SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ALPHONSE FLETCHER, JR. and FLETCHER ASSET MANAGEMENT, INC.

Plaintiffs,

Index No. 101298/11

- against -

DECISION and ORDER

THE DAKOTA, INC., BRUCE BARNES, and PETER NITZE,

Defendants.

Mot Seq. 31, 32

FILED
SEP 14 2015
NEW YORK
COUNTY CLERK'S OFFICE

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HON. EILEEN A. RAKOWER

This is an action for discrimination, retaliation, defamation, and tortious interference based on the board of directors of a cooperative apartment building's failure to approve an existing shareholder's application to purchase additional shares in the corporation. Plaintiffs, Alphonse Fletcher, Jr. ("Fletcher") and Fletcher Asset Management, Inc. ("FAM") (collectively, "Plaintiffs"), claim that Fletcher is an existing shareholder of The Dakota, Inc. ("The Dakota"), the cooperative corporation that owns the cooperative apartment building located at One West 72nd Street, New York NY. Plaintiffs claim that Fletcher has been a resident of the Dakota and shareholder of the corporation since 1992. Plaintiffs claim that, in 2010, Fletcher sought to purchase Apartment 50 in The Dakota, for purposes of combining Apartment 50 with Apartment 52, his existing apartment there.

Plaintiffs claim that The Dakota's board of directors (the "Board") and certain of its members, individual defendants, Bruce Barnes ("Barnes"), and Peter Nitze ("Nitze") (and together with The Dakota, collectively, "Defendants"), improperly denied Fletcher's application to purchase Apartment 50 on the basis of Fletcher's race, and as retaliation for Fletcher's having raised complaints about the Board's discriminatory conduct in the past. In addition, Plaintiffs claim that during the period in which Fletcher's 2010 application was pending, Defendants defamed Plaintiffs by making numerous false statements to others regarding Plaintiffs' finances.

Plaintiffs commenced this action on February 1, 2011, by summons and verified complaint (the "Complaint"). On April 7, 2011, Plaintiffs filed an amended verified complaint (the "First Amended Complaint"). On August 22, 2011, Plaintiffs filed a second amended verified complaint (the "Second Amended Complaint" or "SAC"). Defendants interposed a verified answer to the Second Amended Complaint with Counterclaims on November 14, 2011.[1] Plaintiffs filed a Note of Issue on September 26, 2014 and an Amended Note of Issue on October 3, 2014.

Defendants now move for an Order, pursuant to CPLR § 3212, granting summary judgment in their favor and against Plaintiffs and dismissing Plaintiffs' Second Amended Complaint. (Mot. Seq. #31). Defendants' motion was timely filed on December 18, 2014. (CPLR § 3212(a); Part 15 Rules). In support, Defendants submit the attorney affirmation of Christine Chung ("Chung"), along with exhibits.[i]

Plaintiffs oppose. Plaintiffs cross move for summary judgment in their favor "and/or" to amend the Second Amended Complaint, among other relief.[2] Plaintiffs submit an attorney affirmation of J.A. Sanchez ("Sanchez"), along with exhibits.[ii]

In addition, Plaintiffs now move (Mot. Seq. #32), by Notice of Motion filed on April 7, 2015, for the Court to "consider the documents attached hereto as Exhibit C, that is the Fletcher Affidavit and Exhibits thereto, in its determination of the Defendants' motion for Summary Judgment and/or (at the very least) the Plaintiff's [sic] Cross Motion for various relief."

Oral argument was heard on Defendants' motion for summary judgment, Plaintiffs' cross-motion, and Plaintiffs' motion to consider additional documents on June 29, 2015. The minutes of the June 29, 2015 oral argument were provided to the Court thereafter.

As an initial matter, with respect to Plaintiffs' motion for the Court to consider additional documents, Plaintiffs' notice of motion asks the Court to consider "the Fletcher Affidavit and Exhibits thereto" as "Exhibit C" in determining Defendants' motion to dismiss and Plaintiffs' cross-motion. However, Plaintiffs fail to provide

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[1] Plaintiffs assert three counterclaims against Fletcher seeking reasonable expenses and fees incurred in defending the action under the parties' lease, NYC Admin. Code § 8-502(f), and NY Human Rights Law § 290.

[2] Additionally, Plaintiffs cross move to stay any eviction proceedings at the New York City Housing Court commenced by The Dakota under Index No. L&T 14N088851 and/or to remove and consolidate those eviction proceedings with the present action." The Dakota has dismissed, without prejudice, its actions against Fletcher for failure to make maintenance payments because JP Morgan, whose loans are secured by Fletcher's Dakota properties, cured Fletcher's default. Plaintiffs' motion for a stay and/or consolidation is moot.

such "affidavit", or "exhibits thereto", for consideration[3]. Specifically, Plaintiffs do not provide *any* copy of "the Fletcher Affidavit" along with their moving papers. Plaintiffs also fail to annex hard copies of Plaintiffs' proposed "Exhibit C" to their motion for consideration such documents. Although Plaintiffs do attach an envelope containing an unmarked, unlabeled flash drive to their moving papers, this submission is both inept and incoherent.[4] Accordingly, as Plaintiffs fail to provide

[3] The Court notes that Defendants served the instant motion for summary judgment on December 18, 2014, with a return date of January 23, 2015. On January 23, 2015, the Clerk's Office, over Defendants' objection, extended Plaintiffs' time to oppose Defendants' motion to February 20, 2015, and Defendants were to reply two weeks thereafter. Plaintiffs failed to timely file opposition. Instead, by letter to the Court, Plaintiffs requested a second extension of time to oppose Defendants' motion. Defendants opposed Plaintiffs' request. By so-ordered Stipulation dated March 2, 2015, the Court granted Plaintiffs' request and extended Plaintiffs' time to oppose Defendants' motion to March 5, 2015, with Defendants' reply due two weeks thereafter. On March 5, 2015, Plaintiffs served opposition and cross-motion papers upon Defendants. By email dated March 10, 2015, Plaintiffs sent Defendants a document purporting to be an affidavit from Fletcher (the "Fletcher Affidavit"). Plaintiffs' March 10, 2015 email states: "Attached please find Exhibit A to my motion, the Fletcher Affidavit (including part one and two of its supplemental materials). I understand that it did not arrive with my papers, but this was something that could not be helped and was simply out of my hands. This will be followed with part 3 supplemental materials." In addition, Plaintiffs asked Defendants whether they would "agree to accept the papers or not." Defendants refused to accept to the late filing. By letter dated March 12, 2015, Plaintiffs requested that the Court accept and consider the Fletcher Affidavit. Plaintiffs acknowledged "Fletcher's delay in providing a notarized affidavit" and contended that the delay was a result of Fletcher's inability to have his affidavit notarized in California on March 5. Plaintiffs' counsel wrote, "On March 5, 2015, Fletcher, who lives in California, informed me that he just met with a California notary who had refused to notarize his affidavit in its then form. Plaintiff Fletcher revised his affidavit and succeeded in having the Fletcher Affidavit notarized on Monday, March 9, 2015, two business days after Plaintiffs' timely March 5, 2015 filing. I served the Fletcher Affidavit upon Defendants' counsel the next morning." By email dated March 16, 2015, the Court "advised that the parties are to adhere to the deadlines set forth in the Stipulation" so ordered by Judge Rakower and signed by the parties. The email further stated, as "per that Order, any opposition to Defendants' motion for summary judgment was to be served by March 5, 2015" and any reply brief was to be served by March 19, 2015. Defendants filed their reply brief on March 19, 2015. On March 19, 2015, Plaintiffs' counsel appeared in the Clerk's Office with the Fletcher Affidavit and exhibits, and requested that the Clerk's Office accept the Fletcher Affidavit together with the other motion papers being submitted. The Clerk's Office refused Plaintiffs' request. Defendants contend that on April 3, 2015, Plaintiffs re-served the Fletcher Affidavit, together with a notice of motion requesting that the Court consider the Affidavit and its exhibits, "in its determination of the Defendants' Motion for Summary Judgment and/or (at the very least) the Plaintiffs' Cross Motion for various relief." The history of this litigation reveals torturous delays which prompted this Court to emphasize that the parties strictly adhere to court ordered deadlines and the Court Part Rules. Such treatment has been affirmed by the Appellate Division. *See Fletcher v. Dakota, Inc.*, 127 A.D. 3d 626, 626-27 [1st Dept. 2015](The First Department affirmed this Court's Order entered May 29, 2013, which granted Defendants' motion for an Order striking Plaintiffs' cause of action for defamation to the extent of precluding plaintiffs from offering evidence not timely disclosed regarding that claim. The First Department stated, "Willfulness and contumaciousness can be inferred from what the motion court called plaintiffs' failure to comply with discovery obligations and a frustration of defendants' ability to obtain meaningful discovery as documented in its prior orders."). *See generally Shah v. RBC Capital Markets LLC*, 115 A.D. 3d 444, 444 [1st Dept 2014]) ("Supreme Court providently exercised its discretion in denying plaintiff's motion to compel in the 2011 action. For one and a half years after the commencement of that action plaintiff failed to raise the issue of interrogatories or document demands, despite a number of chances to do so at compliance conferences, and despite the IAS court's rules requiring all outstanding discovery matters to be raised at compliance conferences.")

[4] The Court has opened the flash drive, which contains four files labeled as follows: (1) "ATT00082" (which cannot be opened); (2) "Supplementary Materials Attachement [sic] Part 1")(which can be opened and consists of 271 pages); (3) "Supplementary Materials Attachments Part 2")(which can be opened and consists of 3347 pages); and (4) "Supplementary Materials Attachment Part 3" (which can be opened and consists of 3347 pages). The documents

"the documents attached hereto . . . that is the Fletcher Affidavit and Exhibits thereto" in a coherent form—if at all—for the Court to consider, Plaintiffs' motion for consideration of such documents is not only untimely, but is moot.

Defendants' Motion for Summary Judgment

Turning now to Defendants' motion for summary judgment, the undisputed facts are as follows: In 1992, Fletcher purchased Apartment 11 at The Dakota for the purchase price of $425,000. (Ex. 2[5] at 304:20-306:6 [Deposition Testimony of Fletcher ("Fletcher Tr.")]). In 1993, Fletcher purchased Apartment 52, along with Room 270, for the purchase price of $1,375,000. (Ex. 2 at 306:11-313:7 [Fletcher Tr.]; Ex. 3 [Apt. 52 Closing Document]). In order to purchase Apartment 52, Fletcher was required to sell Apartment 11. (Ex. 2 at 314:17-315:24 [Fletcher Tr.]). In 2000, Fletcher applied to purchase Penthouse B. The Board approved Fletcher's application. The purchase price of Penthouse B was $500,000. (Ex. 7 [Penthouse B Closing Document]). In 2001, Fletcher purchased Room 271, for $19,000. (Ex. 8 [Room 271 Closing Document]). In 2002, the Board approved Fletcher's application to purchase Apartment 92, for a price of $1,060,000, as a residence for Dr. Bettye R. Fletcher ("Dr. Fletcher" or "B. Fletcher"), Fletcher's mother. (Ex. 9 [Apt. 92 Purchase Application]; Ex. 11 [Apartment 92 Contract of Sale]). In 2005, the Board approved Fletcher's application to purchase Rooms 189 and 188, for the purchase prices of $150,000 and $14,000, respectively. (Ex. 13 [Room 189 Closing Information Sheet]; Ex. 14 [Room 188 Subscription Agreement]).

The Dakota's shareholders elected Fletcher to serve on the Board from 1994 through 1996, and again from 2004 through 2009. Fletcher served as President of the Board from 2007 through 2009. (Ex. 2 at 304:8-12 [Fletcher Tr.]).

On March 19, 2010, Fletcher entered into a contract to purchase Apartment 50 from the Estate of Ruth Proskauer Smith. (Ex. 18 at FL0008850 [Contract of Sale]). The sales contract provided for an all-cash purchase of $5.7 million. (*Id.*). By letter dated April 5, 2010, Fletcher advised the Board that, "the estate of Mrs. Smith has offered to sell [him] apartment 50 and [they] have signed a purchase contract" and applied for the Board's approval. (Ex. 18 at FL0008846-65 [Fletcher's

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contained in these three "Parts" are not separated, bate-stamped or labelled in any manner. As such, even if the Court were to consider such late submission, the Court has not received a reviewable copy of the "Fletcher Affidavit".

