidence supporting loss causation, the analysis of PwC-Canada's expert, Professor Christopher James, confirms that Snow Capital cannot demonstrate that any of the alleged losses were caused by misstatements attributable to PwC-Canada. (See Exh. A ("James Report") to Dkt. 99.)

The only statements made by PwC-Canada that Snow Capital alleges were false and misleading were contained within PwC-Canada's audit opinions on IMAX's year-end financial statements for the years ended December 31, 2002-2005 (the "Audit Opinions"). (See Dkt. 46 at ¶¶ 187, 226-227.) Thus, to establish loss causation for class certification purposes, Snow Capital must prove, by a preponderance of the evidence, that (1) the Audit Opinions were false when made and that falsity was concealed from the market; (ii) it purchased IMAX stock after such statements were made, (iii) the falsity of the statements was revealed to the market; and (iv) the disclosure negatively affected the price of the stock. *See Lentell v. Merrill Lynch & Co. Inc.,* 396 F.3d 161, 173 (2d Cir. 2005)

In the Complaint, Snow Capital alleges nineteen corrective disclosure dates. (Dkt. 46 at ¶¶ 115-139; *see also* James Report at ¶ 45.) Of those, only seven are associated with significant company-specific stock price movement. (James Report at ¶ 46.) Of those seven, four do not contain new information that would correct alleged prior misrepresentations by PwC-Canada. (James

Report at ¶¶46, 51-80.) Thus, only three alleged corrective disclosure dates remain that may contain new information that may have corrected alleged misrepresentations by PwC-Canada: the August [9] , 2006 Press Release by IMAX ("August 9 Press , the March 29, 2007 Press Release by IMAX ("March 29 Press Release"), [10] and the July 20, 2007 press release by IMAX (the "July 20 Press Release."). [11]

The August 9 Press Release is not a corrective disclosure because it did not reveal the truth of any alleged misstatements attributable to PwC-Canada, as required by *Dura. See In re eSpeed, Inc. Sec. Litig.,* 457 F. Supp. 2d 266, 296 (S.D.N.Y. 2006) ("[I]t is axiomatic that a concealed fact cannot cause a decrease in the value of a stock before the concealment is made public."). The press release expressly stated, with respect to the application of multiple element accounting to theater system installations: "the Company believes its application of the above [multiple-element] accounting policy is, and has historically been, in accordance with GAAP and the Company's position is supported by its auditors." (August 9 Press Release at p. 2.) In addition, there is plenty of other negative, company-specific information contained in the August 9 Press Release to explain the decrease in IMAX's stock price following the release: (1) IMAX's announcement that no one was willing to buy the company at the valuation sought by the Board of Directors; (2) IMAX's decision to focus on potential joint ventures; (3) IMAX's decision to focus on its conversion to digital technology; (4) IMAX's retraction of its guidance for the remainder of 2006; (5) IMAX's announcement that the SEC had commenced an investigation of the company; and (6) IMAX's announcement of financial results for the 2nd Quarter of 2006 and its retraction of guidance as to future earnings. *(Id.* at pp. 1-2.)

[text redacted in copy] [text redacted in copy] [12] James' analysis suggests that the other bad news, specifically the "no-buyer" announcement, was largely responsible for the price decline following the August 9, 2006 (James Report at ¶ 106), [13] but concludes that separating the effects of each negative announcement may well be impossible (James Report at ¶ 145). It is Snow Capital, not Defendants, who bears the burden of proving that the correction of alleged misrepresentation, and not "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions or other events" was responsible for all or a significant portion of the decline in price. *Dura Pharm.,* 544 U.S. at 343; *In re IPO II,* 399 F. Supp. 2d at 307; *see also In re Williams Sec. Litig.,* 558 F.3d 1130, 1137 (10th Cir. 2009) ("The plaintiff bears the burden of showing that his losses were attributable to the revelation of the fraud and not the myriad other factors that affect a company's stock price. Without showing a causal connection that specifically links losses to misrepresentations, he cannot succeed.). Having provided no analysis regarding the allocation of the price decline among the multiple announcements contained in the August 9 Press Release, Snow Capital has not met that burden.

In addition, neither the March 29 Press Release nor the July 20 Press Release were a corrective disclosure. Both were released by IMAX *after* the "truth" that IMAX's historical financial statements were in error had been revealed to the market. On March 16, 2007, before the markets opened, IMAX disclosed that its prior audited financial statements were in error and, therefore, revealed to the market that the Audit Opinions on those financial statements were false when issued. (Exhibit I to the Lunn Dec.) Snow Capital, however, does not allege any market reaction to the March 16 Press Release That is not surprising, given that IMAX's closing stock price on March 15, 2007 on the NYSE was $4.99 per share and the stock closed on March 16, 2007 at $5.00 per share. (Exhibit J to the Lunn Dec. (Lexis Nexis Historical Quotes).) Subsequently, the March 29 Press Release announced a delay in filing the restatement, but did not provide additional information about IMAX's restatement beyond that provided in the March 16 Press Release. (James Report at ¶157.) Rather, that announcement was made in compliance with Ontario requirements that companies update investors every two weeks on the status of their filing delays. (James Report atl ¶ 151.) The July 20 Press Release announced the completion of the restatement. [14] Because the relevant "truth" had been revealed on March 16, 2007, the July 20 Press Release was not a corrective disclosure but merely a republication of what the market already knew.

Because Snow Capital provides no evidence that the losses following the August 9 Press Release are, in whole or in part, attributable to the alleged misstatements of PwC-Canada, and because the "truth" was already disseminated in the market prior to the March 29 and July 20 Press Releases, Snow Capital has not met its burden of proving loss causation by a preponderance of the evidence. Therefore, Snow Capital is not entitled to the fraud-on-the-market presumption of reliance and the motion for

class certification should be denied. *See, e.g., In re IPO,* 471 F.3d at 43 ("Without the Basic presumption, individual questions of reliance would predominate over common questions.")

D. If The Court Grants Certification, The Class Period Should Extend No Later Than August 9, 2006.

Even if a class is certified, the class period should end no later than August 9, 2006. On that date IMAX announced its second quarter earnings. In that same announcement, IMAX disclosed that it had not found a merger partner at the desired valuation and that it was in the process of responding to an informal SEC inquiry regarding revenue recognition, "including [IMAX's] application of multiple element arrangement accounting in its revenue recognition for theatre systems." (Aug. 9 Press Release.) IMAX further disclosed that it believed its revenue recognition was in accordance with GAAP and that PwC-Canada supported that position. [15] *(Id.)* After this announcement, IMAX's stock price fell by $3.90, or approximately 40%.

As a result, those who purchased IMAX shares after August 9, 2006 cannot allege any damages, and, even if they could, issues of loss causation would predominate over any common questions. Originally, all plaintiffs and movants for lead plaintiff "agree[d] that the relevant class period ended on August 9, 2006." *Kaplan v. Gelfond,* 240 F.R.D. 88, 91 (S.D.N.Y. 2007). Only later did Snow Capital allege a longer class period ending on July 20, 2007. (Dkt. 46 at ¶ 21.) It is well established that in a securities class action, the class period may not extend after curative information has been revealed. *Alaska Elec. Pension Fund v. Pharmacia, Corp.,* No. 03-1513 (RET), 2007 WL 276150, at *3 (D.N.J. Jan. 25, 2007) ("Curative information retracts or dispels the alleged misinformation, or puts the investor on inquiry notice of the alleged fraud, making further reliance on the original statements by investors unreasonable.").

