UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of May, two thousand and nineteen.

Before: Ralph K. Winter,
Circuit Judge.

Claudia Gayle, Indivdiually, On Behalf of All Others Similarly Situated and as Class Representative, Aline Antenor, Anne C. DePasquale, Annabel Llewellyn-Henry, Eva Myers-Granger, Lindon Morrison, Natalie Rodriguez, Jacqueline Ward, Dupont Bayas, Carol P. Clunie, Ramdeo Chankar Singh, Christaline Pierre, Lemonia Smith, Barbara Tull, Henrick Ledain, Merika Paris, Edith Mukardi, Martha Ogun Jance, Merlyn Patterson, Alexander Gumbs, Serojnie Bhog, Genevieve Bar' ot, Carole Moore, Raquel Francis, Marie Michelle Gervil, Nadette Miller, Paulette Miller, Bendy Pierre-Joseph, Rose-Marie Zephirin, Sulaiman Ali-El, Debbie Ann Bromfield, Rebecca Pile, Maria Garcia Shands, Angela Collins, Brenda Lewis, Soucianne Querette, Sussan Ajiboye, Jane Burke Hylton, Willie Evans, Pauline Gray, Eviarna Toussaint, Geraldine Joazard, Niseekah Y. Evans, Getty Rocourt, Catherine Modeste, Marguerite L. Bhola, Yolanda Robinson, Karlifa Small, Joan-Ann R. Johnson, Lena Thompson, Mary A. Davis, Nathalie Francois, Anthony Headlam, David Edward Levy, Maud Samedi, Bernice Sankar, Marlene Hyman,

Plaintiffs - Appellees,

v.

Harry's Nurses Registry, Harry Dorvilien,

Defendants - Appellants.

ORDER

Docket No. 18-3472

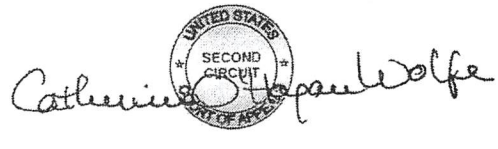
Appella ts move to reinstate this appeal which was dismissed on a briefing default. Appellees oppose the motion.

IT IS HEREBY ORDERED that the motion to reinstate is GRANTED. Appellees must file a scheduling notification letter within 14 days of the date of this order.

For the Court:

Catherine O'Hagan Wolfe,

Clerk of Court



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CORPORATE DISCLOSURE STATEMENT

None.

DECISION UNDER REVIEW

September 30, 2018 District Court Opinion and Order (SA3-8) adopting the September 11, 2018 Magistrate Court's Report and Recommendations (SA9-33) to deny defendants' motion for sanctions against Plaintiffs' counsel.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction of defendants' motion for sanctions pursuant to Dulce v. Dulce, 233 F.3d 143, 146 (2d Cir. 2000) and Peacock v. Thomas, 516 U.S. 349, 354 (1996). This Court has appellate jurisdiction of the September 30, 2018 District Court Opinion and Order (SA3-8) under 28 U.S.C.A. § 1291 per defendants' November 7, 2018 Notice of Appeal. SA1.

STATEMENT OF THE ISSUE

Did the District court err in denying defendants' motion for sanctions without an evidentiary hearing having been held on whether plaintiffs' counsel "double dipped" by appropriating funds collected that should have been paid to plaintiffs and receiving more monies than what the District court's judgments provided? (SA3-8, 9-33)

STATEMENT OF THE CASE

The underlying litigation began in 2007, when plaintiffs sued defendants under the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 *et. seq*, for alleged unpaid overtime pay and attorneys' fees. A9-10; SA9-12. By 2012 and 2013, the District court granted plaintiffs' motion for summary judgment and entered judgments in favor of plaintiffs and against defendants in the total amount of $931,959.39. SA9-12. Defendants appealed, but this Court affirmed. SA11-12; Gayle v. Harry's Nurses Registry, Inc., 594 F. App'x 714, 716 (2d Cir. 2014).