[5] Unless otherwise noted, all numbered exhibits referenced herein refer to the exhibits annexed to the Chung Affirmation in support of Defendants' motion for summary judgment. A list of exhibits annexed to the Chung Affirmation appears in the text of endnote i, *infra*.

April 5, 2010 letter with enclosures]). Fletcher's April 5, 2010 letter enclosed a one page "Estimated Balance Sheet" for Fletcher as of March 31, 2010. (*Id.*)

By email dated April 10, 2010, Barnes, the Board's then treasurer, acknowledged the Board's receipt of Fletcher's application to purchase Apartment 50. (Ex. 24 at DAKOTA005213-14). In addition, Barnes attached a letter executed by Barnes and Jay Goldsmith ("Goldsmith"), the Board's then president, on behalf of the Board, requesting additional information from Fletcher regarding Fletcher's April 5, 2010 submission. (*Id.* at DAKOTA005214).

On April 14, 2010, Fletcher requested that the Board accept his application as submitted. (Ex. 25). However, by letter dated April 15, 2010, the Board denied Fletcher's request. (Ex. 27 at DAKOTA005239 [April 15, 2010 letter from the Board]). On April 23, 2010, Fletcher wrote a letter to Goldsmith and Barnes. (Ex. 1 at FL0008866]). Fletcher wrote, in part:

> While many Boards may have concerns in these challenging times regarding those of us who derive our living in the financial industry, I feel thankful that the liquidity of our investment business enables me, with very little notice, to pay $5.7 million in cash for the purchase of Apartment 50 despite having given a substantial portion of my past earnings in support of education and other drivers of freedom, justice and opportunity.

(*Id.* at FL0008866]). Fletcher's April 23, 2010 letter encloses a letter from Denis J. Kiely ("Kiely")[6], along with additional documents to be considered in connection with Fletcher's application. (*Id.* at FL0008866-8971). Enclosed as "additional materials" were the following documents: Fletcher's Financial Statement; Fletcher's February 27, 2010-March 31, 2010 HSBC Checking Account Statement; Fletcher's tax returns for 2007 and 2008; March 19, 2010 Contract of Sale for Apartment 50; Statements of Financial Condition for the "Private Businesses of Alphonse Fletcher, Jr.," for 2007-2009, and as of March 31, 2010; "Valuation for Fletcher Asset Management and its Affiliates" prepared by "Quantal International Inc.," "a San Francisco-based company that serves as an independent valuation consultant to Fletcher," and a Loan Security Agreement. (*Id.* at FL0008866-8971).

[6] Kiely's letter identifies Kiely as, "[h]aving served as counsel to Mr. Fletcher for approximately one decade". (Ex. 1 at FL0008867).

On April 28, 2010, the Board's Finance Committee unanimously voted to recommend that the Board deny Fletcher's application to purchase Apartment 50. The committee members present at the meeting were: Barnes, Goldsmith, Nitze, Richard Robb ("Robb"), John J. Rydzewski ("Rydzewski"), and Peter R. Sternberg ("Sternberg"). (Ex. 32 [April 28, 2010 Minutes]). On May 2, 2010, the Board unanimously voted[7] to accept the Finance Committee's recommendation to deny Fletcher's application to purchase Apartment 50. The directors present at the meeting were listed as follows: Judy Hart Angelo ("Judy Angelo"), Barnes, B. Fletcher, Goldsmith, Nitze, Susan Luss ("Luss"), Matthew Mallow ("Mallow"), Gwen Myers ("Myers"), Sternberg, and Sydney Weinberg ("Weinberg"). (Ex. 36 [May 2, 2010 Minutes]).

By letter dated June 24, 2010, Peter M. Levine, Esq. ("Levine"), on behalf of Fletcher, wrote to the Board "regarding the arbitrary, unjustified, and ultimately unsustainable rejection of his application to purchase Apartment 50" (the "Levine Letter"). (Ex. 41 [Levine Letter]).

On July 7, 2010, the Board voted to reaffirm the May 2, 2010 Board's denial of Fletcher's application. The directors present at the July 7, 2010 meeting were: Judy Angelo, Barnes, B. Fletcher ("via telephone conference"), Joseph Gerstner ("Gerstner"), Pamela Lovinger ("Lovinger"), Mallow, Myers, Nitze, Rydzewski, Sternberg ("via telephone conference"), and Catherine Vance Thompson ("Thompson"). (Ex. 53 [July 7, 2010 Minutes]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Unless based on personal knowledge of the facts, "[a]n affirmation of counsel "is without evidentiary value" and is insufficient to defeat a motion for summary judgment. (*Zuckerman,* 49 N.Y.2d at 563). "The affidavit or affirmation of an

[7] "Following discussion of the transfers of Apartments 66 and 77, Dr. Fletcher ad Mr. Mallow excused themselves from the meeting. The Board, in the absence of those directors, considered the recommendation of the Finance Committee regarding the proposed transfer of Apartment 50 . . . Thereafter, Mr. Barnes moved that the Board withhold its consent to the transfer. . . . the motion was approved unanimously." (Ex. 36 [May 2, 2010 Minutes]).

attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts." (*Id.* at 563).

"The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified." (*Indig v. Finkelstein*, 23 N.Y.2d 728, 729 [1968]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). *See Soho Ctr. For Arts & Educ. v. Church of St. Anthony of Padua*, 146 A.D. 2d 407, 411 [1st Dep't 1989] (citations omitted) ("A party appearing in opposition to a motion for summary judgment must lay bare his proof and present evidentiary facts sufficient to raise a genuine triable issue of fact ... Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose [to oppose summary judgment], as is reliance upon surmise, conjecture or speculation."). "[A] self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded." (*Lupinksy v. Windham Construction Corp.*, 293 A.D.2d 317, 318 [1st Dep't 2002]).

Discrimination Claims under New York Human Rights Law § 290 *et. seq.* (Sixth Cause of Action) and New York City Administrative Law § 8-101 *et. seq.* (Eighth Cause of Action) – as against The Dakota and Barnes

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination '[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith'" (*40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 153 [2003]). "[D]ecision making tainted by discriminatory considerations is not protected by the business judgment rule." (*Fletcher v. Dakota*, 99 A.D. 3d 43, 48 [1st Dep't 2012]. The New York City Human Rights Law (Administrative Code of the City of New York § 8-101, *et seq.*) ("City HRL"), and the New York State Human Rights Law (Executive Law § 290, *et seq.*) ("State HRL") bar discrimination on the basis of race in the sale, rental, or lease of housing accommodations, including any of the accommodations, advantages, facilities or privileges thereof. (Executive Law § 296[5][a][1]; Administrative Code § 8–107[5]). As per the Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), claims brought under the City HRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws . . . have been so construed."

Discrimination Claims under the State HRL

The framework for analyzing housing discrimination claims under the State HRL is the same as that established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). For a claim of discrimination under the State HRL, the "plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination." *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629 [1997]. To make out a prima facie case of housing discrimination under the State HRL, plaintiff must demonstrate "(1) that he is a member of the class protected by the statute; (2) that he sought and was qualified to purchase the apartment; (3) that he was rejected; and (4) that the coop's denial of his application occurred under circumstances giving rise to an inference of discrimination." (*Sayeh v. 66 Madison Ave. Apt. Corp.*, 73 A.D. 3d 459, 461 [1st Dep't 2010]). "[M]eeting the minimal requirements of a prima facie case ... does not equate to creating a triable issue of fact in the face of admissible evidence that the . . . [defendant] had legitimate, nondiscriminatory reasons for the challenged decisions." (*Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 128 [1st Dep't 2012]).

By making out a prima facie case, the plaintiff "creates the presumption that the [defendant] unlawfully discriminated." *James v. New York Racing Ass'n, 233 F.3d 149*, 154 [2d Cir. 2000]. If the plaintiff satisfies his prima facie burden of establishing a prima facie case of housing discrimination under the State HRL, the burden then shifts to the defendant "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support" the challenged decision. (*Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 304 [2004]). "[I]f the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, then the presumption raised by the prima facie case is rebutted and "'drops from the case.'" (*Ferrante,* 90 N.Y.2d at 629 [citations omitted]). "[T]he defendants' burden in this regard is one of production, and not proof." (*Mancuso v. Douglas Elliman LLC*, 808 F. Supp. 2d 606, 620 [S.D.N.Y. 2011]).

Where the defendant rebuts the presumption of discrimination, then "[i]n order to nevertheless succeed on [his] claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason." (*Forrest*, 3 N.Y. 3d at 304). "In determining whether the reason for an adverse action was pretextual, '[i]t is not for the Court to

determine whether the complaints against plaintiff were truthful or fair, so long as they were made in good faith.'" (*Melman*, 98 A.D.3d at 121 citing *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 508 [S.D.N.Y 2010]).

"A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence." (*Forrest,* 3 N.Y.3d at 326). "Additional evidence of discrimination can be inferred from [a] defendant's departure from its stated ... policy" when taking the challenged adverse action. (*See generally Yanai v. Columbia University*, 2006 WL 6849491 [N.Y. Sup. 2006]).

In order to make out a discrimination claim based on disparate treatment, a plaintiff must first set forth a prima facie case of discrimination, i.e., that he is a member of a protected class and that he was treated differently than similarly situated non-members of the class. (*Shah v. Wilco Sys., Inc.*, 27 A.D. 3d 169, 176 [1st Dep't 2005]). "The individuals being compared must be similarly situated in all material respects." (*Shah*, 27 A.D.3d at 177).

A plaintiff's "[c]onclusory allegations of discrimination are insufficient to defeat summary judgment." *Dickerson v. Health Mgmt. Corp. of Am.*, 21 A.D.3d 326, 329 [1st Dep't 2005]). "Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 [2d Cir. 1999], *as amended on denial of reh'g* [Dec. 22, 1999]. "Stray remarks . . . even if made by a decision maker, do not, without more, constitute evidence of discrimination." *Melman*, 98 A.D. 3d at 125. *See also Mete v. New York State Office of Mental Retardation & Developmental Disabilities*, 21 A.D.3d 288, 294 [1st Dept 2005].

Here, Defendants do not dispute that Fletcher, by virtue of his race, is a member of a class protected by the statute; that Fletcher entered into a contract for an all cash purchase of Apartment 50; that Fletcher applied for Board approval of such contract; and, subsequent to Fletcher providing requested financial submissions, Fletcher was denied approval to make that purchase.

Assuming, as the Court does for these purposes, that Plaintiffs meet their burden of demonstrating a prima facie case of discrimination, the burden shifts to Defendants to set forth, through proof in evidentiary form, legitimate, non-

discriminatory reasons to support the Board's denial of Fletcher's application. (*Forrest*, 3 N.Y. 3d at 304).

Defendants submit deposition testimony of various directors and Finance Committee members who reviewed Fletcher's application to purchase Apartment 50. In the deposition of Goldsmith, when asked what if anything Goldsmith recalled about reviewing Fletcher's April 5, 2010 application materials, Goldsmith testified, "I remember quite clearly, but I think I said, 'holy shit this must be wrong' to myself. It had to be wrong." (Ex. 19 at 132:13-19 [Goldsmith Tr.]). When asked why Goldsmith testified to thinking that the April 5, 2010 application materials, "had to be wrong", (Ex. 19 at 132:19-132:20), Goldsmith testified:

> Well, it shows net worth of $8 million. It shows a debt of $20 million. It shows a million dollars a year in interest and no – very little cash. No liquidity. . . . It had to be wrong. . . . and then there is a letter from a fellow named Kiely who says that it wasn't a mistake. It says 'His net worth was 8.6 million.' Well, how in God's name if a guy's net worth is 8.6 million against the debt of 20, which is two and a half the wrong way, is he expecting to buy another apartment.

(*Id.* at 132:22-133:17 [Goldsmith Tr.]).

When questioned about the meaning of the phrase, "two and a half the wrong way", Goldsmith testified: "I mean you are supposed to have debt to equity, your net worth is supposed to be substantially more than your debt if you want to be in decent financial shape. He has got – he is over leveraged. . . . He has got too much debt for $8 million net worth". (Ex. 19 at 133:18-134:3 [Goldsmith Tr.]).

Regarding the additional financial materials submitted on April 23, 2010 by Fletcher, Goldsmith testified: "[W]e look at a lot of balance sheets and income statements in our job as directors of The Dakota, and people who have net worths purported to be $80 [sic] million very rarely have . . . $50,000 in the bank. $50,000 for a man that's worth $80 [sic] million. Would you believe that?" (Ex. 19 at 487:23-488:8 [Goldsmith Tr.]).