In the Complaint, Snow Capital does not identify a single corrective disclosure that occurred after August 9, 2006 and caused a drop in IMAX's share price - because there is none. After IMAX's July 20, 2007 restatement (the "Restatement"), the price of IMAX shares increased from $4.40 at close on July 19, 20007 to $4.85 at close on July 20, 2007 and then to $4.98 at close on July 23, 2007, the next trading day. (Exh. J to the Lunn Dec.) Therefore, if a class is certified, the class period should not extend beyond August 9, 2006. [16]

E. If The Court Grants Certification, In-and-Out Shareholders Who Bought Prior To August 9, 2006 Should Be Excluded From The Class Because They Cannot Prove Loss Causation As A Matter Of Law

As the class is currently pled, it could be read to include in-and-out shareholders who bought and sold prior to August 9, 2006. The first corrective disclosure alleged by Plaintiff is the IMAX press release of August 9, 2006. Thus, purchasers who bought and sold before August 9, 2006- even if they suffered a loss- not hold over any corrective disclosure pled in the Complaint and therefore there is no allegation in the Complaint that such shareholders suffered a loss as a result of any alleged misrepresentation. For such shareholders, any alleged price inflation built into the stock price at the time of purchase was still present at the time of sale. Consequently, class members who sold prior to August 9, 2006 will not be able to show loss causation as a matter of law because the absence of a prior corrective disclosure pled in the Complaint is fatal to a plaintiffs claim. See Dura, 544 U.S. at 342-43; Lentell, 396 F.3d at 175. Nor does Snow Capital allege that information available before August 9, 2006 "exposed the public to the truth about [the alleged] misstatements." *In re Flag Telecom,* 574 F.3d at 41. Thus, the in-and-out shareholders should be excluded from the class.

F. If The Court Grants Certification, Foreign Purchasers Of Shares Traded On A Foreign Exchange Must Be Excluded From The Class Because The Court Does Not Have Subject Matter Jurisdiction Over Such Claims

The Securities Exchange Act, under which Snow Capital brings this case, is silent as to its territorial application. Therefore, "courts have developed two tests for determining subject matter jurisdiction over foreign transactions." *Nathan Gordon Trust v. Northgate Exploration, Ltd.,* 148 F.R.D. 105, 108 (S.D.N.Y. 1993). Under the conduct test, "a federal court has subject matter

jurisdiction if: (1) the defendant's activities in the United States were more than 'merely preparatory' to a securities fraud conducted elsewhere ... and (2) these activities or culpable failures to act within the United States 'directly caused' the claimed losses." *Itoba Ltd., v. LEP Group, PLC,* 54 F.3d 118, 122 (2d Cir. 1995). Under the effects test, a federal court has subject matter jurisdiction over a foreign transaction "where illegal activity abroad causes a 'substantial effect' within the United States." *Nathan Gordon Trust,* 148 F.R.D. at 108 (quoting Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000).

Here, the activities forming the basis of the claims asserted in the Complaint satisfy neither the conduct nor effects test for subject matter jurisdiction over a foreign transaction. In the Motion for Certification, Snow Capital provides no legal of factual support for the inclusion of foreign purchasers who purchased IMAX shares on the TSE. Although a handful of courts have certified securities class actions whose class members included foreign purchasers, such cases were predicated on fraudulent transactions with U.S. customers or U.S. acquisitions, [17] neither of which are alleged here. Rather, the allegations in the Complaint focus on IMAX's revenue recognition on worldwide theater installations. The alleged misstatements - the release of financial results and related press releases - were all issued from the headquarters of IMAX in Ontario. PwC-Canada conducted the bulk of its audit work at IMAX's Ontario headquarters and at its own offices in Toronto so essentially all of its activities were extra-territorial as well. As in *Morrison v. Nat'l Australia Bank, Ltd.,* the alleged "actions taken and actions not taken" by IMAX and PwC-Canada and the Individual Defendants outside of the United States are "significantly more central to the [allegations] and more directly responsible for the harm to investors" than any activity that occurred in the United States. 547 F.3d 167, 176 (2d Cir. 2008). [18]

Thus, Snow Capital has not met and cannot meet its burden to prove subject matter jurisdiction over the foreign transactions and this Court should exclude foreign purchasers who purchased IMAX securities on the TSE from any certified class.

III. CONCLUSION

For the reasons stated above, Plaintiffs Motion for Class Certification should be denied in its entirety. Alternatively, should the Court grant Plaintiffs Motion in whole or in part, the Court should certify a class that excludes foreign purchasers of IMAX securities on the Toronto Securities Exchange and a class period ending on August 9, 2006.

Dated: June 10, 2010

Respectfully Submitted,

By: /s/ Samantha A. Lunn

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Footnotes

1 Defendants IMAX Corporation ("IMAX"), Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce and Kathryn A. Gamble (collectively, the "IMAX Defendants") have filed a separate opposition to Plaintiffs' Motion for Class Certification (the "IMAX Opp."). PwC-Canada hereby joins in and incorporates the IMAX Opp. in all respects.

2 Unless otherwise indicated, all emphasis is added and all internal quotations and citations omitted.

4 "The defendant need not show at the certification stage that the unique defense will prevail, only that it is meritorious enough to require the plaintiff to 'devote considerable time to rebut the unique defense.'" *Hallet v. Li & Fung, Ltd.,* No. 95 Civ. 8917, 1997 WL 621111 at *3 (S.D.N.Y. Oct. 6, 1997) (quoting *Landry v. Price Waterhouse,* 123 F.R.D. 474,476 (S.D.N.Y. 1989)).

5 Snow Capital seeks certification of a class of "all persons and entities who purchased or otherwise acquired IMAX common stock from February 27, 2003 through July 20, 2007." (Dkt. 125 at 2.) Such proposed class would necessarily include persons who purchased after November 3, 2005 and who, unlike Snow Capital, would be able to recover damages, if any, for artificial inflation as a result of post-November 3, 2005 alleged misstatements.

6 *See also* IMAX Opp. at pp. 7-12.

7 *See also* IMAX Opp. at pp. 12-15.

8 In addition, all such opinions, as of the time of this filing, except for In re AIG, Inc. Sec. Litig., 265 F.R.D. 157 (S.D.N.Y. 2010), were issued prior to the Second *Circuit's ruling in Teamsters Local and In re Flag Telecom,* both of which cemented the "preponderance of the evidence" standard at the class certification stage.

9 Exhibit E to the Lunn Dec.

10 Exhibit F to the Lunn Dec.

11 Exhibit G to the Lunn Dec.

12 [text redacted in copy]

13 "The announcement that IMAX had not found a buyer at the desired valuation level was viewed very negatively by the market, which was expecting a converse announcement, namely the announcement of a potential buyer ... Correspondingly, the lack of a buyer announcement and announcement that IMAX would search for buyers at a lower price negatively impacted market expectations and likely triggered the majority of the stock price decline on August 10, 2006."

14 Not surprisingly, IMAX's stock price actually increased in response to the July 20 Press Release - an indication that the market had expected the restatement to have a larger impact on IMAX's future cash flows than, in fact, it had. (James Report ¶160.)

15 IMAX went on to specify that its application of MEA accounting was related to theater systems installed in 2005 and 2006: "The Company recognized revenue in the fourth quarter of 2005 on 10 theatre installations in theatres which did not open in that quarter, and

in seven of those cases, revenue associated with the screen element of the system was deferred until the final screen was installed ... This accounting policy has similarly been applied to one theatre installation in the second quarter of 2006." (Aug. 9 Press Release)

16 At a minimum, the class period certainly should not extend past August 11, 2006, when the first complaint was filed in this action. *See In re Zyprexa Prods. Liab. Litig.,* 253 F.R.D. 69, 196 (E.D.N.Y. 2008).