The appeal before the Court here arises from the actions of plaintiffs' counsel in collecting on the judgments, and defendants' subsequent motion for sanctions against plaintiffs' counsel on the chief ground that counsel failed to properly account for the monies collected on the judgments and collected more money in attorneys' fees than due. Defendants moved for sanctions against plaintiffs' counsel in September 2017 (A55), filing additional evidence and argument in support of the motion in the ensuing months (A69, 81, 85, 88, and as identified in the Table of Appendix). Plaintiffs' counsel opposed defendants' motion (A58) and filed further submissions in opposition as well (A72, 142, and as set forth in the Table of Appendix).

The District court referred defendants' motion for sanctions to United States Magistrate Court Judge Marilyn Go (A192), who on September 11, 2018 issued a

Report and Recommendations to deny defendants' motion. SA9-33. Defendants filed objections to the Report and Recommendations (A280-85, 298-315); Plaintiffs' counsel requested that the District court adopt it (A286-91). By Order and Decision of September 30, 2018, District Court Judge Garaufis adopted in full the Report and Recommendations denying defendants' motion for sanctions. SA3-6. Defendants filed a Notice of Appeal to this Court on November 7, 2018. SA1.

STATEMENT OF FACTS

As Magistrate Judge Go noted, it is an "undisputed fact that plaintiffs' counsel successfully levied against defendants' assets and collected $931,959.39, the full amount of the three judgments entered." SA12.[1] The main issue on the sanctions motions was whether plaintiffs' counsel had "double dipped" by appropriating funds collected that should have been paid to plaintiffs and receiving more money than what the District court judgments awarded. As defendants posed the issue to the District court, "did the individual working nurses get all of the money they were entitled to under this Court's Judgments and did [Plaintiffs' counsel] double dip by taking his attorney's fees both from my bank account and

[1] Magistrate Judge Go found that "after entry of the 2012 Judgment, the plaintiffs collected $633,851.76, the full amount of that judgment through levies on defendants' accounts on November 23, 2012 and January 2, 2013. On January 8, 2014, plaintiffs collected $256,678.46, the full amount of the 2013 Judgment entered on October 22, 2013. On August 5, 2015, plaintiff collected the full amount of the third judgment entered on April 15, 2015 for post-judgment fees and cost of $41,429.17." SA13 (citations omitted).

again from the money due the individual nurses, depriving those nurses of judgment awards." A57.

In support of their motion for sanctions, defendants filed with the court below Affidavits signed by plaintiff nurses affirming that they received less compensation than awarded to them – contradicting the representations of plaintiffs' counsel. Each of these plaintiffs set forth the amount she was entitled to receive and the lesser amount received from plaintiffs' counsel. A62-65, 88-141, 236-39. Though Plaintiffs' counsel maintained that he and his firm had properly disbursed all monies levied upon, defendants' counsel argued to Magistrate Judge Go that an evidentiary hearing should be held "regarding what the nurses received" in light of the conflicting evidence:

> I have received Mr. Bernstein's letter of July 27, 2018 with enclosures. As of this date I have not received copies of the fronts and backs of all checks from Mr. Bernstein. Yesterday I received checks relative to the four (4) affidavits provided to the Court. I am again requesting copies of all the checks. Unfortunately the checks do not all coincide with the affidavits which I provided to you and Mr. Bernstein indicating which checks have not been received. On the basis of those affidavits and my discussions with Mr. Dorvilier it appears that these nurses are claiming that they have not received the following:
>
> Check #17644 payable to Yolanda Robinson - $141,600.00, check dated 2/3/14, her affidavit is dated 2/13/16;
>
> Check #17626 payable to Jan Burke Hylton - $40,848.00, check dated 1131114, her affidavit is dated 10/27/17;

Check #17637 payable to Linden Morrison - $11,480.25, check dated 1127/14, her affidavit is dated 9/23/16;

Check #17636 payable to Paulette Miller - $595.00, check dated 1127/14, her affidavit is dated 9/20/16. [A249-50]

As the District court had noted, defendants "alleged that Mr. Bernstein had 'double dipped' by charging his clients for contingency fees and also charging those same fees over to Mr. Dorvilier amounting to an extra $171,643.73 paid by Mr. Dorvilier under the federal judgment. On the total judgment of $931,959.39, Mr. Bernstein charged clients $275,002.00 and also received $171,643.73 from Mr. Dorvilier.... Of the $931,959.39 paid by Mr. Dorvilier, Mr. Bernstein received 51.91% of those monies and this is the nature of Mr. Dorvilier's 'double dipping' claim that these monies should be refunded to Mr. Dorvilier ($171,643.73)." Defendants requested that the court hold an evidentiary hearing to resolve the conflicting evidence and make findings of fact on whether plaintiffs' counsel properly disbursed the monies levied upon or, as defendants charged and the Nurse Affidavits indicated, collected from defendants $171,643.73 in additional funds to which counsel was not entitled under the judgments. A275.