When asked whether Barnes recalled his reactions to a document bearing the heading "Financial Statement" and stating "The following is submitted as being a true and accurate statement of the financial condition of the undersigned on the 31st

day of March, 2010", Barnes testified: "I was surprised or shocked that Mr. Fletcher had only $50,000 in the bank and that there were no other assets that I would have characterized as -- cash and securities on this balance sheet statement, notwithstanding that the prior statement had shown $1.37 million worth of – worth of cash and – excuse me, let me refresh my recollection – cash and liquid investments." (Ex. 20 at 394:5-395:11 [Barnes Tr.]).

Barnes further testified: "Based on my review of the statement fully, $1,327,000 of that $1,377,000 was in a profit sharing pension plan that I would not consider a liquid asset." (Ex. 20 at 395:11-14 [Barnes Tr.]). In response to questioning about whether FAM's ability to provide future income to Fletcher was discussed at the April 28, 2010 Finance Committee meeting, Barnes testified:

> We observed that for the calendar year 2008, the net income of his businesses was a loss of $875,000, and that for 2009, the net income of his businesses was a loss of $137,000, and that . . . called into question the ability of Mr. Fletcher's business, which appeared to represent his only source of support to generate income for him in the future.

(Ex. 20 at 445:18-446:14 [Barnes Tr.]).

When asked whether Nitze recalled his initial reaction to certain materials submitted in connection with the April 5 application, Nitze testified: "I remember focusing on the liquidity and then focusing on the liabilities and just coming to the conclusion that this was the balance sheet of a man who was considerably at risk of being unable to meet his financial obligations." (Ex. 33 at 188:23-189:17 [Nitze Tr.]). When asked why Nitze recommended that the application not be approved, Nitze testified: "Because I found the material in this second submission to raise more problems rather than fewer problems than the one-page submission." (Ex. 33 at 215:9-15 [Nitze Tr.]).

Nitze further testified: "The one-page submission gave me cause for serious concern whether the applicant had sufficient liquidity and sufficient predictability so that there was no significant risk that he would fail to perform his future – to discharge his future obligations in a prompt and proper fashion, and those concerns remained at almost a heightened degree after I reviewed the submission." (Ex. 33 at 215:22-216:6 [Nitze Tr.]).

Nitze further testified:

> When you have the relationship between cash and definite obligations, which you have in these documents, there is a risk and there is a risk that pressure that the person with his balance sheet may not be able to liquidate assets in a way which will meet whatever obligations he incurs within a number of years. . . . In the submission, the one page submission, cash is stated at being $1,377,000, a number which stuck in my mind. In the subsequent submission cash is stated at $50,000 and we see that the balance of the cash referred to in Exhibit 6 is not readily available in bank accounts. Its in a Keogh plan, which would be subject to significant penalties, taxes and this, that and the other thing in terms of rapid withdrawal.

(Ex. 33 at 216:23-217:17 [Nitze Tr.]).

Nitze further testified: "Now I find that he doesn't have a million three of cash ... he only has $50,000 of cash which he can readily draw on." (Ex. 33 at 216:16-218:2 [Nitze Tr.]).

Nitze further testified: "And then we get the bank statements, which reveal a debt service which is in, substantially in excess of the income reported on the tax returns and I got a report back that Buddy said that this was the result of skillful tax management." (Ex. 33 at 218:21-219:2 [Nitze Tr.]). In response to further questioning about the issue of "sufficient predictability", Nitze testified: "We are all subject to having reverses from time to time and the issue here is if you look at the entire balance sheet, is this a balance sheet which evidences an applicant who has the ability over the foreseeable future to withstand reverses without having to liquidate his apartment under pressure." (Ex. 33 at 220:13-19 [Nitze Tr.]).

Rydzewski testified that he reviewed Fletcher's April 23, 2010 application materials at Goldsmith's request. (Ex. 35 at 34:24-35:12 [Rydzewski Tr.]). When asked what surprised Rydzewski about the information contained in the April 23 application materials, Rydzewski testified: "Well, the level of cash or the low level of cash on the balance sheet and the amount of financial obligations, monthly obligations that had to be paid. . . relative to his income." (Ex. 35 at 201:5-15 [Rydzewski Tr.]).

Robb testified, "I found the assets seemed illiquid." (Ex. 5 at 193:18 [Robb Tr.]).

Sternberg testified that he did not believe that the supplemental materials contained in the April 23, 2010 application materials, "support[ed] a conclusion that he [Fletcher] was financially qualified" to purchase Apartment 50. (Ex. 34 at 69:11-19 [Sternberg Tr.]). Sternberg further testified, "There were speculative valuations of intangible and illiquid assets and substantial liabilities contained with relatively low cash." (Ex. 34 at 69:20-25 [Sternberg Tr.]).

Here, Defendants satisfy their burden of producing evidence of legitimate, independent, and nondiscriminatory reasons for the Board's denial of Fletcher's application to purchase Apartment 50. Therefore, the burden shifts to Plaintiffs to produce sufficient proof in admissible form to support a rational finding that the legitimate, nondiscriminatory reasons proffered by Defendants were false and that more likely than not discrimination was the real reason for the Board's denial.

At his deposition, Fletcher was asked, "Did you ever come to learn that your race was a topic of conversation in that meeting [the April 14, 2010 meeting]?" Fletcher responded, "Not explicitly." (Ex. 2 at 533:5-10 [Fletcher Tr.]). Fletcher testified: "What I heard was that in multiple board meetings directors were told not to talk to me about my application because Buddy's black and could sue." (Ex. 2 at 536:16-20 [Fletcher Tr.]). Fletcher further testified, "I am not aware of any other explicit discussions of race in board – of my race in board meetings." (Ex. 2 at 537:7-10 [Fletcher Tr.]). Fletcher testified, "I don't believe I have any evidence of my race being explicitly discussed in the other board meetings." (Ex. 2 at 537:16-18 [Fletcher Tr.]). When asked whether Goldsmith and Barnes "raise[d] to you your race" during the parties' telephone conversation on April 21, 2010 and whether his race was discussed, Fletcher responded, "I don't know that race bias in particular was discussed, but if the word race wasn't, certainly the discussion of bias was there" and "[b]ias against me based on something unstated was discussed." (Ex. 2 at 537:19-538:5 [Fletcher Tr.]).

Fletcher testified that, "There is a general understanding among co-ops and brokers that certain applicants are more desirable than others and that understanding, which is usually unspoken, results in signals to buyers to reduce the number of times that a less desirable applicant is presented to a board." (Ex. 2 at 645:16-23 [Fletcher Tr.]). Fletcher further testified, "The understanding that I gained is that many co-ops prefer not to have any or many black shareholders and though it is unstated, it is surprisingly effectively enforced." (Ex. 2 at 646:3-7 [Fletcher Tr.]).

Fletcher testified: "The basis [of my understanding] is my reading about the subject, my reading about the statistics of the number of blacks in these co-ops, firsthand accounts from brokers who sell property in these co-ops and just noting how few blacks are included either as brokers, buyers, renters, and any other way with many co-ops . . . there are people who study it, and apparently their findings are rigorously tested and surprisingly telling. But I'm specifically referring to the higher priced co-ops where there's a reputation for being less than welcoming to certain minority groups." (Ex. 2 at 646:17-647:17 [Fletcher Tr.]).

Fletcher further testified that when applying for the Board's approval to purchase Apartment 50 in April 2010, Fletcher received "treatment completely opposite of what every shareholder had received" (Ex. 2 at 361:13-362:19 [Fletcher Tr.]) when he was asked to supplement his April 5 submission, which had consisted of a one-page balance sheet, and provide additional materials. Fletcher claims that such a request was inconsistent with the Board's "Transfer Disclosure Policy", implemented in 2007, which allowed existing shareholders of The Dakota to submit only a "one page balance sheet" when seeking to purchase another apartment in the building. (Ex. 4 [May 27, 2007 Minutes]). Fletcher testified that Rydzewski and Robb were "most likely [the] cause of this dramatic departure" (Ex. 2 at 363: 3-16 [Fletcher Tr.]) and the reason why "all of a sudden [he] was getting a treatment completely opposite of what every shareholder had received" (Ex. 2 at 361:13-362:19 [Fletcher Tr.]). Fletcher further testified that Rydzewski and Robb "had shown their ability and their interest in doing this," and had been "targeting [him] for the prior three years or so." (Ex. 2 at 363:3-16 [Fletcher Tr.]). With respect to Rydzewski, Fletcher had testified, "I felt my race was factor in his [Rydzewski] awkward dealings with me." Ex. 2 at 951:18-19 [Fletcher Tr.]. Fletcher testified, "I was trying to understand what could motivate him to work so hard against Ms. Flack and then later I realized that he was working similarly as hard against me and then my mother's candidacy when she arrived in the – became a candidate for the board. And that in combination with the snobbish airs that he put on struck me as the type of animus that is seen sometimes from some white people who have a deep-seated dislike for blacks." (Ex. 2 at 953:7-18 [Fletcher Tr.]).

At his deposition, Fletcher was questioned regarding the following statement he had made in his March 2, 2011 affidavit: "On April 28, 2010, in sharp contrast to the Finance Committee never seriously considering my April 24, Submission, it considered and recommended for approval two pending purchase applications submitted by white applicants. One application, most comparable to mine, because it was submitted by existing shareholders, had financial qualifications clearly not as

strong as mine, despite the applicant' proposal to purchase an apartment twice as expensive as Apartment 50." (Ex. 2 at 441:24-442:19 [Fletcher Tr.], Ex. 28 at ¶ 33 (Fletcher's March 2, 2011 Affidavit). When asked about the statement, Fletcher identified the couple that he had believed had submitted an application "most comparable" to his application. (Ex. 2 at 442:20-443:2 [Fletcher Tr.].

Additionally, in response to Defendants' motion, Plaintiffs submit an affirmation of counsel who lacks personal knowledge of the facts. Plaintiffs' attorney affirmation points to certain emails exchanged between Rydzewski and others as proof that Defendants' proffered legitimate reasons for denying Fletcher's application to purchase Apartment 50 were merely a pretext for discrimination. First, Plaintiffs' attorney affirmation points to an email dated June 22, 2007, from Rydzewski to Robb, in which Rydzewski states:

> I just walked into the building through the courtyard and witnessed the changing of the guard with Buddy talking, tensely, to 2 staff. I breezily walked by with a "hi guys" and kept going. Buddy, with a tennis bag over his shoulder, sullenly said 'hi John,' with a tone of voice and a look on his face like he wanted to hit me! Buddy might as well put on a butler's livery for john angelo and peter nitze. Haven't enjoyed a scene as much as this in years.

(Pls. Ex. DAKOTA009002 [June 22 Email from Rydzewski]).

Second, Plaintiffs point to an email exchange dated March 3, 2008, between Susan Hullin ("Hullin") and Rydzewski, in which Hullin states: "Just wait until one of the formidable tenants finds him non-responsive. I think I hear 'Dixie.'" (Ex. DAKOTA019551 [March 3, 2008 email from Hullin to Rydzewski]).[8]

However, at his deposition, with respect to the June 22, 2007 email that he sent to Robb, Rydzewski testified:

> Richard and I were coming to the realization that we were effectively turned into servants of the wealthy people in

[8] Plaintiffs also reference a May 27, 2008 email from Rydzewski to Robb in which Rydzewski allegedly "derisively suggested to Mr. Robb that they forward a 'spam' e-mail regarding obtaining fake graduates to Mr. Fletcher." A copy of the referenced May 27, 2008 email is not provided to the Court. Plaintiffs also reference a January 1, 2008 email from Rydzewski to Robb in which Rydzewski allegedly "called Mr. Fletcher lazy" and "invoking a stereotype to insult Mr. Fletcher." A copy of the referenced January 1, 2008 email was not provided to the Court.

the building because in our roles as directors and presidents of the board. And we were feeling, or at least I was and he shared the view, that we were more or less servants of a certain group of wealthy people in the building. And now Buddy, who had sought this position, had to basically turn himself into a similar role and he didn't look happy about it. John Angelo and Peter Nitze are maybe the two wealthiest people in the building by everyone's estimation." (Ex. 107 at 146:24-147:13 [Rydzewski Tr.]).