17 In *In re Nortel Networks Corp. Sec. Litig.,* the Court found subject matter jurisdiction existed over the foreign transactions based on allegations that "[d]efendants were extending vendor financing to numerous U.S. customers that defendants knew to be uncreditworthy, so as to artificially inflate the Company's revenues." No. 01 Civ. 1855, 2003 WL 22077464 at *8 (S.D.N.Y. Sept. 8, 2003). In *In re Gaming Lottery Sec. Litig.,* the Court certified a class including foreign purchasers because the allegations in the complaint "revolve [d] around [defendant[s] **acquisition of United States companies** [and]... its activities within [the U.S.] borders are the very factual predicates of fraud which lie at the heart of plaintiffs' case." 58 F. Supp. 2d 62, 74 (S.D.N.Y. 1999).

18 Indeed, a purported class action against IMAX and certain of its officers and directors, brought by Canadian purchasers of IMAX stock, is pending in Ontario. PwC-Canada respectfully requests that the Court take judicial notice of the pendency of that action, *Silver v. IMAX Corporation, et al.,* Case No. CV-06-3257-000, in the Superior Court of Justice in Ontario.

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IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE

NORTH GEORGIA TEXTILE SUPPLY COMPANY, INC.,	)	
Plaintiff,	)	**CASE NO. 13C1000**
v.	)	**DIVISION II**
RSS INSURANCE, LLC, DANIEL G. FULGHUM, NORTH POINT UNDERWRITERS, INC., and NAVIGATORS INSURANCE COMPANY	)	**JURY DEMAND**
Defendants.	)	

DEFENDANT NAVIGATORS INSURANCE COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Navigators Insurance Company ("Navigators"), through counsel, respectfully replies as follows in support of its Motion for Summary Judgment on the Complaint filed by North Georgia Textile Supply Company, Inc. ("NGTS"):

I. PRELIMINARY STATEMENT

After spending 12 of the 27 pages of its Combined Response telling NGTS's "version" of the story, dominated by irrelevant facts and conjecture, the remainder of the Combined Response is an attempt to create just enough confusion on the clear issues here to skate past summary judgment. In fact, the small portion of the Combined Response that is even applicable to Navigators' Motion has no impact on that motion's merit. Despite NGTS's attempt, there is no valid argument that Georgia law does not apply to the substantive contract and tort claims in this case. By its own decision to file suit in Tennessee and its strenuous attempts to have this controversy decided under Tennessee law, Plaintiff concedes that it sees those differences and

clearly prefers its chances under Tennessee law.[1] Simply because Plaintiff argues that the outcome under a particular set of facts ends in a similar result under two states' laws does not mean that there is no conflict. "To create a variation sufficient to trigger a choice of law analysis, the differences among the laws of the various states need not be great, because even nuances can be significant to the resolution of issues raised in the case."[2] Even so, regardless of what law applies to these facts, Navigators is entitled to summary judgment and nothing in Plaintiff's Combined Response creates an issue of fact that needs be resolved at trial.

II. ARGUMENT

1. There Is A Conflict of Law In This Case Between Georgia and Tennessee.

In its Combined Response, NGTS asserts that, because "no conflict exists," Tennessee law should apply to this case. This statement is mere sophistry, however, as the laws of Tennessee and Georgia do conflict in this case, and with potentially significant effect upon Navigators' defenses. NGTS knows this, of course, and thus has argued for the application of Tennessee law, which it deems more favorable to its claims.

a. The "Duty To Read" Standard Differs Under Tennessee and Georgia Law.

Navigators agrees with NGTS that both Tennessee and Georgia law impose a stringent duty on the insured to read his policy.[3] NGTS concedes and Navigators agrees that NGTS failed to meet its general "duty to read" requirements under both Georgia and Tennessee law.[4]

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[1] In the Combined Response, NGTS argues that Defendants have changed their position during this controversy on the applicable substantive law. In fact, it is counsel for Plaintiff who has changed its position, evidenced by the fact that the first demand letter in this case, attached as Exhibit A, was sent citing substantive law of Georgia.

[2] Gov't Employees Ins. Co. v. Bloodworth, No. M2003-02986-COAR10CV, 2007 WL 1966022, at *30 (Tenn. Ct. App. June 29, 2007) (citing In re Am. Medical Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996); Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir.1995)).

[3] See Webber v. State Farm Mut. Auto. Ins. Co., 49 S.W.3d 265, 274 (Tenn. 2001); MacIntyre & Edwards, Inc. v. Rich, 599 S.E.2d 15, 17 (Ga. App. 2004).

[4] See NGTS's Combined Response in Opposition to Motions for Summary Judgment by Defendants RSS, Fulghum, North Point and Navigators ("Combined Response"), p. 14–15.

Comparing Tennessee and Georgia law, the exceptions to the duty to read rule vary broadly. Georgia courts have enunciated a clear exception to the insured's duty to read:

> (1) when the agent holds himself out as an expert and the insured reasonably relies on the agent's expertise to identify and procure the correct amount or type of insurance, and (2) where the evidence reflects a "special relationship of trust or other unusual circumstances which would have prevented or excused [the] plaintiff . . . to exercise ordinary diligence to ensure that no ambiguity existed between the requested insurance and that which was issued."[5]

Georgia courts have also articulated an exception to this exception. If an examination of the policy would have made it "readily apparent" that the requested coverage was not contained in the policy, the exception to the duty to read does not apply, and even an agent who acted in a fiduciary capacity and gave expert advice, relied upon by the insured, has no liability.[6]

In contrast, Tennessee case law is not as comprehensive and, more specifically, has not created the same exception to the duty to read as Georgia law, nor enunciated an "exception to the exception" whatsoever. Courts applying Tennessee law have noted that the "general principle which governs insurance policies is that the insured is obligated to read the policy and is bound to its contents."[7] In some circumstances, Tennessee courts have applied an exception to the duty to read in cases in which an insurance agent assumes a duty of care to recommend and select coverage.[8] Unlike Georgia law, however, Tennessee courts have never asserted a conjunctive exception rule in which the movant must prove (1) that the agent held himself out as an expert and the insured reasonably relies on the agent's expertise and (2) that there is evidence of a

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[5] Rain and Hail Ins. Services, Inc. v. Vickery, 618 S.E.2d 111, 117 (Ga. App. 2005) (quoting Heard v. Sexton, 532 S.E.2d 156, 158 (Ga. Ct. App. 2000)) (internal citations omitted).
[6] Atlanta Women's Club, Inc. v. Washburne, 207 Ga. App. 3, 4–5 (Ga. Ct. App. 1992).
[7] Gieringer v. Cincinnati Ins. Companies, No. 3:08-CV-267, 2011 WL 540526, at *4 (E.D. Tenn. Feb. 4, 2011).
[8] See Barrick v. State Farm Mut. Auto. Ins. Co., No. M20 13-01773-COA-R3CV, 2014 WL 2970466 (Tenn. Ct. App. June 27, 2014).

"special relationship of trust or other unusual circumstances which would have prevented or excused [the] plaintiff . . . . to exercise ordinary diligence. . . ."[9]

In even further contrast, there is no exception to the exception of the general duty to read under Tennessee law. While Georgia law clearly states that if an examination of the policy would have made it "readily apparent" that the requested coverage was not contained in the policy then the exception to the duty to read does not apply – Tennessee law is devoid of such a rule. In fact, NGTS's only case law citation that an "exception to an exception" rule exists in Tennessee is to Morrison v. Allen, 338 S.W.3d 417, 429-430, 455 (Tenn. 2011).[10] Morrison makes no such assertion concerning a "readily apparent" exception to the exception. In fact, directly contrary to NGTS's assertion, despite noting that the insurance application was clear, the Morrison court found that because of the insured's reliance on their agent, they were not bound by the issued policy that they failed to read.[11]

It is undisputed that North Georgia did not read the Policy. The relevant terms of the Policy were readily apparent and the facts of the case at bar do not meet any of the exceptions to the duty to read under Georgia or under Tennessee. Therefore, Navigators is entitled to judgment as a matter of law on all NGTS's claims, under the legal precedent of either state.

b. *Respondeat Superior* Standard Differs Under Georgia and Tennessee Law.