The Magistrate Court's Report and Recommendations

The Magistrate Court noted that "the issue whether plaintiffs' counsel properly paid the funds collected to the plaintiffs clearly falls within the ancillary jurisdiction of this Court to insure that the awards made to the plaintiffs and

embodied in the judgments entered were properly paid" SA28 (citing Grimes v. Chrysler Motors Corp., 565 F.2d 841, 843–44 (2d Cir. 1977) (affirming district court's jurisdiction to supervise the distribution of settlement funds)). The court found that th amount sent by plaintiffs' counsel to each plaintiff in 2013 "equals 75% of the amounts awarded to each plaintiff" and "that the aggregate amount distributed ($440,933.83) was only 70% of the 2012 Judgment of $633,851.76, since checks to 14 of the plaintiffs either were returned or were not sent to plaintiffs whom Levy Davis could not locate." SA22. "After the Court entered the second judgment on October 22, 2013 awarding increased or new damages to certain plaintiffs and attorneys' fees and costs, *Levy Davis* issued a check to itself on October 25, 2013 for $130,214.46 for fees and costs, leaving an escrow balance of $62,703.47. Plaintiffs' counsel then collected the full 2013 judgment on January 8, 2014 and distributed checks to plaintiffs totaling $288,722.93 in January and February 2014, and four checks to plaintiffs totaling $17,114.96 after 2014." SA22-23.

The Magistrate Court acknowledged the nurse affidavits and other evidence defendants submitted, but said that the submission by plaintiffs' counsel had "dispelled" any concerns about the proper accounting of the funds (SA24-25), and that "[t]he bank statements and copies of checks submitted by Mr. Bernstein, as an officer of the Court, provide persuasive evidence that appropriate funds were

disbursed to the plaintiffs" (SA31). "Even though the statements of the four Plaintiff-Affiants in their affidavits initially raised concerns that Levy Davis had not sent these plaintiffs their full awards, the checks and bank statements submitted by counsel dispel such concern. The submissions show that Levy Davis issued two checks to each Plaintiff-Affiant for the full amounts of their awards -- the first check for 75% of the award in 2013 and a second check for the balance in 2014." SA24-25, 31.

Though defendants contended that plaintiffs' counsel had "double dipped" by "collect[ing] from funds that should have been paid to the plaintiffs a contingency fee in addition to the fees awarded under the federal judgments" (SA32), the Magistrate Court said this was only a "bald assertion" for which "defendants have presented no evidence in support other than the affidavits from the four Plaintiff-Affiants." The Magistrate Court said that plaintiffs' counsel "has produced copies of checks undermining the statements made in the affidavits that each Plaintiff-Affiants received only one of two checks issued. Defendants have not countered with any further evidence to cast doubt on the accuracy of the checks provided or otherwise to show that the four Plaintiff-Affiants did not actually receive the second check issued to them." SA32. The Magistrate Court discounted the veracity of the Affidavits that defendants had filed, saying that the signatures on the affidavits were "strikingly similar" to the signatures on the issued checks

and that "serious questions are raised" about the veracity of the Affidavits. SA26. The Magistrate Court said that "[t]he affidavits of Jane Burke Hylton and Lindon Morrison lend support for Mr. Bernstein's suspicions raised in his September 25, 2017 letter the affidavits produced were fraudulently procured by a private investigator employed by Mr. Dorvilier and are not accurate." SA26. "[T]his Court finds that defendants have not presented sufficient evidence to support this prong of their motion that Levy Davis pocketed monies that should have disbursed to the Plaintiff-Affiants and the other plaintiffs." SA32.