At his deposition, Rydzewski testified, with respect to the March 3, 2008 email that Hullin had sent to him, "Well, along the themes of if you're a formidable tenant, i.e. you're one of the wealthy people in the building, and you're not getting the board to do what you want it to do, finding you unresponsive. I assume that's what she's talking about." (Ex. 107 at 284:8-13 [Rydzewski Tr.]). The deposition continued: "Q: What is the reference, if you know, what does she mean by referring to Dixie here? A: I don't know." (Ex. 107 at 284:14-16 [Rydzewski Tr.]). [9]

Here, even viewing Fletcher's testimony and the 2007 and 2008 emails annexed to Plaintiffs' attorney affirmation in the light most favorable to Plaintiffs, Plaintiffs fail to raise a genuine issue of fact as to whether Board's proffered nondiscriminatory reason for denying Fletcher's application was "mere pretext". Even assuming, *arguendo*, that the 2007 and 2008 emails contain race-related remarks made by Rydzewski and Hullin, as Plaintiffs argue, these emails, which were sent over two years before the Board's 2010 review of Fletcher's application, constitute "stray remarks" and are insufficient to establish pretext. These emails do not concern and are completely unrelated to the purported discrimination by the Board's denial of Fletcher's application in 2010. Therefore, even when viewed in the light most favorable to Plaintiffs, these two emails fail to support a finding that Defendants' proffered reasons for denying Fletcher's application "were pretextual, either in whole or in part." (*Melman*, 98 A.D 3d at 125-126). Moreover, it is undisputed that Rydsewski, Hullin, and Robb were not members of the Board that unanimously voted to deny Fletcher's application in May 2010. (*See* Ex. 36 at

[9] Defendants' counsel posits that this testimony indicates that Hullin was referring to Fletcher likely becoming disillusioned as Board President, and that, in this context, the term "Dixie" is fully consistent with the dictionary definition of the phrase, "Whistling Dixie", meaning, to "engage in unrealistically rosy fantasizing". (Defs. Reply MOL p. 17 [citing American Heritage Dictionary of the English Language]).

DAKOTA004277).[10] In sum, Plaintiffs fail to submit any evidence that the 2007 emails exchanged among Rydzewski, Hullin, and Robb create an issue of fact as to whether the Board's proffered reason in 2010 for denying Fletcher's application was pretextual.

Nor is Fletcher's deposition testimony sufficient to raise a genuine of fact as to pretext. Although Fletcher's deposition testimony indicates that Fletcher believed that his race played a role in the Board's decision to deny Fletcher's application to purchase Apartment 50, Fletcher's testimony in this regard is devoid of any specifics and replete with conclusions and Plaintiffs fail to provide any proof in admissible form to substantiate Fletcher's belief that his race played a role in the Board's decision to deny Fletcher's application to purchase Apartment 50. Fletcher's subjective, unsubstantiated belief that his race played a role in the Board's denial of his application is insufficient to establish pretext. (*Bickerstaff*, 196 F.3d at 452 ["Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment."])

As far as the "Transfer Disclosure Policy" is concerned, Goldsmith testified that the Board decided in 2010 that "a higher degree of financial review" was necessary in light of "problems in the economy" and "Madoff type activities." (Ex. 19 at 127:11-18, 127:24-128:4 [Goldsmith Tr.]). Furthermore, Defendants submit proof in admissible form demonstrating that the new policy was applied to shareholders other than Fletcher. For instance, in February 2010, prior to Fletcher's application, the Board had requested additional materials from an existing shareholder couple seeking to purchase another apartment. (Ex. 20 at 129:8-19 [Barnes Tr.]; Ex. 22 [February 16, 2010 email from Goldsmith to McFarland, Douglas Elliman, stating, "We must stick to the process and only review after full application."]

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[10] Section 8, "Committees," of The Dakota by-laws provide, "The board of directors shall appoint such committees as it shall deem advisable to carry out its functions, specifying the committee's functions, responsibilities, and authority. Members of committees appointed by the board need not be directors, but at least one member of every committee shall be a director of the corporation." Ex. 17 [The Dakota By-laws at DAKOTA004301]. Barnes testified that the Finance Committee "makes a recommendation [to the Board] as to the financial qualification of the applicant to purchase the apartment on the terms that are materialized in the purchase contract." Ex. 20 at 60:25-61:5 [Barnes Tr.]. The Board makes the determination concerning whether or not to approve the application. (Ex. 36 at DAKOTA004277). On April 28, 2010, the Finance Committee held a meeting and recommended denial of Fletcher's application to the Board. Ex. 32 at DAKOTA004274 [April 28, 2010 Minutes]. Rydsewski, Hullin, and Robb were not members of the Board that voted to deny Fletcher's application on May 2, 2010. Ex. 36 at DAKOTA004277 [May 2, 2010]. Hullin was not a member of the Finance Committee that recommended denial of Fletcher's application to the Board on April 28, 2010. (*See* Ex. 32 at DAKOTA004274). Rydsewski and Robb were members of the Finance Committee that recommended denial of Fletcher's application on April 28, 2010. (*Id.*)

Additionally, Plaintiffs provide no evidence to substantiate Fletcher's allegation that discriminatory animus can be inferred by the Board's acceptance of an existing white shareholder couple's full application (as distinct from a one page submission) to purchase Apartment 66 at the same time it denied his application to purchase Apartment 50. Plaintiffs fail to make the required showing that Fletcher's application was similarly situated in all material respects to the other application. Defendants produced the materials submitted in connection with the other application, which shows that those applicants earned a combined positive income in each of the previous three years of between $6.6 million and $8 million and that although they were planning to finance the purchase $11.5 million purchase with a loan in the amount of $3.5 million, the Applicants had sufficient liquidity to buy the apartment without a loan. (Ex. 84 [2007, 2008, and 2009 Tax Information for Applicant for Apartment 66]; Ex. 85 at DAKOTA004546 [Apartment 66 Financial Statements], Ex. 87 at DAKOTA004578 [Apartment 66 Applicants' Employer Letter]). As for the review of Applicants' financial qualifications, Goldsmith testified, "I do remember discussing the fact that he [the husband] had a letter from Cantor Fitzgerald, a huge financial company, about his $5 million salary and his earnings for the previous years had been 5, 10 million together." (Ex. 19 at 219:3-8 [Goldsmith Tr.]). Nitze testified that the couple had "come through that period with substantially unimpaired assets and earnings." (Ex. 33 at 9-15 [Nitze Tr.]).

Accordingly, Plaintiffs have failed to raise a genuine issue of fact concerning either the falsity of Defendants' proffered reason for the Board's denial of Fletcher's application to purchase Apartment 50 or that discrimination was more likely the real reason for the denial versus his lack of financial qualifications. Summary judgment is appropriate and Plaintiffs' State HRL discrimination cause of action is dismissed.

Discrimination Claims Under the City HRL

A claim of discrimination brought under the City HRL must, "on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework *and* the somewhat different 'mixed-motive' framework recognized in certain federal cases." (*Melman v. Montefiore Medical Center*, 98 A.D. 3d 107, 113 [1st Dep't 2012]) (emphasis added).

Under the mixed motive analysis, a plaintiff only has to raise an issue as to whether the Defendant's adverse action was "motivated at least in part . . . by discrimination" or "more likely than not based in whole or in part on discrimination." (*Melman*, 98 A.D.3d at 113 [internal citations omitted]). A plaintiff need not prove

the reasons proffered by the defendant for the adverse action were false or pretextual. (*Id.*).

Thus, under the City HRL, once a defendant "on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff "must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." (*Id.*). A plaintiff "may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive," or "leave unchallenged one or more of the defendant's proffered reasons for its actions and ... show that discrimination was just one of the motivations for the conduct." (*Bennett,* 92 A.D.3d at 38-39). "[E]vidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial--as with proof of any other fact." (*Id.*).

Even under the City HRL's liberal mandate, "not every plaintiff asserting a discrimination claim will be entitled to reach a jury." (*Melman*, 98 A.D.3d at 131 [affirming summary judgment in favor of Defendant and dismissal of Plaintiff's age discrimination and retaliation claims under the City HRL]).

As discussed above, even assuming that Plaintiffs meet their prima facie burden under the *McDonnell Douglas* framework, Plaintiffs fail to provide evidence in admissible form to demonstrate that Defendants' proffered legitimate reason for denying Fletcher's application to purchase Apartment 50 was mere pretext.

Turning to the mixed-motive analysis, even the 2007 and 2008 emails discussed above do not provide evidence from which a reasonable fact-finder could infer that race played any role in the Board's 2010 decision to deny Fletcher's application to purchase Apartment 50. (*Bennett,* 92 A.D.3d at 40-41).

Accordingly, Defendants demonstrate that no jury could find Defendants liable under either the McDonnell Douglas test, "or as one of a number of mixed motives, by direct or circumstantial evidence," as also required under the City HRL. (*Bennett*, 92 A.D.3d at 41). Defendants are therefore entitled to summary judgment and a dismissal of Fletcher's race discrimination claim under the City HRL.

Retaliation Claims under New York Human Rights Law § 290 et. seq. (Seventh Cause of Action) and New York City Administrative Law § 8-107 et. seq. (Ninth Cause of Action) – as against The Dakota

The State Human Rights Law ("NYSHRL") provides, in pertinent part, that "[i]t shall be ... unlawful ... to retaliate ... against any person because he or she has opposed any practices forbidden under this article ..." (Executive Law § 296[7]). The City Human Rights Law ("NYCHRL") prohibits retaliation, "in any manner against any person because such person has ... opposed any practice forbidden under this chapter." (Administrative Code § 8–107[7]). The City HRL is "uniquely broad and remedial" and its provisions are liberally construed. (*Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 68 [1st Dep't 2009]).

In order make out a retaliation claim under the State or City Human Rights Laws, the plaintiff must show: (1) the plaintiff engaged in protected activity; (2) the defendant was aware that she participated in such activity; (3) the plaintiff suffered an adverse action[11] based upon that activity; and, (4) there was a causal connection between the protected activity and the adverse action. (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312-13 [2004]). Under the NYSHRL or the NYCHRL, "proof of causation can be shown either: (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment . . . ; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." (*Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 [2d Cir. 2000]). On a motion for summary judgment in a retaliation case, under State or City HRL, a defendant may establish its entitlement to summary judgment by demonstrating that the plaintiff cannot make out a prima facie claim of retaliation. (*Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 740-41 [2d Dep't 2013]).

As limited by the First Department, Plaintiffs' instant retaliation claims, under both the City and State HRL, arise from certain claimed conduct regarding a Jewish couple's application to purchase an apartment at The Dakota in 2007. (*See Fletcher*, 99 A.D. 3d at 270). Plaintiffs claim that Fletcher complained about the Board's

[11] In keeping with the uniquely broad and remedial purposes of the NYCHRL, the City HRL is "more liberal than either its federal or state counterpart", (*Sandiford v. City of New York Dept. of Educ.*, 94 A.D.3d 593, 595 [1st Dep't 2012]), and defines the term "adverse action" to include any act that is "reasonably likely to deter a person from engaging in protected activity." (Administrative Code § 8-107[7]; *Williams*, 61 A.D.3d 62 at 71). However, although "the NYCHRL expanded the definition of actionable retaliatory conduct to include manifestations of retaliation which might not meet the standards under comparable state and federal law," "the plaintiff still bears the ultimate burden of establishing a prima facie case of retaliation under the NYCHRL." (*Brightman v. Prison Health Service, Inc.*, 108 A.D. 3d 739, 740 [2d Dep't 2013]).

treatment of the Jewish couple, and that the Board's rejection of Fletcher's application to purchase Apartment 50, in 2010, was retaliation for Fletcher's purported complaints about the Board's treatment of the Jewish couple, in 2007. (SAC ¶¶ 34, 36; *Fletcher*, 99 A.D. 3d at 270).

By way of background, it is undisputed that the couple in question sought to purchase an apartment at The Dakota in 2007. The couple's application initially was rejected, as the couple had declined to submit their income tax returns to the Board. (*See* Ex. 2 at 718:23-719:2 [Fletcher Tr.] [When asked to recall the Board's decision to insist on the [couple] submitting their full tax returns, Fletcher testified, "I do agree that the consensus was, and I felt that they should submit their tax returns."). Later, after having submitted their tax returns, the couple were interviewed and approved to make the purchase they proposed. (*See* Ex. 2 at 733:7-13 [Fletcher Tr.] ["Q: And ultimately the [couple] were approved to purchase the apartment they were applying for; is that correct? A: That's correct, that after they were brought up in the new term they were interviewed and approved."]).