In the Combined Response, NGTS does not address the issue of conflicts of law as it relates to *respondeat superior*, quickly glossing over this issue. However, the *respondeat superior* standard differs in regards to insurance providers under Tennessee and Georgia law. Tenn. Code Ann. § 56-6-115(b) states that:

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[9] Compare Rain, 618 S.E.2d at 117 with Barrick, 2014 WL 2970466 (Tenn. Ct. App. June 27, 2014); Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508, 532 (Tenn. 2012); Peters v. Burgess, 416 S.W.3d 394, 401 (Tenn. Ct. App. 2011); Gieringer, 2011 WL 540526, at *4; Webber, 49 S.W.3d 265, 274 (Tenn. 2001).

[10] See Combined Response, p. 16, footnote 72.

[11] Morrison, 338 S.W.3d at 429.

> An insurance producer who solicits or negotiates an application for insurance shall be regarded, in any controversy arising from the application for insurance or any policy issued in connection with the application between the insured or insured's beneficiary and the insurer, as the agent of the insurer and not the insured or insured's beneficiary. This subsection (b) shall not affect the apparent authority of an agent.

In contrast, under Georgia law, "to impose liability under *respondeat superior*, some relationship must exist between the principal and agent or employer and employee."[12] In direction opposition to Tenn. Code Ann. §56-6-115(b), under Georgia law, an independent insurance agent or broker is generally considered an agent of the insured, not insurer.[13]

In determining who the principal of an insurance agent is under Georgia law, courts often consider whether the insurance agent had apparent authority to act for an insurer. In order to impose liability based on apparent agency, the apparent principal must have held out the apparent agent as its agent, and the insured's justifiable reliance on that representation must have led to the insured's injury.[14] Thus, Tennessee and Georgia law regarding the agency standard between the insurer and the insured differs considerably.

It is undisputed that Mr. Fulghum, RSS, and North Point are not and were not agents of Navigators under Georgia law. As set forth in Navigators' Motion for Summary Judgment, there is no contractual relationship between Navigators and Mr. Fulghum or RSS. The Broker Agreement between Navigators and North Point expressly states that North Point is not Navigators' agent unless required by state law. North Point's business model, in fact, is to act as an intermediary with multiple insurance carriers, procuring quotes from multiple carriers and allowing agents and customers to select the quotes they prefer.

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[12] Herring v. Harvey, S.E.2d 460, 463 (Ga. Ct. App. 2009) (quoting Gaskins v. Gaona, 209 Ga. App. 322, 323(2) (Ga. Ct. App. 1993)).
[13] European Bakers Ltd. v. Holman, 338 S.E.2d 702, 704 (Ga. Ct. App. 1985).
[14] Kirby v. Northwestern Nat'l Cas. Co., 445 S.E.2d 791, 796 (Ga. Ct. App. 1994) (quoting Whitaker v. Zirkle, 374 S.E.2d 106, 109 (Ga. Ct. App. 1988) (disapproved of on other grounds by Cleaveland v. Gannon, 667 S.E.2d 366, 370 (Ga. 2008)).

Turning to apparent agency, Navigators never communicated directly with North Georgia before the Fire, nor did it hold Mr. Fulghum, RSS, or North Point out as Navigators' agent. Under Georgia law, Navigators is entitled to judgment as a matter of law on any theories of agency or respondeat superior.

2. Georgia Law Applies In This Case Under The Most Significant Relationship Test.

Because a conflict of laws exists, the court must look toward Tennessee conflicts law to determine which law applies. NGTS has not disputed that, for contract claims on an insurance policy that does not contain a choice of law clause, Tennessee courts apply the law of the state in which the policy was issued and delivered. NGTS's contract claims, accordingly, should be considered by this Court under Georgia law.

For tort claims, Tennessee courts follow the Restatement approach of identifying the state with the most significant relationship to the dispute.[15] NGTS asserts that Tennessee law should apply because certain, but not all, of its alleged claims occurred in Tennessee.[16] However, the *lex loci delicti* standard that NGTS has asked this Court to follow was cast aside and declared "outmoded and increasingly irrelevant" by the Tennessee Supreme Court.[17] Rather, under the appropriate "most significant relationship test," the determining factor is which state has "the most significant relationship **to the occurrence and the parties.**"[18] As Navigators has asserted in its Memorandum of Law in Support of Summary Judgment ("Navigators' Memorandum of Law"), a balance of the Restatement Factors should lead this Court to conclude that Georgia law should apply to the tort claims in this case.[19]

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[15] Bloodworth, 2007 WL 1966022, at *28.
[16] See Combined Response, p. 27.
[17] Hataway v. McKinley, 830 S.W.2d 53, 57 (Tenn. 1992).
[18] Id. at 59 (emphasis added).
[19] See Navigators' Memorandum of Law, p. 11–12.

3. Plaintiff Raises No Material Issue of Fact Under Georgia Law.

A surprisingly small portion of NGTS' Combined Response is relevant to the claims against Navigators and none of the arguments or authorities create a material issue of fact that would prevent summary judgment in favor of Navigators.

a. Plaintiff's Facts Are Not Disputed And Are Irrelevant.

First, NGTS attempts to dispute the fact that the language of the Policy was plain and unambiguous with irrelevant testimony regarding an unchecked box on the Schedule of Coverages.[20] Rather, it is the Location Schedule on the final page of the Schedule of Coverages, as retyped in Navigators' Memorandum of Law, that plainly and unambiguously lists the Policy limits for building and for business personal property at the respective location.[21] The Location Schedule was provided to Navigators, attached to the Application[22] and incorporated by reference into the Quote.[23] The limits in the Quote and the Policy were set using the information provided on the Application. The Location Schedule was included in the issued Policy directly behind the schedule of Coverages.[24] A reasonable person could not have read the Location Schedule in conjunction with the entirety of the Policy and been unclear about the respective policy limits for building and business personal property at each location.[25]

NGTS further attempts to cast doubt by disputing the meaning of the phrase "business personal property."[26] As an initial matter, NGTS's point is moot as Navigators paid out the Policy limits for the business personal property at each damaged location. There was no

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[20] See Combined Response, p. 17–18.
[21] See the Policy, attached to Navigators' Motion for Summary Judgment as Exhibit A-3.
[22] See Navigators' Motion for Summary Judgment, Exhibit A1.
[23] See Navigators' Motion for Summary Judgment, Exhibit A1.
[24] See the Policy, attached to Navigators' Motion for Summary Judgment as Exhibit A-3.
[25] Partin v. Georgia Farm Bureau Mut. Ins. Co., 770 S.E.2d 38, 41–42 (Ga. Ct. App. 2015 reconsideration denied (Apr. 10, 2015) (like the rules of normal contract construction, insurance policies are considered in their whole); Garrison v. Bickford, 377 S.W.3d 659, 664 (Tenn. 2012) (same).
[26] See Combine Response, p. 17.

ambiguity related to the business personal property when NGTS filed its insurance claim under the Policy for its lost business personal property, or when Navigators paid out the Policy limits under the claim for business personal property. Notwithstanding, this well-defined industry term is left intentionally broad in commercial insurance contracts.[27] Pragmatically, the constant flux of inventory and equipment during the course of a year would necessitate countless amendments to the policies, if as NGTS apparently desires, each individual piece of equipment and inventory item were listed therein. The purpose of business personal property insurance is to cover all the business personal property of an insured up to its policy limits unless specifically excluded.[28]

b. Plaintiff Argues Non-Existent Duties.