The District Court's Ruling

Defendants filed objections to the Magistrate's Report and Recommendations with the District court, stressing, "all the nurses should be required to testify under oath regarding overtime payments to them and monies, if any, actually received by them. My client believes that Mr. Bernstein's retainer agreement is relevant. My client continues to believe that Mr. Bernstein has engaged in 'double dipping' and a scheme to defraud by allegedly providing fake checks which did not satisfy the above judgments." A28, 298-303. The District court rejected defendants' objections and adopted in full the Magistrate's Report and Recommendations. SA4. The Court rejected *de novo* review and conducted a review for clear error only. SA5-7. With regard to defendants' central objection that an evidentiary hearing should have been held, the District court said that these

"due process" objections "are unsupported by any legal authority or factual basis." SA6. "Defendants cite no authority in support of their claim that 'all the nurses should be required to testify under oath regarding overtime payments to them and monies, if any, actually received by them.' Nor do Defendants offer any reason for the court to reject the R&R's findings that Plaintiffs' counsel did not engage in 'double dipping'" (SA6).

STATEMENT OF RELATED CASES

In 2014, this Court (per defendants' Notice of Appeal) affirmed the District court's judgments in favor of plaintiffs and against defendants. Gayle v. Harry's Nurses Registry, Inc., 594 F. App'x 714, 716 (2d Cir. 2014)

STANDARD OF REVIEW

The Court of Appeals reviews for abuse of discretion a district court's decision to deny a party's motion for sanctions. Perry v. Ethan Allen, Inc., 115 F.3d 143, 154 (2d Cir. 1997); Virginia Properties, LLC v. T-Mobile Ne. LLC, 865 F.3d 110, 113 (2d Cir. 2017); see Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd., 682 F.3d 170, 175 (2d Cir. 2012) ("An abuse of discretion occurs when a district court bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.")

SUMMARY OF THE ARGUMENT

The District court erred because it affirmed the Magistrate Court's Report and Recommendations to deny defendants' motion for sanctions without an evidentiary hearing having been held to resolve the disputed issue of fact of whether the monies collected by plaintiffs' counsel were properly paid pursuant to the District court's judgments entered in this lawsuit. This Court should reverse the denial of defendants' motion for sanctions and remand this matter back to the District court with direction that an evidentiary hearing be held on this central factual question raised by the submissions below.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SANCTIONS WITHOUT AN EVIDENTIARY HEARI NG HAVING BEEN HELD ON WHETHER PLAINTIFFS' COUNSEL "DOUBLE DIPPED" BY APPROPRIATING FUNDS COLLECTED THAT SHOULD HAVE BEEN PAID TO PLAINTIFFS AND COLLECTING MORE MONEY FROM DEFENDANTS THAN WHAT THE DISTRICT COURT JUDGMENTS PROVIDED (SA3-33).

An evidentiary hearing should have been held because of the Affidavits from the nurses filed below, which created a factual issue on the central question of whether the individual working nurses, the plaintiffs in this lawsuit, received all the money due to them under the District court's judgments – or did plaintiffs' counsel "double dip" by taking attorney's fees from defendants' bank accounts levied upon and, again, from the money due to some of the individual plaintiffs. The failure to conduct an evidentiary hearing and make proper findings of fact on a disputed issue is an error on which this Court has reversed in prior cases. See, e.g., Forts v. Ward, 566 F.2d 849, 851–52 (2d Cir. 1977) (reversing denial of motion for preliminary injunction for failure to hold evidentiary hearing and stressing, "a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper to another.' … This is particularly so when the judge without holding an evidentiary hearing, resolves the bitterly disputed facts in favor of the party who has the burden of establishing his right to preliminary relief"); Sassower v. Sheriff of Westchester Cty., 824 F.2d

184, 190 (2d Cir. 1987) ("where the affidavits in a contempt proceeding raise a disputed issue of material fact, due process requires an evidentiary hearing"); Fengler v. Numismatic Americana, Inc., 832 F.2d 745, 747–48 (2d Cir. 1987) ("Bochner contends that the preliminary injunction must be vacated because of the district court's failure to hold an evidentiary hearing, as well as its failure to make findings of fact. We agree with appellants on both counts").