As far as Fletcher's purported complaints about the Board's treatment of the Jewish couple are concerned, at deposition, Fletcher testified that, in September 2007:

> I believe I said to Peter [Nitze] that Juliana Terian has asked me to raise the [couple's] application again, and that I am inclined to do it, and one very sensitive issue is that the last time around I felt the process was biased by comments and conduct that was wrong, or I'm not sure exactly which word I used, and I believe I cited the reference to the applicants' religion as part of what I thought was wrong in the process.

(Ex. 2 at 726:6-16 [Fletcher Tr.]). Fletcher's deposition continued: "Q: And how did you cite or refer to the applicants' religion? A: I think I referred to both the explicit comment by Susan Luss and the general coded comments by John Rydzewski." (Ex 2 at 726:17-21 [Fletcher Tr.]). In addition, Fletcher testified that, "I said that it was flagrantly wrong for her to make her Jewish mafia comment in the board's discussion of the application of this Jewish couple,"[12] (Ex. 2 at 727:16-20 [Fletcher Tr.]), and that, "I believe I suggested to [Nitze] that I felt an obligation to

[12] Plaintiffs submit, for the first time on reply, an email dated April 25, 2007, sent from Fletcher to Kiely, with subject line, "Today's Board Conference Call" (the "April 25, 2007 Fletcher/Kiely Email"). In the April 25, 2007 Fletcher/Kiely Email, Fletcher lists, "'Jewish Mafia' comment" among the "Several things about today's conversation and what preceded it [that] concern me". (Pls. Ex. "Email regarding 'Jewish Mafia'").

address the situation and I don't believe he had any further comment for me on that." (Ex. 2 at 728:25-729:7 [Fletcher Tr.]).

Defendants argue that Plaintiffs cannot establish a prima facie claim of retaliation because Plaintiffs cannot establish a prima facie showing of the requisite element of causation. Defendants argue that Plaintiffs fail to submit "indirect" proof demonstrating that a bona fide, triable issue of fact exists as to the element of causation because Fletcher's purported complaints, in 2007, were not "followed closely" by the Board's rejection of Fletcher's application to purchase Apartment 50, in 2010. (*Gordon*, 232 F.3d at 117). Indeed, Plaintiffs do not dispute that, while Fletcher expressed concerns, regarding the Jewish couple's application process, in September 2007, the Board rejected Fletcher's application to purchase Apartment 50 in May 2010.

Defendants further argue that the submission of Fletcher's application to purchase Apartment 50 did not present the Board with its "first opportunity for retaliation" against Fletcher. (*See Fletcher*, 88 A.D.3d at 53). Defendants submit Board records and deposition testimony indicating that the Board unanimously elected Fletcher as President of the Board in June 2008, approximately nine months after the conversation between Fletcher and Nitze took place. (*See* Ex. 16 at DAKOTA004225 [June 3, 2008 Board Minutes] [stating that Alphonse Fletcher, Jr. was nominated and unanimously elected to serve as President for the upcoming year]; Ex. 2 at 302:7-20 [Fletcher Tr.]). In the deposition of Fletcher, the following exchange took place:

> Q: How often are board member elections held?
>
> A: I believe they're generally held each year.
>
> Q: You referred to having served as the board president from 2007 to 2009. How is the board president selected?
>
> A: Technically, the members of the board vote for the officers including the president. Unofficially, the president is agreed by consensus before the votes take place so there's generally one person nominated for president and the board unanimously elects that person.
>
> Q: Is that what happened in the two instances that you were elected president?

A: Yes.

(Ex. 2 at 302:3-20 [Fletcher Tr.]).

Here, the length of time between Fletcher's 2007 complaints and the Board's 2010 denial, along with the Board records and testimony demonstrating an opportunity for retaliation via the 2008 Board election, establish that Plaintiffs cannot make out a prima facie showing of causation based on "indirect" proof of temporal proximity alone. Plaintiffs do not point to any document or testimony indicating that the 2008 Board election did *not* present the Board with an opportunity to retaliate against Fletcher, or that the submission of Fletcher's application to purchase Apartment 50 *did* present the first opportunity for such retaliation. Therefore, Plaintiffs fail to raise any triable issue of fact as to whether Fletcher's 2007 objection to the Board's treatment of the Jewish couple was "closely followed" by the Board's 2010 decision to deny Fletcher's application to purchase Apartment 50.

In addition, Defendants submit deposition testimony indicating that the Board did not have Fletcher's 2007 complaint in mind when it denied Fletcher's application. (*E.g.*, Ex. 20 at 84:20-85:3 [Barnes Tr.] ["Q: . . . did [Nitze] relate to you a conversation he had with Mr. Fletcher wherein Mr. Fletcher expressed a concern that it may be the appearance that the Board had treated [the Jewish couple] unfairly? . . . A: He did not."]; Ex. 35 at 102:2-10 [Rydzewski Tr.] ["Q: Did you have any discussions with Mr. Fletcher about the Jewish Mafia comment that was made? A: No. Q: Did Mr. Fletcher ever express a concern to you that the board had acted improperly because of a reference to an applicant's religion? A: No."]; Ex. 19 at 459:12-16 [Goldsmith Tr.] [answering "I don't recall" when asked "Did Mr. Fletcher ever raise a concern that Board might not be acting properly in connection with its evaluation of the [Jewish Couple's] application?"]). Defendants further submit deposition testimony from various directors who evaluated Fletcher's application, in which those directors state that they recommended denial, or voted to deny, Fletcher's application to purchase Apartment 50 based on Fletcher's financial qualifications. (*E.g.*, Ex. 5 at 237:11-14 [Robb Tr.] [testifying that, "everyone wanted to approve this. There was no reason not to approve it. It's a flip tax. It's a nice price. We already know him. And it was a very—people with different backgrounds, all of them financially knowledgeable, they all independently arrived at the same conclusion."]; Ex. 19 at 408:21-409:7 [Goldsmith Tr.] ["Q: Did you think that in April of 2010 there were people on the Finance Committee who were inclined to be biased against Mr. Fletcher? . . . A: No, absolutely not."]; Ex. 37 at

85:6-20 [Luss Tr.] ["Q: . . . Generally speaking, what was the reason why you did not support the transfer of Apartment 50? A: It was based on the financial materials that were presented."]).

In response to Defendants' motion setting forth the reasons for the Board's denial, Plaintiffs fail to come forward with proof in admissible form that the Board's decision to deny Fletcher's application to purchase Apartment 50 constituted retaliation for Fletcher's objecting to the Board's allegedly discriminatory treatment of the Jewish couple in 2007. Plaintiffs do not provide any "direct" proof in evidentiary form showing that a bona fide, triable issue of fact exists as to whether there was a retaliatory animus toward Fletcher. Nor do Plaintiffs point to any document or testimony suggesting that any member of the Board had Fletcher's complaints in mind when the Board denied Fletcher's application to purchase Apartment 50. Although Plaintiffs point to the April 25, 2007 Fletcher/Kiely Email as evidence of the Board's retaliatory animus toward Fletcher, even if this email—which is submitted, for the first time, on reply—may properly be considered herein, (*see Sanford v. 27-29 W. 181st St. Ass'n*, 300 A.D.2d 250, 251 [1st Dep't 2002]), the April 25, 2007 Fletcher/Kiely Email is insufficient, without more, to raise a bona fide, triable question of fact as to the element of causation. The April 25, 2007 Fletcher/Kiely Email contains the subject line, "Today's Board Conference Call" and lists "'Jewish Mafia' comment" as one of "[s]everal things about today's conversation and what preceded it [that] concern [Fletcher]". (Pls. Ex. "Email regarding 'Jewish Mafia'"). That such a comment was made, however, or that Fletcher expressed such a concern in an email to a non-Board member, does not create a bona fide, triable question of fact as to whether Fletcher's 2007 complaints were causally linked to the Board's 2010 decision to deny Fletcher's application to purchase Apartment 50.

In sum, Defendants' uncontroverted evidence demonstrates that Plaintiffs cannot make out a prima facie claim of retaliation because Plaintiffs cannot establish a prima facie showing of a causal connection between Fletcher's 2007 complaints and the Board's 2010 decision to deny Fletcher's application to purchase Apartment 50. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiffs' claims for retaliation under the NYSHRL and the NYCHRL. (*See Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 129 [1st Dep't 2012] [finding summary judgment dismissing City retaliation claims was appropriate where, under the circumstances presented, there could be no causal connection between the protected activity and the challenged conduct]).

Tortious Interference as against The Dakota (Eleventh Cause of Action)

Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. (*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 [1996]). Tortious interference with prospective economic relations requires a showing that the plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct. (*Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 266 [1st Dep't 2002]).

In this case, Defendants do not dispute that Fletcher entered into a contract of sale to purchase Apartment 50 from the Estate of Ruth Proskauer Smith (the "Contract of Sale"). (*See* Ex. 18 at FL0008850-65 [Executed copy of Contract of Sale for Apartment 50 as between the executor for the Estate, as Seller, and Fletcher, as Purchaser]). Nor do Defendants dispute that Defendants were aware of the Contract of Sale. (*See* Ex. 18 at FL0008846-65). However, Plaintiffs' tortious interference claim depends on Plaintiffs' discrimination and retaliation claims. As Plaintiffs fail to present evidence in admissible form sufficient to raise an issue of fact as to whether the Board's denial of Fletcher's application was not based on Fletcher's lack of financial qualifications, Plaintiffs fail to present proof in admissible form demonstrating that a bona fide, triable issue of fact exists with respect to the "without justification" requirement of a tortious interference claim. To the extent that Plaintiffs' tortious interference claim sounds in tortious interference with prospective economic relations rather than tortious interference with contract, Plaintiffs likewise fail to present proof in admissible form sufficient to demonstrate that a bona fide, triable issue of fact exists with respect to the "wrongful means" requirement of a tortious interference with prospective economic relations claim.

Moreover, Section 6.1 of the Contract of Sale expressly states: "This sale is subject to the unconditional consent of the [Dakota] Corporation." (Ex. 18 at FL0008852). As Section 6.1 articulates a condition precedent to the sale of Apartment 50, namely, the Board's consent, the Board's denial of such consent establishes a prima facie showing that Fletcher's obligation to close on Apartment 50 was neither triggered nor actually breached based on a failure of an express condition precedent under the Contract of Sale. (*Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 266 [1st Dep't 2002] [finding that tortious interference with contract claim failed where the failure of an express condition precedent established no actual breach of viable contract]). In opposition, Plaintiffs fail to present proof

in admissible form demonstrating that a triable issue of fact exists as to whether Defendants caused Fletcher to breach any contractual obligation that was triggered in the absence of such consent.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiffs' tortious interference claims.

Defamation against the Dakota and Nitze (fifth cause of action)

"The elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*." (*Dillon v. City of New York*, 261 A.D.2d 34 [1st Dep't 1999]). Defamation *per se* consists of statements: (i) charging plaintiff with a serious crime; (ii) tending to injure another in his or her trade, business or profession; (iii) asserting that plaintiff has a loathsome disease; or, (iv) imputing "unchastity" to a woman. (*Liberman v. Gelstein*, 80 N.Y.2d 429, 435 [1992]).

To support an action for defamation, a statement must be both defamatory in meaning and factual in nature. (*Dillon*, 261 A.D.2d at 38; *Mann v. Abel*, 10 N.Y.3d 271, 276 [2008]). A statement is defamatory in meaning if it exposes an individual, "to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or . . . induce[s] an evil opinion of one in the minds of right-thinking persons, and . . . deprive[s] one of their confidence and friendly intercourse in society." (*Kimmerle v. N.Y. Evening Journal, Inc.*, 262 N.Y. 99, 102 [1933]). In determining whether a statement is defamatory in meaning, the allegedly defamatory words, "must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." (*Dillon*, 261 A.D.2d at 38). Where the allegedly defamatory words or statements are capable of multiple meanings, New York courts employ an ordinary person standard to determine if that statement is "reasonably susceptible [to] a defamatory connotation." (*James v. Gannett Co.*, 40 N.Y.2d 415, 419 [1976]).

It is well settled that, "[t]ruth provides a complete defense to defamation claims." (*Dillon*, 261 A.D.2d at 39; *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 [1st Dep't 2014] ["Because the falsity of the statement is an element of

the defamation claim, the statement's truth or substantial truth is an absolute defense."]).