NGTS also seeks to conjure up fictitious legal duties owed by Navigators to the insured. First, NGTS alleges that Navigators failed NGTS because the Quote and Policy did not mirror the Application. Under both Georgia and Tennessee law, an insurance provider has no duty to respond to an application with an identical quote. Rather, the courts have held that a quote is an offer which the insured can choose to accept or reject.[29] NGTS has not and cannot cite any case law that creates such a duty, because insurance contracts are interpreted under normal rules of

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[27] See, e.g., Rothenberg v. Liberty Mut. Ins. Co., 153 S.E.2d 447, 447–448 (Ga. Ct. App. 1967); Burt, Burt, & Rentz Ret. Pension Trust v. Dougherty Cnty. Tax Assessors, 256 Ga. App. 648, 650, 569 S.E.2d 557, 559 (Ga. Ct. App. 2002) (Georgia counties tax "business personal property"); Finchum v. Patterson, No. M200700559COAR3CV, 2008 WL 2019408, at *1 (Tenn. Ct. App. May 9, 2008); Childress v. Union Realty Co., No. W1998-00658-COA-R3CV, 1999 WL 1336047, at *2 (Tenn. Ct. App. Dec. 15, 1999); see also, e.g., EMC INSURANCE, "Business Insurance – Property Descriptions," https://www.emcins.com/businessIns/General/Property.aspx (last visited June 3, 2015); THE CINCINNATI INSURANCE COMPANIES, "Protection for Your Commercial Property," https://www.cinfin.com/business-insurance/commercial-package-policy/property-insurance.aspx (last visited June 3, 2015).

[28] Id.

[29] Whitmire v. Colonial Life & Acc. Ins. Co., 323 S.E.2d 843, 844 (Ga. Ct. App. 1984) (internal citations omitted); see also Cohran v. Liberty Mut. Ins. Co., 258 Ga. 341, 342, 368 S.E.2d 751, 752 (1988).

contract construction.[30] Tennessee law is in accord with Georgia law, holding that there is no duty for an insurance provider to respond to an application with an identical quote.[31]

Likewise, NGTS asserts that Navigators owed it a duty of care in processing the Application and to investigate whether the policy limits applied for would adequately insure NGTS's property.[32] This assertion is false and contrary to both Georgia and Tennessee law.

NGTS cites no Georgia case law for the existence of a "duty of care" or "duty to investigate." Indeed, there is no such case law and no such duties in Georgia.[33] Similarly, under Tennessee law there is no duty of care of an insurer or a duty to investigate an insurance application.[34] The Tennessee case law cited by NGTS does not support the contention that a duty to investigate an insurance application exists.[35] Estate of Wilson v. Arlington Auto Sales, Inc., 743 S.W.2d 923, 929 (Tenn. Ct. App. 1987), cited in NGTS's Combined Response, does not require the insurer to investigate an application of the insured. Rather, in this case the insurer was held liable under the Tennessee Consumer Protection Act for bad faith denial a claim prior to investigating the statements made by its agent.[36] The case at bar is not a bad faith case. The second case NGTS provides as "authority" for a duty of care is Barrick, and NGTS provides no page-specific citation. It is unclear what NGTS is relying on in this case to support its assertions

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[30] See Banks v. Bhd. Mut. Ins. Co., 686 S.E.2d 872, 874 (Ga. Ct. App. 2009)

[31] Woodfin v. Neal, 65 S.W.2d 212, 216 (Tenn. Ct. App. 1933 (a quote is an offer which the insured can choose to accept or reject); Travelers Indem. Co. of Am. v. Moore & Associates, Inc., 216 S.W.3d 302, 305 (Tenn. 2007) (insurance contract are interpreted under the normal rules of contract construction); see also Brewer v. Vanguard Ins. Co., 614 S.W.2d 360 (Tenn. Ct. App. 1980) (holding that when an insurer added terms into a policy renewal that were not assented to, the terms of the policy were reverted to the terms of the previous year that were mutually agreed upon).

[32] See Combined Response, p. 24.

[33] Colony Insurance Company v. 9400 Abercorn, LLC, 2012 WL 3985088, at * (S.D. Ga. Sept. 12 2012) (citing Avemco Ins. Co. v. Rollins, 380 F.Supp. 869, 873 (N.D.Ga.1974); see also Graphic Arts Mut. Ins. Co. v. Pritchett, 220 Ga. App. 430, 432 (Ga. Ct. App. 1995) ("[A]n insurer is entitled to rely on statements of an applicant as true, without conducting an independent investigation.").

[34] Green v. Mut. of Omaha Ins. Co., No. 10-2487, 2011 WL 112735, at *9 (W.D. Tenn. Jan. 13, 2011) aff'd, 481 F. App'x 252 (6th Cir. 2012).

[35] See Combined Response, p. 24, ft. 100.

[36] Estate of Wilson, 743 S.W.2d at 932–933.

as Barrick does not touch on any issues relating to an insurer's duty to investigate. Rather, the holding in Barrick is that an insurance agent can assume a duty of care, but there is no such assumed duty for an insurer, absent vicarious liability.

NGTS indicates in its Combined Response that Navigators was negligent by issuing the Quote based on an unsigned application.[37] NGTS only relies on its own insurance expert's report regarding industry protocol in making this assertion.[38] Unfortunately for NGTS, neither Georgia not Tennessee law establishes such a legal requirement that an insurer can only provide a quote or issue an inland marine insurance policy based on a signed application. In fact, courts in both states have considered unsigned insurance applications and none have established such a duty.[39]

Finally, NGTS asserts in its Combined Response that all Defendants assumed responsibility for completing the application of insurance for NGTS.[40] As an initial point, this is the first time NGTS has argued that Navigators has assumed a duty of care. NGTS made no such allegation in its Complaint and cannot raise such a claim on Reply to a Summary Judgment Motion.[41] Further, there is absolutely no evidence whatsoever that Navigators assumed any duty related to NGTS in any way. It is undisputed that Mr. Fulghum, RSS, and North Point are not and were not agents of Navigators under Georgia law. There is no contractual relationship between Navigators and Mr. Fulghum or RSS. Navigators never communicated directly with North Georgia before the Fire, nor did it hold Mr. Fulghum, RSS, or North Point as Navigators'

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[37] See Combined Response, p. 25.
[38] Id.
[39] See, e.g., Estate of Wilson, 743 S.W.2d at 931; Ga. Code Ann. § 33-24-6 (West) and Ga. Code. Ann. § 33-24-1 though § 33-24-98 (generally) (noting that the only statutory requirement that an insured sign an application is in regard to life insurance); Loveless v. Life & Cas. Ins. Co. of Tennessee, 147 S.E.2d 835, 836 (Tenn. 1966) (indicating that oral acceptance is acceptable).
[40] See Combined Response, p. 12–13.

[41] See Complaint, Causes of Action ¶¶ 27-58.

agent. Under Georgia law, Navigators is entitled to judgment as a matter of law on any theories of agency or assumption of duties.