The Affidavits from the plaintiff nurses denied that they had been paid the money due to them under the judgments that plaintiffs' counsel claimed they had been paid:

- Yolanda Robinson, one of the plaintiff nurses, affirms that she was to receive $210,864 in compensation but instead received two separate checks of $69,264 and $14,600 (A90, 236);
- Paulette Miller, another of the plaintiff nurses, affirms that she was to receive $2,380 in compensation but received only $1,785 (A237)
- Linda Morrison affirms that she was to receive $45,921 in compensation but received only $38,321 (A238).[2]

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[2] Jane Burke Hylton also filed an Affidavit below and affirmed that she was to receive $143,712 in compensation but received only $102,990 (A95, 239). Subsequently, however, the plaintiff law firm submitted a letter purportedly from Ms. Hylton saying that she did not remember receiving a second check. A268.

After additional submissions by plaintiffs' counsel in July 2018 (A240-48), defendants again noted to the Magistrate Court that the evidence conflicted and "it appears that these nurses are claiming that they have not received the following:"

> Check #17644 payable to Yolanda Robinson - $141,600.00, check dated 2/3/14, her affidavit is dated 2/13/16;
>
> ***
>
> Check #17637 payable to Linden Morrison - $11,480.25, check dated 1127/14, her affidavit is dated 9/23/16;
>
> Check #17636 payable to Paulette Miller - $595.00, check dated 1127/14, her affidavit is dated 9/20/16. [A249]

Letters from the plaintiff law firm show that the firm did not issue 1099s to certain plaintiffs in the years the monies were claimed to have been paid, further supporting defendants' charge that the monies were not distributed as claimed. A65-68. As defendants' counsel summarized to the courts below, plaintiffs' counsel "'double dipped' by charging his clients for contingency fees and also charging those same fees over to Mr. Dorvilier amounting to an extra $171,643.73 paid by Mr. Dorvilier under the federal judgment. On the total judgment of $931,959.39, Mr. Bernstein charged clients $275,002.00 and also received $171,643.73 from Mr. Dorvilier… Of the $931,959.39 paid by Mr. Dorvilier, Mr. Bernstein received 51.91% of those monies and this is the nature of Mr. Dorvilier's 'double dipping' claim that these monies should be refunded to Mr. Dorvilier ($171,643.73)." A275. "The attorney held the amount of $192,917.93 of the

paychecks of the nurses. The counsel, Jonathan Bernstein, violated the order that was entered by the Judge on September 19, 2012 because he failed to give the money to the plaintiff nurses. He failed to explain his 'double dipping' method of compensation or explain why he took attorney' s fees from my bank account. By only displaying the amount of $440,933.83 he could never comply with the order." A299-313.

> Mr. Bernstein claims in his affidavit that he issued a check in 2013 with check number 16665 in the amount of $69,264.00 and in 2014 a check with check number 17644 in the amount of $141,600.00. These checks were fraudulent. The judgment in the amount of $256,678.46 could never have been satisfied. This clearly reveals that Mr. Bernstein was "double dipping."
>
> The order could never have been satisfied for the amount of $256,678.46 because of the fact that Jonathan Bernstein held the amount of $34,330.00 of the first order. He held $6,512.00 of the second order. He claims that he issued a check in 2013 with number 16667 for $102,990.00 and one in 2014 with check number 17626 for $40,848.00. The second check was fraudulent. This clearly reveals that Mr. Bernstein was "double dipping." [A300]

The Court should reverse the District court's decision adopting the Magistrate Court's Report and Recommendations and remand this matter for an evidentiary hearing on the central issue of whether the monies collected by plaintiffs' co unsel were properly paid pursuant to the District court's judgments entered in this lawsuit.

The District court applied the incorrect standard of review in adopting the Magistrate Court's Report and Recommendations. A district court must review *de*

novo "those portions of the report ... to which objection is made." 28 U.S.C.A. § 636; Fed. R. Civ. P. 72(b)(3). If no objection is made to a portion, the factual and legal bases supporting the Magistrate Court's findings are reviewed for clear error. Fed. R. Civ. P. 72(b). The District court said that only the clear error standard applied because defendants failed to make specific objections to the Magistrate's Report. SA4-6. But defendants did make specific objections – chiefly that the Magistrate Court failed to hold an evidentiary hearing where the nurses could have testified as to what, precisely, they had been paid. Defendants objected in the District court, "all the nurses should be required to testify under oath regarding overtime payments to them and monies, if any, actually received by them." A28, 298-303. Defendant (Mr. Dorvilier), "who is an accountant," noted to the District court that the monies obtained from defendants by plaintiffs' counsel "were $931,959.39 but the checks disbursed to creditors do not match up to that amount." A28, 298-303. The District court erred in failing to submit the Magistrate's Report and Recommendations to *de novo* review at least on the issue of whether an evidentiary hearing was required to be held.