In addition, expressions of "pure opinion" may not give rise to an action for defamation. (*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 [1986]). Such statements receive the Federal constitutional protection accorded to the expression of ideas, "no matter how vituperative or unreasonable" they may be. (*Id.* at 289; *Mann v. Abel*, 10 N.Y.3d 271, 276 [2008] ["Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation."). However, an expression of opinion may "lose" its protection and become actionable, "where the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it." (*Guerrero v. Carva*, 10 A.D.3d 105, 112 [1st Dep't 2004] *quoting Steinhilber*, 68 N.Y.2d at 289). In a so-called "mixed opinion" case, "the actionable element . . . is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking." (*Steinhilber*, 68 N.Y.2d at 289-90).

Whether a particular statement constitutes an opinion or an objective fact is a question of law. (*Mann*, 10 N.Y.3d at 276). In distinguishing between opinion and fact, the following factors are to be considered: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and, (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact. (*Id.*). Additionally:

> [C]ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose" and in particular "should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff.

(*Id. quoting Immuno AG. v Moor-Jankowski*, 77 N.Y.2d 235, 254 [1991]).

Even if a statement is defamatory, a qualified privilege exists for communications, "made to persons who have some common interest in the subject

matter." (*Foster v. Churchill*, 87 N.Y.2d 744, 751 [1996]; *Silverman v. Clark*, 35 A.D.3d 1, 10 [1st Dep't 2006]; *see also Santavicca v City of Yonkers*, 132 A.D.2d 656, 657 [2d Dep't 1987] ["A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty"]). Privileged communications are, "one[s] which, but for the occasion on which [they] [are] uttered, would be defamatory and actionable." (*Foster*, 87 N.Y.2d at 751 [1996] *quoting Park Knoll Assocs. v. Schmidt*, 59 N.Y.2d 205, 208 [1983]).

The common interest privilege has been extended to communications between members of a board of governors of a tenants' association, (*Liberman v. Gelstein*, 80 N.Y.2d 429, 437 [1992]), between a college administrator and members of a tenure committee of a faculty, (*Stukuls v. State of New York*, 42 N.Y.2d 272 [1977]), and between physicians belonging to a health insurance plan (*Shapiro v. Health Ins. Plan*, 7 N.Y.2d 56, 60-61 [1959]). The rationale in applying the privilege in these circumstances is that, "so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded." (*Silverman v. Clark*, 35 A.D.3d 1, 10 [1st Dep't 2006] *quoting Liberman*, 80 N.Y.2d at 437). In order for the common interest privilege to apply, "the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others." (*Silverman*, 35 A.D.3d 1, 12 [1st Dep't 2006] *quoting Lewis v. Chapman*, 16 N.Y. 369, 375 [1857]).

The defense of qualified privilege will be defeated by demonstrating that the defendant spoke with malice. (*Foster*, 87 N.Y.2d at 751). For purposes of defeating the defense of common interest privilege in a defamation case, malice "includes either common-law malice (motivated by spite or ill will) or constitutional malice (statements made with a high degree of awareness of their falsity)." (*Silverman*, 35 A.D.3d 1, 11 [1st Dep't 2006]).

As far as the element of publication is concerned, "[a] cause of action for defamation requires publication of the defamatory matter, which occurs when it is heard by some third party." (*Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 298 [1st Dep't 1999]). A defendant in a defamation case may establish a prima facie showing of lack of the requisite publication by submitting sworn statements "unequivocally denying" that the alleged defamatory statements were made. (*Id*; *Garcia v. Puccio*, 62 A.D.3d 598, 598 [1st Dep't 2009]). Upon a prima facie showing of no publication, the plaintiff "is bound to come forward with proof in

evidentiary form to show that a bona fide, triable issue of fact exist[s] as to whether the slanderous statement[s] [were] made and published." (*Snyder*, 252 A.D.2d at 298). In such circumstances, "a plaintiff may not rely solely on hearsay or conclusory allegations that the slanderous statement was made." (*Id.*).

The allegedly defamatory statements now in issue are as follows:

> 1. STATEMENT ONE: "[At an April 14, 2010 board meeting,] one or more of the Individual Defendants told the other members of the Board that Fletcher had not fulfilled binding charitable commitments and pledges, that Fletcher's assets were all illiquid and difficult to value, and that FAM's business loans left it over-extended and at risk of collapse . . . " ("Statement 1").
>
> 2. STATEMENT TWO: "[On or before May 7, 2010, Nitze told Dakota shareholder Craig Hatkoff that Fletcher] 'had not actually given the money he had promised to give [to charity]' and 'he owes it' . . ." ("Statement 2").
>
> 3. STATEMENT THREE: "[At some point between June 24, 2010 and September 2010] one or more of the Individual Defendants falsely and maliciously stated to Hatkoff that Fletcher had 'checked out of his business' and was living on 'borrowed money' . . ." ("Statement 3").
>
> 4. STATEMENT FOUR: "On September 14, 2010, ... the Board sent a letter to certain Dakota shareholders ... [It stated, inter alia,] '[b]ased on the financial information submitted by Fletcher, the Board concluded that approving such a purchase would not be in the best interest of The Dakota' ... [The letter] also contained the false and misleading statement that Fletcher had declined the Board's request to provide additional financial information." ("Statement 4").

(*see Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 55 [1st Dep't 2012]).

1. Statement 1

Turning now to Statement 1, Defendants submit Board records and testimony indicating that Fletcher was not present at the April 14, 2010 meeting in which Statement 1 allegedly was made. (*E.g.*, Ex. 26 [April 14, 2010 Space Committee Minutes] [listing Goldsmith, Nitze, Barnes, Dr. Fletcher[13], Luss, Mallow[14], Meyers, Charles Patten, and Weinberg as "Directors Present"]). Indeed, in the deposition of Fletcher, Fletcher testified, with respect to the April 14, 2010 meeting: "[w]ell, I was not at the meeting and so I can't really describe what was at the meeting. I've simply tried to describe what I've learned about the meeting from various sources." (Ex. 2 at 387:25-388:5 [Fletcher Tr.]).

Fletcher testified that he learned of the "content of the April 14, 2010 meeting" in a telephone conversation with Goldsmith and Barnes, in which Goldsmith "provided a description of what was going on." (Ex. 2 at 345:25-346:7 [Fletcher Tr.]). The telephone call in question took place on April 21, 2010. (*Id.* at 346:8-347:20 [Fletcher Tr.]). With respect to the April 21, 2010 conversation regarding the April 14, 2010 meeting, Fletcher's deposition continued:

> Q: Now what concerns did they discuss with you?
>
> A: I think first on the list was that I had not honored binding charitable commitments that should be properly listed as liabilities on my balance sheet.
>
> Q: And who raised that concern on the phone call?
>
> A: Mr. Goldsmith did most of the talking.
>
> Q: And as near as you can remember, what is it that he said?
>
> A: He was describing the issues being raised by finance committee members and board directors and said,

[13] At deposition, Dr. Fletcher testified that she did not remember any of the Board's discussions of Fletcher's application to purchase the Apartment because Dr. Fletcher, "had to leave before the discussions took place." (Chung Affirm., Ex. 39 at 144:10-23 [Dr. Fletcher Tr.]).

[14] At deposition, Plaintiffs' counsel questioned Mallow about the April 14, 2010 meeting and Mallow testified: "I recused myself from any discussion or consideration of his purchase or his purchase application." (Chung Affirm., Ex. 38 at 80:11-25 [Mallow Tr.]). Mallow further testified: "I recused myself because I was an early investor in Mr. Fletcher's fund, the Fletcher Fund. I was an early limited partner of the Fletcher Fund. And because my law firm of which I was at the time of this meeting and at the time the contract was signed . . . represented the Fletcher Fund, represented Fletcher Asset Management, . . . I thought it was not appropriate for me to participate in discussions of his purchase of the Apartment." (Chung Affirm., 81:14-82:2 [Mallow Tr.]).

effectively, taking their position and saying you've got binding, in our discussions we talked about how you've got binding charitable commitments which are liabilities that should be on your balance sheet and we've got to have a private investigator talk to all these charities and confirm exactly what you owe and when you owe it, etc., etc.

Q: Do you have a recollection today that it was Mr. Goldsmith who said this, or was it Mr. Barnes?

A: Mr. Goldsmith.

Q: So what happened next?

A: I said, where is that coming from. I was just shocked. And he said something to the effect of we've got a New York Times article that talks about your charitable commitments. And I said I'm aware of that article, but that article doesn't describe any charitable donation liabilities, nor am I aware of any, or even aware of anyone talking about that, and so how did this arise. And he just went on about how a private investigator is going to have to investigate that and get those details.

Q: And what happened in the conversation after that?

A: He started to go on to the next concern and I was – I was just in shock because clearly something was very, very wrong. So I was listening. At he started in on assets and what they're worth and talking about private assets, illiquid assets, difficult-to-value assets, and I said to that how do you even know what assets, these details about the assets in my portfolio, or a fund's portfolio, and he just ran on saying that's private, illiquid things, it's not AT&T stock, I can value AT&T stock, I can't value your private business, but there are people out there who can and you've got to get one, you have to have an independent valuation expert value your business and to submit that to the board.

Q: Do you remember saying anything else that Mr. Goldsmith or Mr. Barnes said on that topic?

A: Not right now.

Q: What was your response?

A: I think I was pretty silent at this point.

Q: Who talked next?

A: Mr. Goldsmith continued with the next concern, the business loans. He started quoting debt to equity, or debt to asset ratios and talking about good ratios and bad ratios, and I think he calculated my debt to assets ratios to something like 65 percent and he said that may be a little too high, and on and on. And that may be too high because if the loans are called then you've got to sell those assets and that may or may not be easy at that time.

And I either—I think I interrupted him and said but how do you even know what my debt to equity, debt to assets ratio is. And he said I can see it right on this balance sheet, you've got $21 million of debt and you've got 30 whatever some million dollars of assets and that's a 65 or whatever the percentage was ratio and that's too much.

And I said but you're comparing the debt to the cost of the assets not the debt to the market value of the assets, and even if the debt was 65 percent of the value of the assets there is no magic to say that that's an unacceptable ratio. And he said what do you mean the cost, the balance sheet is right here and it shows this many, and this many in assets, and I said but Jay, that balance sheet is showing you the cost, it says at lower of cost or market, market is believed to significantly exceed cost. So you're looking at the cost of these assets.

And then he interrupted me and he said, which I cannot forget because now I knew something was very wrong, he said, Buddy, you're not going to talk your way out of this one. And I was thinking what is—where is that

coming from, have I talked my way out of something before? I never had—I mean I was just in complete shock.

So we went back to getting him the additional information so that he could properly assess these issues that are important.

Q: When you say you went back to getting him the additional information, what got said at that point?

A: I believe I said that, I can't remember if I committed at that time, but I think I did not close the door to providing the additional information. I thanked him for his kindness in saying that the board should respect, should pay Buddy respect as our neighbor and past president. I believe I said that if they had real concerns to share, that I'd welcome those concerns because I don't want to miss anything. I was trying to be positive and constructive and while still saying I don't know where all this is coming from.

I don't believe I committed at that time, but we left the door open to—I didn't foreclose the possibility of delivering all that information, and the call ended after my thanking them.

I recall Mr. Barnes had a comment at the end which right now is escaping me.

Q: Do you remember anything else Mr. Barnes said during the conversation?

A: He was very quiet, but he had one question at the end. I think, I think Barnes asked about income at the end of the conversation, but it was a very quick, it wasn't one of the three principal issues that Mr. Goldsmith outlined.

Q: Do you remember what it was he asked about income?

A: I think it was taxable income versus economic income, something about tax returns.

Q: Do you remember anything more about that question was?

> A: No, it was really almost in passing. Mr. Goldsmith was in complete control of the call.

(Ex. 2 at 352:3-359:17 [Fletcher Tr.]).

However, in the deposition of Goldsmith, Plaintiffs' counsel asked Goldsmith whether "any shareholder of the Dakota ever said, in words or substance, that Mr. Fletcher has not given the money to charity he had promised to give and he owes it?" (Ex. 19 at 574:18-21 [Goldsmith Tr.]). In response, Goldsmith testified:

> No, what we – what we said on the Finance Committee was that if he had charitable pledges outstanding, he should include them on the financial statement. We never made any allegations that he didn't – that he didn't – not in my presence at least – that he didn't – that he had obligations that were not included. We simply stated that if – that if he has some, he should put it on the statement. That's all.

(Ex. 19 at 573:23-574:8 [Goldsmith Tr.]).