4. Navigators Is Not Liable Under Any Georgia Law *Respondeat Superior* Claim.

Navigators is not liable under the principles of *respondeat superior*. Under Georgia law, Navigators was not in an agency or *respondeat superior* relationship with Mr. Fulghum, RSS or North Point. As previously stated, "to impose liability under *respondeat superior*, some relationship must exist between the principal and agent or employer and employee."[42]

Mr. Fulghum, RSS, and North Point are not and were not agents of Navigators under Georgia law. There is no contractual relationship between Navigators and Mr. Fulghum or RSS.[43] The Broker Agreement between Navigators and North Point expressly states that North Point is not Navigators' agent unless required by state law.[44] North Point's business model, in fact, is to act as an intermediary with multiple insurance carriers, procuring quotes from multiple carriers and allowing agents and customers to select the quotes they prefer.[45]

Turning to NGTS's assertions of apparent agency, in determining who the principal of an insurance agent is under Georgia law, courts often consider whether the insurance agent had apparent authority to act for an insurer. In order to impose liability based on apparent agency, the apparent principal must have held out the apparent agent as its agent, and the insured's justifiable reliance on that representation must have led to the insured's injury.[46] Navigators never communicated directly with NGTS before the Fire, nor did it hold Mr. Fulghum, RSS, or North

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[42] Herring, S.E.2d 460, 463 (Ga. Ct. App. 2009) (quoting Gaskins, 209 Ga. App. at 323(2).

[43] Admitted by NGTS in its Response to Navigators' Statement of Undisputed Facts, ¶ 9.
[44] Admitted by NGTS in its Response to Navigators' Statement of Undisputed Facts, ¶ 10.
[45] Admitted by NGTS in its Response to Navigators' Statement of Undisputed Facts, ¶ 6.
[46] Kirby v. Northwestern Nat'l Cas. Co., 445 S.E.2d 791, 796 (Ga. Ct. App. 1994) (quoting Whitaker v. Zirkle, 374 S.E.2d 106, 109 (Ga. Ct. App. 1988) (disapproved of on other grounds by Cleaveland v. Gannon, 667 S.E.2d 366, 370 (Ga. 2008)).

Point out as Navigators' agent.[47] As in European Bakers, the case at bar involves an independent insurance agent or broker and such an agent is generally considered agent of insured, not insurer.[48] Therefore, under Georgia law, Navigators is entitled to judgment as a matter of law on any theories of agency or *respondeat superior*.

III. CONCLUSION

For the reasons set forth above, Navigators respectfully requests the entry of summary judgment in its favor, that such judgment be final, and for such other relief as may be just.

Respectfully submitted,

HUSCH BLACKWELL LLP

By: _____

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Attorneys for Navigators Insurance Company

[47] See Restaino Aff. ¶7 attached to Navigators Motion for Summary Judgment as Exhibit A; E. Ledford Dep. 213:21-24, 224:18-226:4.
[48] European Bakers, 338 S.E.2d at 704.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served by first class U.S. Mail, on the 5th day of June, 2015 upon the following:

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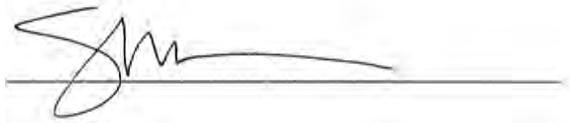

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March 11, 2013

VIA U.S. MAIL
VIA E-MAIL: inlandmarineclaims@navg.com
VIA FACSIMILE: 212-613-4301

Navigators Management Company, Inc.
One Penn Plaza
32nd Floor
New York, NY 10119

Re: Your Insured: North Georgia Textile Supply Company ("NGT")
July 2012 Fire Loss at NGT's Summerville, Georgia Facility
Your Policy Number: NC11ILM018090

Dear Sir or Madam:

This law firm represents your insured, North Georgia Textile Supply Company ("NGT").

In July 2012, NGT experienced a catastrophic fire loss and has made a claim under Navigators Insurance Company Policy No. NC11TLM018090, Policy Period November 15, 2011 – November 15, 2012 ("Navigators Policy" or the "Policy").

It is our understanding that Navigators has requested that NGT execute a general release of claims against Navigators before it will release final payment of funds due to NGT under the Policy. NGT has no obligation to sign any release of claims it may have against Navigators. Rather, Navigators is obligated by contract and by law to pay a loss covered by the Policy.

Indisputably, NGT has suffered a covered loss under the Navigators Policy. Navigators confirmed this by making a partial payment of $1,202,000 to NGT based on the losses it suffered due to the July 2012 fire. Your adjuster, Darlene McDow, tells NGT that the amount of coverage under the Navigators Policy for NGT's losses is $2,572,000, leaving a balance of at least $1,370,000 owing to NGT. Ms. McDow also estimates that, as a result of the July 2012 fire, NGT's losses of buildings and personal property exceed $6.8 million – nearly three times the coverage that Ms. McDow deems available to NGT under the Policy. We also note that, although the loss occurred nearly eight months ago, Navigators has never requested that NGT provide a proof of loss for the remaining amount NGT is owed under the Policy. And NGT has complied with all Navigators' requests for information related to NGT's claim under the Policy.

EXHIBIT
A
tabbies

To the extent that Navigators is withholding payment of the $1,370,000 that is due to NGT under the Policy until NGT executes a release of claims against Navigators, such refusal to pay NGT's covered loss is improper under Georgia law. Moreover, to our knowledge, Navigators has no other basis for withholding payment of the $1,370,000 due to NGT under the Policy. Pursuant to Ga. Code Ann. § 33-4-6(a), NGT demands prompt payment of the $1,370,000 owing to NGT under the Navigators Policy along with all other amounts that are due to NGT as a result of it having suffered a loss covered by the Policy.

You should remit payment directly to NGT at the following address:

North Georgia Textile Supply Company
Attn: Edward Ledford
P.O. Box 1067
Lafayette, Georgia 30728

If Navigators refuses to remit full payment within sixty (60) days after this demand, NGT will consider commencing an action for bad-faith refusal to pay a covered loss and seek all remedies available to it under contract and the law, including statutory penalties and attorneys' fees.

Please contact me if there is anything we need to discuss. Otherwise, we will look forward to prompt resolution of this matter.

Sincerely,

Bruce C. Bailey

BCB/DAL/rmb

cc: Edward J. Barbosa (via email: Edward_Barbosa@swissre.com)
William R. Hannah (via email)
D. Aaron Love (via email)

2016 WL 1730057 (Tenn.Ct.App.) (Appellate Brief)
Court of Appeals of Tennessee.

HITACHI CAPITAL AMERICA CORP., Plaintiff-Intervenor/Appellant,
v.
COMMUNITY TRUST & BANKING COMPANY, Plaintiff/Appellee,
v.
Travis L. SHIELDS, Thomas A. Dobson, Joshua O. Dobson, and Southern Group, LLC, Defendants,
v.
CORNERSTONE COMMUNITY BANK, Rule 19 Defendant/Appellee.

No. E2015-02121-COA-R3-CV.
April 21, 2016.

Chancery Court of Hamilton County Case No.: 10-0230, Part I

Brief of Appellee Cornerstone Community Bank

Samantha A. Lunn, TN BPR #30473, Caleb T. Holzaepfel, TN BPR #33356, Husch Blackwell LLP, 736 Georgia Avenue, Suite 300, Chattanooga, Tennessee 37402, Phone: (423) 266-5500, Fax: (423) 266-5499, Email: samantha.lunn @huscblackwell.com, Email: caleb.holzaepfel@huschblackwell.com, for Cornerstone Community Bank.

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***ii TABLE OF AUTHORITIES**

CASES

*2 *STATEMENT OF THE CASE*

1. On September 27, 2010, the Trial Court issued an Order Granting Motion for Summary Judgment whereby Cornerstone was awarded a judgment ("*Judgment* ") against Southern Group, LLC, Travis L. Shields, Thomas A. Dobson, and Joshua Dobson (the "*Southern Group Defendants*") for all causes of action in the case styled *Cornerstone Community Bank v. Southern Group, LLC, Travis L. Shields, Thomas A. Dobson, and Joshua Dobson*, Civil Action File No. 10-0356, Part II (the "*Cornerstone Case*"). (TR 644-647).

2. The Judgment awarded the principal amount of $675,625.68, plus pre-judgment interest, post-judgment interest, and attorney's fees and expenses, against the Southern Group Defendants, jointly and severally. (TR 644-647).