Applying the *de novo* standard or even a clearly erroneous one, the failure to hold the evidentiary hearing on the disputed issue of whether plaintiffs' counsel properly accounted for and disbursed the monies levied upon is an error the District court should have remedied and is reversible error here on appeal. As the

Magistrate Judge herself noted, "the issue whether plaintiffs' counsel properly paid the funds collected to the plaintiffs clearly falls within the ancillary jurisdiction of this Court to insure that the awards made to the plaintiffs and embodied in the judgments entered were properly paid" SA28 (*citing* Grimes, 565 F.2d at 843–44, affirming district court's jurisdiction to supervise the distribution of settlement funds). The Magistrate Court said that defendants' charge that plaintiffs' counsel had "double dipped" was a "bald assertion" for which "defendants have presented no evidence in support other than the affidavits from the four Plaintiff-Affiants." But affidavits from witnesses is evidence not "bald assertions" (such as those contained in an unsworn legal brief, for example). Cf. Commodity Futures Trading Comm'n v. Incomco, Inc., 649 F.2d 128, 131–32 (2d Cir. 1981) ("It is settled law in this Circuit that motions for preliminary injunctions should not be decided on the basis of affidavits when disputed issues of fact exist... The existence of factual disputes necessitates an evidentiary hearing followed by the making of findings of fact and conclusions of law as required by Fed. R. Civ. R. 52(a) before a motion for a preliminary injunction may be decided... no such hearing was held, or findings made, and the trial judge never had the opportunity to judge the credibility of witnesses").

The Magistrate Court further discounted the veracity of the Affidavits defendants submitted by stating that the signatures on the Affidavits were

"strikingly similar" to the signatures on the checks issued and that "serious questions are raised" about the veracity of the Affidavits. SA26. The Magistrate Court credited the "suspicions" raised by plaintiffs' counsel that the "affidavits produced were fraudulently procured by a private investigator employed by Mr. Dorvilier and are not accurate." SA26; cf. A62 with A63. This too was error that the District c ɔurt should have corrected. The Magistrate Court erred by crediting on the face of the papers one party's affirmations over the other's. The Magistrate Court could not do this without an evidentiary hearing to see and hear the witnesses. Any conclusions about believability could have been made following the evidentiary hearing, but not before. This fundamental error that the District court adopted further warrants remand for the evidentiary hearing here on appeal, we submit. Cf. Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996) (stressing "function of the district court in considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried. … Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment… Any weighing of the evidence is the prerogative of the finder of fact, not an exercise for the court on summary judgment.")

CONCLUSION

The Court should reverse the District Court's September 30, 2018 Order adopting the Magistrate Court's September 11, 2018 Report and Recommendations and remand this matter for an evidentiary hearing on the factual issue of whether the monies collected by plaintiffs' counsel were properly paid pursuant to the District court's judgments entered in this lawsuit.

Respectfully submitted,

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Dated: April 29, 2019

CERTIFICATION OF BAR MEMBERSHIP, COMPLIANCE WITH BRIEF LENGTH/TYPE-VOLUME LIMITATION REQUIREMENT, SERVICE, AND ANTI-VIRUS CHECK

I certify that I am a member of the Bar of the United States Court of Appeals for the Second Circuit.

I certify that the accompanying Brief of Appellant, which uses a proportional 14-Point Font in Times New Roman Style, contains less than 13,000 words (Micr soft Word was used to determine the word count) in accordance with Fed. R. App. P. 32(a)(7).

I certify that service of Appellant's Brief and Appendix (and the accompanying Motion to Reinstate) was served today via ECF on counsel for appellee. I certify that paper copies are identical to the electronic versions.

I certify that a virus check was performed on the PDFs with Norton Security Suite Version 22.5.4.24 and that no virus was detected.

/s/ Michael Confusione

Michael Confusione

Dated: April 29, 2019