In the deposition of Nitze, Plaintiffs' counsel asked Nitze: "Do you recall any member of the board of The Dakota or the Finance Committee stating that Mr. Fletcher had not fulfilled binding charitable commitments?" (Ex. 33 at 383:17-23 [Nitze Tr.]). In response, Nitze testified, "No." (Ex. 33 at 383:22-23 [Nitze Tr.]). The deposition of Nitze continued:

> Q: To the best of your recollection, did any member of the board of The Dakota or the Finance Committee had stated that Mr. Fletcher's assets were all illiquid and difficult to value?
>
> A: I remember stating myself that in my opinion, many of Mr. Fletcher's assets, I would never have said all, because even at its minimum levels he had some cash, but I remember stating myself that in my opinion, many of the assets appearing on the left-hand side of Mr. Fletcher's balance sheets, both original one-pager and the later a

more expanded balance sheet, were illiquid and difficult to value.

(Ex. 33 at 384:2-15 [Nitze Tr.]). When asked whether Nitze recalled "any member of the board of The Dakota of the Finance Committee saying in words or substance that FAM's business loans left it overextended and at risk of collapse" Nitze also testified "No." (Ex. 33 at 387:2-8 [Nitze Tr.]).

In the deposition of Barnes, the following exchange took place: "Q: Dr. Barnes, are you aware of any time prior to December 31, 2010 a board member saying in words or substance that Mr. Fletcher had not given the money he promised to give to charity and he owes it? A: . . . No I do not." (Ex. 20 at 592:22-593:5 [Barnes Tr.]). Similarly, in the deposition of Luss, Luss responded "no" when asked, "Do you recall any discussion of his [Fletcher's] proposed charitable contributions?" (Ex. 37, 86:18-87:6 [Luss Tr.]).

Here, Defendants' unequivocal denials of Statement 1, coupled with the Board records and deposition testimony demonstrating that Fletcher lacks first-hand knowledge of Statement 1, are sufficient to establish a prima facie showing of no publication with respect to Statement 1. In opposition, Plaintiffs fail to provide proof in evidentiary form sufficient to suggest that a bona fide, triable issue of fact exists as to whether Statement 1 was made or published. Plaintiffs do not make any showing that Plaintiffs have first-hand knowledge of Statement 1. Nor do Plaintiffs point to any testimony of any person present at the April 14, 2010 meeting as evidence that Statement 1 was made or published. Although Fletcher testified, at deposition, that he learned of the content of the April 14, 2010 meeting during the course of a telephone call between Fletcher, Goldsmith, and Barnes, (Ex. 2 at 345:25-346:7 [Fletcher Tr.]), Fletcher's second-hand recitation reveals no admission that Statement 1 was made or published.

Furthermore, even assuming that Statement 1 was made, Statement 1 falls within the scope of the common interest privilege, as a communication made between members of the Finance Committee, who have a common interest in reviewing the financial qualifications of an applicant seeking to purchase an apartment at The Dakota. In response to Defendants' motion, Plaintiffs fail to demonstrate that Statement 1, if made, was motivated by spite or ill will or made with a high degree of awareness of its falsity. Thus, even if Plaintiffs were able to raise a triable issue of fact as to whether Statement 1 was published, Defendants' submit evidence in admissible form demonstrating that Statement 1 is protected under the common interest privilege, and Plaintiffs do not produce any proof in

evidentiary form showing that a genuine issue of fact exists as to whether Statement 1, if made, was made with malice.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiffs' claims for defamation arising from Statement 1.

2. Statement 2

As for Statement 2, the alleged defamatory statement by Nitze to Hatkoff that Fletcher "had not actually given the money he had promised to give [to charity]' and 'he owes it'", Defendants submit testimony from Nitze's deposition, in which Plaintiffs' counsel asked Nitze to recall a telephone conversation between Nitze and Hatkoff about Fletcher's application. (Ex. 33 at 308:2-12 [Nitze Tr.]). In response to counsel's questioning, Nitze testified:

> I told [Hatkoff] that in the board of directors there are concerns that Buddy may – among the concerns of the board of directors are not just Buddy's current ability to pay his maintenance, but a concern, among the concerns is the possibility of obligations to charities. I would never have made the statement he owes the money.

(Ex. 33 at 308:23-309:5 [Nitze Tr.]).

In addition, Defendants submit testimony from Hatkoff's deposition, in which Plaintiffs' counsel asked Hatkoff: "Did you have a conversation with Mr. Nitze where Mr. Fletcher's charitable contributions were discussed?" (Ex. 6 at 140:9-11 [Hatkoff Tr.]). In response, Hatkoff testified: "I don't have a recollection that that came up in the conversation with Peter." (Ex. 6 at 140:12-13 [Hatkoff Tr.])[15].

As Nitze and Hatkoff are the parties between whom Statement 2 allegedly took place, (SAC ¶ 100; *Fletcher*, 99 A.D.3d at 55), Nitze's and Hatkoff's sworn statements denying that Statement 2 was made or published adequately establish a prima facie showing of no publication with respect to Statement 2. (*See Snyder*, 252

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[15]On the subject of charitable contributions, Hatkoff further testified that discussion of "a pledge that appeared on the front page of the New York Times" had "come up in general but I don't recall who said it" (Ex. 6 at 141:4-10 [Hatkoff Tr.]). Hatkoff further testified that, "someone had heard that he hadn't fulfilled the pledge, and whether the pledge itself was a commitment or a looser arrangement. But I don't think, as we worked through, that was a central issue." (Ex. 6 at 140:18-24 [Hatkoff Tr.]).

A.D.2d at 298 ["By submission of affidavits from the only . . . persons present during the conversation [where the defamatory statement is claimed to have been made], in which each unequivocally denies that the slanderous statement was made, defendants made a prima facie showing of no publication."]).

In opposition, Plaintiffs do not make any showing that Plaintiffs have first-hand knowledge of Statement 2. Nor do Plaintiffs point to any testimony of any other person with first-hand knowledge of Statement 2. Accordingly, Plaintiffs fail to provide proof in evidentiary form showing that a bona fide, triable issue of fact exists as to whether Statement 2 was made or published and Defendants are entitled to judgment as a matter of law on Plaintiffs' defamation claims arising from Statement 2.

3. Statement 3

With respect to Statement 3—the alleged defamatory statement by "one of the Individual Defendants" to Hatkoff at some time between June 24, 2010 and September 2010—Defendants argue that there is no triable issue of fact as to whether Statement 3 was made or published. In the deposition of Nitze, the following exchange took place:

> Q: Are you aware of any member of the board of The Dakota or the Finance Committee stating in words or substance that Mr. Fletcher had checked out of his business?
>
> A. No, I don't recall such a comment.
>
> Q: And are you aware of any member of the board of The Dakota or the Finance Committee stating in words or substance that Mr. Fletcher was living on borrowed money?
>
> A: I don't recall such a statement.

(Ex. 33 at 383:5-16 [Nitze Tr.]). Similarly, during the deposition of Barnes, Plaintiffs' counsel asked Barnes, "were you part of any conversations with any Dakota Board members regarding the concept that Mr. Fletcher had checked out of his business?" (Ex. 20 at 594:22-25 [Barnes Tr.]). In response, Barnes testified:

"No, I don't recall any such conversations."[16] (Ex. 20 at 595:4-5 [Barnes Tr.]). In addition, Plaintiffs' counsel asked Barnes: "Have you ever heard a Dakota shareholder make the statement in words or substance that Mr. Fletcher was living on borrowed money?" (Ex. 20 at 595:10-13 [Barnes Tr.]). In response, Barnes testified: "Not that I recall." (Ex. 20 at 595:14 [Barnes Tr.]).

In the deposition of Goldsmith, Plaintiffs' counsel asked Goldsmith: "Are you aware of any Dakota shareholder saying, in words or substance, that Mr. Fletcher had checked out of his business?" (Ex. 19 at 574:20-22 [Goldsmith Tr.]). In response, Goldsmith testified: "Checked out of his business? No, sir." (Ex. 19 at 574:23 [Goldsmith Tr.]). In addition, Plaintiffs' counsel asked Goldsmith: "Are you aware of any Dakota shareholder saying, in words or substance, that Mr. Fletcher was living on borrowed money?" (Ex. 19 at 574:24-575:2 [Goldsmith Tr.]). In response, Goldsmith testified: "No, sir." (Ex. 19 at 575:3 [Goldsmith Tr.]). A similar conversation took place between Plaintiffs' counsel and Luss at Luss's deposition. (Ex. 37 at 87:7-21 [Luss Tr.]).

The deposition testimony of Hatkoff is as follows:

> Q: Did you – did you – did anyone in a conversation with you say, in connection with Mr. Fletcher's application to purchase Apartment 50, that he had checked out of his business?
>
> A: I believe that phrase was used. I don't recall who said it, but I think it was in reference to the performance of Fletcher Asset Management, but I don't recall. But it was more of – it wasn't a – I think it was more of a performance issue than anything to do with – I think the performance of the funds. I just don't recall who said it.
>
> Q: Did anyone at The Dakota, in your conversations in connection with Mr. Fletcher's Apartment 50 application, say that Mr. Fletcher was living on borrowed money?
>
> A: . . . I perhaps, in conveying to Mr. Fletcher, those were probably two of the issues that were raised about the business indebtedness, the performance and the cash flow;

[16] Barnes was cautioned to exclude any conversations with counsel. (Ex. 20, 595:2-3 [Barnes Tr.]).

> but that was probably more of a synthesis of me saying here's what I think the issues are.

(Ex. 6 at 208:14-209:14).

Here, Defendants submit sworn statements from Nitze, Barnes, Goldsmith and Luss, denying that Statement 3 was made. In opposition, Plaintiffs fail to submit proof in evidentiary form to show that a bona fide, triable issue of fact exists as to whether Statement 3 was made or published. Plaintiffs do not make any showing that Plaintiffs have first-hand knowledge of the conversation in which Statement 3 purportedly was made. Nor do Plaintiffs point to any testimony of any Individual Defendant or other person as evidence that any Individual Defendant made Statement 3 to Hatkoff at any time between June 24, 2010 and September 2010.

As far as Hatkoff's deposition testimony is concerned, Hatkoff's statement that he conveyed the content of Statement 3 to Fletcher, as "a synthesis of me saying here's what I think the issues are", is insufficient, without more, to raise a bona fide, triable issue of fact as to the element of publication. That Hatkoff made Statement 3 to Fletcher fails to raise a triable issue as to the requisite element of third-party publication. (*See Frechtman v. Gutterman*, 115 A.D.3d 102, 104 [1st Dep't 2014] ["The elements [of defamation] are a false statement, published without privilege or authorization *to a third party* . . ."] [emphasis added]). To the extent that Hatkoff's testimony relates to Hatkoff's "after-the-fact characterization of the slander, rather than the slanderous utterance itself," such testimony is insufficient to defeat a prima facie showing of no publication. (*See Snyder*, 252 A.D.2d at 299 [finding that, "a listener's after-the-fact characterization of the slander" was insufficient to defeat defendants' prima facie showing of no publication at summary judgment stage]).

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiffs' defamation claims arising from Statement 3.

4. <u>Statement 4</u>

Defendants argue that Statement 4 is protected opinion because Statement 4, which was published in the September 14, 2014 Letter from the Board, sets forth the Board's opinion regarding Fletcher's application. The September 14, 2010 Letter From the Board states: "[w]e are writing to you because we understand that, despite our complete discretion, Alphonse (Buddy) Fletcher Jr. has communicated directly with you and several other neighbors concerning his application to purchase Apartment 50." (Ex. 95 at DAKOTA005289).

Defendants submit an email dated August 18, 2010 from Fletcher, copying Dakota shareholders, in which Fletcher states:

> The Board has not diligently and objectively reviewed my application. Individuals with a known bias have misled the Board. The Board did not ask a single question of me prior to denying my application even after I pleaded (and you claimed to have also pleaded) that it should meet with me to confirm its understanding of my application. Indeed, in your own references to my financial statements, you confirm that the Board has not analyzed the hundreds of pages of information that it demanded of me. In refusing my request to address any questions, Mr. Barnes assured me that the Board and its finance committee have members who are "financial experts."