3. Forty-two (42) days after entry of the Judgment, on November 8, 2010, Cornerstone recorded its judgment with the Register of Deeds in Marion County, Tennessee in Book 425, Page 720 (the "*Property*"). (TR 602-605).

4. On October 25, 2010, and in a separate proceeding, the Trial Court issued an Order Granting Community Trust and Banking Company's Motion for Default Judgment for all causes of action against the Southern Group Defendants in the case styled *Community Trust & Banking Company v. Travis L. Shields, Eric Brewer, Thomas A. Dobson, Joshua O. Dobson and Southern Group, LLC*, Civil Action No. 10-0230, Part I (the "*Community Bank Case*"). (TR 160-162).

5. On September 19, 2014, Hitachi Capital America Corporation ("*Hitachi*" or "*Appellant*") filed a Motion to Intervene in the Community Bank Case. (TR 542-545).

6. On September 29, 2014, Appellant filed an Amended Motion to Intervene in the Community Bank Case. (TR 551-554).

7. On October 24, 2014, the Motion to Intervene was granted by the Trial Court in the Community Bank Case. (TR 564-565).

***3** 8. On November 5, 2014, Hitachi filed its Intervening Complaint and added Cornerstone as a Rule 19 Defendant to the Community Bank Case. (TR 566-605).

9. According to the Intervening Complaint, Hitachi obtained a default judgment against Travis L. Shields ("*Shields*") on March 23, 2011 in *Hitachi Capital America Group v. LCM Group, LLC, et al.*, in the Circuit Court for Marion County, Civil Action No. 19201 (the "*Hitachi Case*"). (TR 566-570, 594-595).

10. According to the Intervening Complaint, Hitachi then recorded its judgment in Marion County on April 28, 2011, approximately five and one half (5 1/2) months after Cornerstone had recorded its Judgment in Marion County. (TR 566-570, 594-595).

11. On December 22, 2014, Cornerstone appeared in the Community Bank Case. (TR 615-617).

12. On January 16, 2015, Cornerstone filed a Motion to Dismiss the Intervening Complaint in the Community Bank Case. (TR 621-622).

13. On January 28, 2015, Hitachi filed its Response to Appellee's Motion to Dismiss in the Community Bank Case. (TR 636-659).

14. On April 14, 2015, the Court entered an Order Denying Cornerstone's Motion to Dismiss, converting the Motion to a Motion for Summary Judgment and setting matter for hearing on summary judgment. (TR 672-674).

15. On October 6, 2015, following the hearing on Cornerstone's Motion for Summary Judgment, the Court entered an Agreed Order Granting Appellee Cornerstone's Motion to Dismiss which was converted to a Motion for Summary Judgment. (TR 690-692).

16. On October 28, 2015, Hitachi filed a Notice of Appeal with the Court. (TR 693-696).

*1 *STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

Whether the Chancery Court for Hamilton County, TN (the "*Trial Court*") erred in finding that an order entered by the Trial Court which finally adjudicated all the claims, rights, and liabilities of the parties, without a specific assessment of costs, was a final order pursuant to Tenn. R. Civ. P. 54.02, Tenn. R. Civ. P. 54.04 and Tenn. Code Ann. § 25-5-101, *et seq.*, thereby enabling Cornerstone Community Bank (the "*Bank*" or "*Appellee*") to perfect its judgment lien on certain real property.

*4 *STANDARD OF REVIEW ON APPEAL*

Review of a trial court's order granting a motion for summary judgment is *de novo* and based upon the record before the Court. *See* Tenn. R. App. P. 13(d); *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997).

*5 *ARGUMENT*

I. The Judgment was a Final Judgment under Tennessee Statutory Law and Tennessee Case Law.

A judgment is final under Tennessee law if: "(1) the court expressly designated it as a final judgment pursuant to Tennessee Rule of Civil Procedure 54.02; or (2) the order adjudicated all claims in the action." *Andrews v. Fifth Third Bank*, 228 S.W.3d 102, 108 (Tenn. Ct App. 2007) (citing *In re Estate of Henderson*, 121 S.W.3d 643, 646 (Tenn. 2003)). Any final judgment that is a judgment meeting one of the two above criteria can be recorded as a judgment lien against real property by recording the judgment in the register's office in the county where the property is located. *See* Tenn. Code Ann. § 25-5-101(b)(1); *Andrews*,

228 S.W.3d at 108. The priority of such lien depends on the time it attached to the property in question and became perfected. *See Id*. at 106. Tennessee applies the universal principle that "a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds." *Id*. at 107.

It is undisputed by the parties that Cornerstone was awarded the Judgment in the Cornerstone Case. It is undisputed that the Judgment adjudicated all claims between the parties. It is undisputed that Cornerstone recorded its judgment lien on November 8, 2010 in Marion County, Tennessee as to the Property. It is further undisputed that Hitachi recorded its judgment lien as to the Property on April 28, 2011, approximately five and one-half (5) months *after* Cornerstone recorded its judgment lien. The sole dispute between the parties is whether the Judgment in the Cornerstone Case constituted a "final judgment" thereby making Cornerstone's judgment lien a perfected lien as of November 8, 2010.

Tennessee law is clear that a judgment is final if it adjudicates all claims between all parties, "leaving nothing else for the trial court to do." *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997); *see also* *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003); Restatement of Judgments § 41. In this case, the Judgment adjudicated all ***6** claims between the parties and nothing remained for the Trial Court to do – statutory construction, Tennessee case law, and public policy each support this conclusion.

A. Tennessee Statutory Law Requires the Adjudication of Costs in a Judgment as a Matter of Law.

Tennessee statutory law supports the interpretation that an adjudication of costs to the prevailing party in a suit occurs as a matter of law. [1] Tenn. R. Civ. P. 54.04(1) states:

Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs…

The language of Rule 54.04(1), and the use of the verb "shall" expressly provides for the assessment of costs to the prevailing party, "unless the court otherwise directs." Term. R. Civ. P. 54.04(1) [2] . To ascertain legislative intent, courts must consider the natural and ordinary meaning of the statutory language within the context of the entire statute, avoiding a construction which would limit or expand its scope. *See Rutherford v. Rutherford*, 416 S.W.3d 845, 851 (Tenn. Ct. App. 2013). When the language of a statute is clear, courts "must utilize the plain, accepted meaning of the words used by the legislature to ascertain the statute's purpose and application." *Gate Bluegrass Precast, Inc. v. Chumley*, No. M200700250COAR3CV, 2008 WL 695867, at *2 (Tenn. Ct. App. Mar. 14, 2008) (citing *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004).

Following the rules of statutory construction, it is well settled in Tennessee that, "when the word 'shall' is used in statutes, it is ordinarily construed as being mandatory and not discretionary." *JJ & TK Corp. v. Bd. of Comm'rs of City of Fairview*, 149 S.W.3d 628, 631 (Tenn. Ct. App. 2004) (citing ***7** *Gabel v. Lerma*, 812 S.W.2d 580, 582 (Tenn. Ct. App. 1990); *see also Bobo v. State Real Estate Comm'n*, No. M2013-02037-COA-R3CV, 2014 WL 1852604, at *6 (Tenn. Ct. App. May 5, 2014).

The mandatory "shall" language the legislature included in Rule 54.04(1) reveals a clear intention that costs be allowed to the prevailing party as a matter of law. While the legislature did provide judges with discretion to assess costs in a different manner, unless a judge affirmatively acts to "otherwise direct," the costs are allowed to the prevailing party as a matter of law.

In this case, while the Trial Court issued a final order that did not include language assessing court costs to the prevailing party, the Trial Court's final judgment also did not "otherwise direct" the adjudication of costs. *See* TR 644-647. The Trial Court's decision not to "otherwise direct" resulted in the costs being taxed against the Southern Group Defendants as a matter of law. That court costs are included as a matter of law is the very conclusion that the Trial Court made in her interpretation of Rule 54.04 in the Community Bank Case. The Trial Court aptly stated in her opinion that "a final judgment is not compelled to include court costs. Rather, **court costs are included as a matter of law.**" *See* TR 692 (emphasis added).

Such is the plain meaning and natural, ordinary reading of Rule 54.04(1). For example, the Court in *Kardoush, LLC v. City of Memphis Alcohol Comm'n* considered the legislative intent behind Tennessee Code Annotated Section 57-3-208(e) which provided that the Alcohol Commission "shall" act within 60 days or an application for a certificate of compliance shall be deemed granted. *See Kardoush, LLC v. City of Memphis Alcohol Comm'n*, No. W2005-00104-COA-R3CV, 2005 WL 3017602, at *3 (Tenn. Ct. App. Nov. 9, 2005); Tenn. Code Ann. § 57-3-208(e). Noting that the "shall" language is interpreted as mandatory under Tennessee law, the Court held that the Commission's failure to act within 60 days waived its authority to deny the appellant's application. *Kardoush*, 2005 WL 3017602, at *3. Similarly, in this Cornerstone Case, the Trial Court's decision not to assess ***8** costs other than as mandatorily provided under Rule 54.04(1) did not cause the judgement to somehow not become a final judgment, but rather assessed the costs to Cornerstone, the prevailing party, as a matter of law.

B. Local Rules Cannot Modify Tennessee Law

Hitachi argues that the language of Rule 5.04(a) of the Local Rules of Civil Practice for the Chancery and Circuit Court for the Eleventh Judicial District (Hamilton County), Tennessee demands that courts costs be taxed in final judgments. Regardless of the language or purported interpretation of Local Rule 5.04(a), local practice rules are not intended to, nor can, affect or alter state law.[3] This Court has stated that "[n]o rule of court is ever effective to modify or abrogate a law." *Brown v. Daly*, 884 S.W.2d 121, 124 (Tenn. Ct. App. 1994); *see also In re Estate of Young*, No. W201501753COAR3CV, 2016 WL 369587, at *7 (Tenn. Ct. App. Jan. 29, 2016) ("Rule 18 of the Rules of the Tennessee Supreme Court mandates that local rules cannot conflict with not only the Rules of the Tennessee Supreme Court, but also statutory law." *See* Tenn. R. Sup. Ct. 18(a)).

C. Tennessee Case Law Notes That the Taxation of Costs is Not a Consideration in Determining Whether a Judgment is Final.

Though not an issue often considered, Tennessee courts that have considered the issue have held the absence of specific language assessing court costs will not affect the finality of a judgment. On point with the facts of this appeal, the Tennessee Supreme Court in *Mengle Box Co. v. Lauderdale Cty.*, considered whether a trial court's dismissal of a request for an injunction that failed to tax court costs to the parties was a final, appealable judgment. *Mengle Box Co. v. Lauderdale Cry.*, 230 S.W. 963, 965 (Tenn. 1921). In expressly determining that the taxation of costs was not an element for consideration as to whether an ***9** order was final, the Tennessee Supreme Court held: "A decree **will be treated as final,** and an appeal entertained **only where there is nothing left for future determination except the adjudication of the costs.**" *Id*. at 966 (emphasis added); *see also Cockrell v. Cockrell*, 83 S.W.2d 281, 284 (Tenn. Ct. App. 1935) (noting that taxation of costs is not an element in determining the finality of a court's order); *but see Grand Valley Lakes Property Owners' Ass'n, Inc. v Gunn*, No. W2008-01116-COA-R3-CV, 2009 WL 981697, at *3 (Tenn. Ct. App. April 13, 2009) (unreported decision noting that a judgment awarding dismissal to the plaintiffs which did not address a pending motion filed by the defendants to set aside the satisfaction of a judgment or the assessment of costs was not final and appealable). Further, in *Sullivan v. Parham*, this Court noted in dicta that, "[a] final judgment must leave nothing for future adjudication except, perhaps, the taxation of court costs." *Sullivan v. Parham*, No. 86-272-II, 1987 WL 18716, at *2 (Tenn. Ct. App. Oct. 23, 1987) (citing *Aetna Cas. & Sur. Co. v. Miller*, 491 S.W.2d 85, 86 (Tenn. 1973); *Mengle Box Co.*, 230 S.W. at 966).

Plaintiff cites only *Green v. Moore* in support of its argument that costs must be assessed for an order to become final. *Green v. Moore*, 101 S.W.3d 415 (Tenn. 2003). However, the *Green* case stands for the proposition that the time for appeal of a final judgment runs from the date a final order is entered, not the filing of a notice of voluntary dismissal by a party, and is therefore irrelevant to the issue in this appeal. *See Green v. Moore*, 101 S.W.3d 415, 420 (Tenn. 2003).

D. Public Policy Favors Allowing the Finality of Judgments

Public policy is "the present concept of public welfare or general good" and is "practically synonymous with public good." *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 5 (Tenn. 1964) (internal citations omitted). The public policy of Tennessee "is to be found in its constitution, statutes, judicial decisions and applicable rules of common law." *Smith v. Gore*, 728 S.W.2d 738, 747 (Tenn. 1987). It is for the court to decide whether ***10** or not any controlling public policy has been declared and then ascertain its application to a particular case. *Id*. at 746.

In Tennessee, it is well settled "public policy favor[s] finality of judgments and termination of litigation." *Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001). The Appellant is asking this Court to hold that the Judgment, which fully adjudicated all claims against the parties, was not a final judgment because the Trial Court's order did not assess costs. The ramifications of such a determination, and consequently a party's inability to perfect its lien, is grave and far-reaching. Perhaps the Trial Court stated the public policy concerns best in noting that to find the Judgment in the Cornerstone Case not a final judgment pursuant to Rule 54.04(1) on the issuance if the Judgment, "could call the finality of other prior judgments into question." (TR 690-692).

***11** *CONCLUSION*

The taxation of court costs under Tennessee law is applied to final judgments as a matter of law. Statutory interpretation requires this plain reading of Tennessee Rule of Civil Procedure 54.04(1) and Tennessee Code Ann. Section 25-5-101(b)(1). Though the issue has rarely been litigated, starting with the Supreme Court of Tennessee's still precedential holding in *Mengle Box Co. v. Lauderdale Cty.*, Tennessee courts have long expressed a clear determination that the assessment of costs is not a factor in considering whether a judgment is final. Finally, public policy in Tennessee favors the finality of judgments. Cornerstone respectfully requests that this Court find - according to statutory law, case law and public policy - that the Judgment in the Cornerstone Case was final judgment upon the Trial Court's issuance and as such was properly perfected in Marion County, Tennessee on November 8, 2011.

Respectfully submitted,

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Footnotes

1 Although the rules of civil procedure are not statutes, the same rules of statutory construction apply in the interpretation of rules. *See Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009).

2 Tenn. Code Ann. § 20-12-101 states in parallel that the "successful party in all civil actions is entitled to full costs, unless otherwise directed by law or by a court of record, for which judgment shall be rendered."

3 In fact, Local Rule 5.04(a) reiterates and strengthens the fact that costs are assessed as a matter of law. Local Rules 5.04(a) simply states that "All orders shall provide for the taxing of court costs." Hamilton County Local Rule 5.04; *see also* Rule § 33.03 of the Local Rules of Civil Practice for the Chancery and Circuit Court for the Twentieth Judicial District (Davidson County) ("All final judgments shall provide for the taxing of court costs").

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