(Ex. 58 at FL0117288 [August 18, 2010 email from A. Fletcher, copying Dakota shareholders]). The August 18, 2010 email from Fletcher, copying Dakota shareholders attaches a letter, dated June 24, 2010, from Peter M. Levine ("Levine") to the Board (the "Levine Letter"). (Ex. 58 at FL0117290-95 [Levine Letter]). In the Levine Letter, Levine identifies himself as Fletcher's counsel and states that Fletcher "has asked me to correspond with you regarding the arbitrary, unjustified, and ultimately unsustainable rejection of his application to purchase Apartment 50 from the Estate of Ruth Proskauer". (Ex. 58 at FL0117290 [Levine Letter]).

Defendants also argue that Statement 4 is protected as true or substantially true because the assertion, "based on the financial information submitted by Fletcher, the Board concluded that the purchase would not be in the best interest of the Dakota", accurately reports the Board's conclusion that approving Fletcher's application was not in the best interest of shareholders. With respect to the assertion that Fletcher "had declined to provide key financial information, thus preventing the Board from reconsidering his application", (Ex. 95 at DAKOTA005289), Defendants submit Board records regarding a Board meeting held on September 8, 2010. (Ex. 56 at FL0002911-12 [September 8, 2010 Board Minutes]). The minutes from the Board meeting on September 8, 2010 state:

> The Board discussed various additional information that could be useful in its consideration of Mr. Fletcher's request and directed Mr. Barnes to request that Mr.

> Fletcher disclose the documents related to the $20.8 million in loans included on the balance sheet he had submitted to the Board in April 2010.

(Ex. 56 at FL0002912 [September 8, 2010 Board Minutes]).

At deposition, Barnes testified that he requested the loan documents referenced in the minutes of the September 8, 2010 Board meeting from Fletcher later that day. (Ex. 20 at 623:24-624:2 [Barnes Tr.]). Barnes further testified:

> I explained to [Fletcher] that the Board, in order to seek any kind of negotiated arrangement with Mr. Fletcher that would include the approval of his purchase of the apartment or of a series of steps that would lead to his owning the apartment, in order to fulfill its fiduciary obligations, the Board would need to review the – the loan documents of Mr. Fletcher's – the loans that were on Mr. Fletcher's balance sheet.

(Ex. 20 at 624:20-625:5 [Barnes Tr.]). When asked, at deposition, whether Fletcher agreed to provide the loan documents as requested, Barnes testified: "He did not." (Ex. 20 at 626:10-12 [Barnes Tr.]). Defendants further submit a letter from Barnes to Fletcher dated September 14, 2010, in which Barnes states, regarding the loan documents, "Subsequently, your mother has indicated to me that you are not inclined to provide the requested documents" and, "I again urge you to allow us to review the loan documents in the hope that this would be a step toward a resolution of our disagreement." (Ex. 97 at DAKOTA005358). In an email from Fletcher to Barnes and the directors of The Dakota dated October 18, 2010—more than one month after Statement 4 was published—Fletcher writes, "I have completed gathering the documents requested in our president's letter sent to me on September 14." (Ex. 98 at FL0002887).

Defendants argue that Statement 4 is protected under the common interest privilege as a communication between the Board and the shareholders on the subject of a common concern. The Board's September 14, 2010 Letter states, "[w]e are writing to you because we understand that, despite our complete discretion, Alphonse (Buddy) Fletcher Jr. has communicated directly with you and several other neighbors concerning his application to purchase Apartment 50." (Ex. 95 at DAKOTA005289). This letter is addressed to those shareholders who received Fletcher's August 18, 2010 email, stating that, "The Board has not diligently and

objectively reviewed my application" and attaching the Levine Letter. (Ex. 95 at DAKOTA005289).

Here, Defendants adequately establish a prima facie showing that Statement 4 is protected as opinion or true or substantially true. Statement 4 appears in a letter which, on its face, signals its readers, i.e., the shareholders who received Fletcher's August 18, 2010 email with Levine Letter attached, that what is being read is a response to the same. In addition, Fletcher's August 18, 2010 email with Levine Letter attached, not only questions the Board's "diligence" and "objectivity" relating to Fletcher's application to purchase Apartment 50, but also raises the prospect of legal action against The Dakota. Thus, the full context and surrounding circumstances of the communication in which Statement 4 appears—as well as the content of the communication as a whole, its tone, and its apparent purpose—are such as to signal Statement 4's readers that what is being read is the Board's side of the story *vis-à-vis* Fletcher's application to purchase Apartment 50. Furthermore, in view of the overall context in which Statement 4 was made, Defendants' submissions also demonstrate that Statement 4 is a communication on a subject, namely, the concerns raised by Fletcher's August 18, 2010 email and the Levine Letter, in which the Board had a duty to speak, and that Statement 4 was made to shareholders, who, having received the Levine Letter, had a corresponding interest in the subject matter. (*See Santavicca*, 132 A.D.2d at 657).

In opposition, Plaintiffs do not provide any proof in admissible form sufficient to raise a genuine, triable issue of fact as to whether Statement 4 may support a claim for defamation.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiffs' claims for defamation arising out of Statement 4.

Plaintiffs' Cross Motion to Amend

Plaintiffs cross move to amend the Second Amended Complaint to add proposed additional defendants, John Angelo, Jesse Angelo, James Murdoch, "John Doe", and "Jane Doe" (collectively, the "New Defendants"), as additional defendants in this action and to assert proposed additional claims of RICO, civil conspiracy, retaliation, and defamation as additional causes of action as against the New Defendants and Defendants. In support, Plaintiffs submit a proposed unverified copy of Plaintiffs' third amended complaint (the "Third Amended Complaint").

Defendants oppose.

CPLR § 3025 permits a party to amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." (CPLR § 3025[b]). Pursuant to CPLR § 3025(b), such "leave shall be freely given upon such terms as may be just including the granting of costs and continuances." (CPLR § 3025[b]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325 [1st Dep't 1998]). In addition, pursuant CPLR § 1003, parties may be added at any stage of the action by leave of court. (CPLR § 1003).

Leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit. (*See Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]). Thus, "[w]here no cause of action is stated, leave to amend will be denied." (*Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 325 [1st Dep't 1998]). Although a plaintiff "need not establish the merit of its proposed new allegation" on a motion to amend, the plaintiff must "show that the proffered amendment is not palpably insufficient or patently devoid of merit." (*MBIA Ins. Corp. v. Greystone & Co.,* 74 A.D.3d 499, 500 [1st Dep't 2010] [holding that the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony]).

Where the statute of limitations period has expired, a plaintiff may add a new party or claim in an amended pleading pursuant to the relation back doctrine. (*Buran v. Coupal*, 87 N.Y.2d 173, 177 [1995]; CPLR § 203[c]). This doctrine "enables a plaintiff *to correct a pleading error*—by adding either a new claim or a new party—after the statutory limitations period has expired." (*Buran v. Coupal*, 87 N.Y.2d 173, 177-78 [1995] [emphasis added]). "The doctrine thus gives courts the 'sound judicial discretion' . . . to identify cases 'that justify relaxation of limitations strictures ... to facilitate decisions on the merits' if the correction will not cause undue prejudice to the plaintiff's adversary." (*Id. quoting Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 477 [1985]).

The relation back of amendments adding new defendants implicates more serious policy concerns than the relation back of new causes of action "since, in the latter situation, the defendant is already before the court." (*Buran v. Coupal*, 87 N.Y.2d 173, 178 [1995]). Under the relation back doctrine, therefore, claims asserted against one defendant may "relate back" to claims previously asserted

against another defendant, for purposes of the Statute of Limitations, only if three criteria are met:

> (1) both claims arose out of same conduct, transaction or occurrence; (2) the new party is "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and, (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

(*Buran v. Coupal*, 87 N.Y.2d 173, 178 [1995]). However, "[w]hen a plaintiff intentionally decides not to assert a claim against a party . . . , there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired." (*27th St. Block Ass'n v. Dormitory Auth.*, 302 A.D.2d 155, 164 [1st Dep't 2002], *quoting Buran v. Coupal*, 87 N.Y.2d 173, 181 [1995]).

Even where a proposed amendment is not time-barred, the court may properly deny a plaintiff's motion to amend the complaint to add a new claim where "such would cause defendant undue prejudice." (*Rodriguez v. Terence Cardinal Cooke Health Care Ctr.*, 4 A.D.3d 147, 148 [1st Dep't 2004]). In addition, the court may properly deny a plaintiff's motion to amend the complaint to add "a new claim . . . against persons sought to be named as additional parties to the action" if the existing defendants in the action "would be prejudiced by the need to prepare a defense on behalf of the additional parties", particularly where the plaintiff "offers no plausible excuse" for its delay in seeking to assert the additional claims. (*Haughton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 305 A.D.2d 214, 215 [1st Dep't 2003]).

Turning now to Plaintiffs' proposed additional claims, CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint "must allege the time, place and manner of the false statement and specify to whom it was made." (*Dillon v. City of New York*, 261 A.D. 2d 34, 38 [1st Dept. 1999]). Defamation claims are governed by a one-year statute of limitations that accrues "at the time the alleged statements are originally uttered." (*Melious v. Besignano*, 125 A.D.3d 727, 728 [2d Dept 2015]; CPLR §215[3]). The proposed Third Amended Complaint alleges that New Defendants, along with the existing Defendants, "knowingly made false statements, or made such false

statements in reckless disregard of their truth and falsity, about Fletcher and FAM to the Board, and to other parties." It is further alleged that the New Defendants caused the "[m]edia to publish false stories which contradicted evidence in their possession." Even accepting these allegations as true, the proposed Third Amended Complaint fails to identify the "the particular words complained of," or "the time, place and manner of the false statement and to specify to whom it was made." Plaintiffs' proposed defamation claim therefore fails to state a claim. Plaintiffs' counsel's affirmation is insufficient to cure the pleading deficiencies of the proposed defamation claim. Plaintiffs' counsel's affirmation references two articles in the Wall Street Journal dated December 20, 2011 and another "updated July 4, 2012" which allegedly contain defamatory statements. Even assuming these are the alleged defamatory statements and further assuming that these statements can be attributed to the Angelos and Murdoch, the statute of limitations would have run in December 2012 and July 2013, respectively, one year after the statements were made.

As for the proposed claims for retaliation, again, in order make out a retaliation claim under the State or City Human Rights Laws, the plaintiff must show: (1) the plaintiff engaged in protected activity; (2) the defendant was aware that she participated in such activity; (3) the plaintiff suffered an adverse action based upon that activity; and, (4) there was a causal connection between the protected activity and the adverse action. (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 312-13 [2004]). Here, the proposed Third Amended Complaint alleges that New Defendants, along with existing Defendants, retaliated against Fletcher in "their review and denial of Fletcher's application in 2010" for "Fletcher's engagement in the protected activity of opposing the Dakota's, Barnes and John Angelo's discriminatory treatment of other shareholders and non-shareholder seeking to purchase units in the Dakota." Here, even if Plaintiffs' conclusory allegations that the New Defendants "pulled the strings" of the existing Defendants were sufficient to state a claim for retaliation against New Defendants, Plaintiffs' proposed new retaliation claims arising out of the 2010 denial of Fletcher's application are time barred under the three year statute of limitations that govern claims brought under the City HRL and State HRL. *See* Administrative Code of the City of New York § 8–502(d) (providing that "[a] civil action commenced under this section must be within three years after the alleged unlawful discriminatory practice" occurred.); CPLR § 214(2). Furthermore, to the extent that Plaintiffs also allege that Defendants retaliated against Fletcher by causing the "[m]edia to publish false stories which contradicted evidence in their possession" concerning Fletcher's finances," Plaintiffs' conclusory allegation are insufficient to state a claim.

As for the proposed claims of "conduct and participation in a RICO enterprise through a pattern of racketeering activity" and "conspiracy to engage in a pattern of racketeering activity" against "All Defendants" under 18 U.S.C. §§ 1961 and 1962, in order to state a RICO civil claim, a plaintiff must meet two pleading burdens. (*Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 [2d Cir. 1983]). First, a plaintiff must plead the seven elements of a substantive RICO claim: (1) that the defendant; (2) through the commission of two or more acts; (3) constituting a "pattern"; (4) of "racketeering activity"; (5) directly or indirectly invests in, or maintains an interest in, or participates in; (6) an "enterprise"; and, (7) the activities of which affect interstate or foreign commerce. (18 U.S.C. § 1962[a]-[c]; *Moss*, 719 F.2d at 17). Second, in order to invoke RICO's civil remedies of treble damages, attorney's fees, and costs, a plaintiff must plead that he was, "injured in his business or property *by reason of* a violation of section 1962." (*Moss*, 719 F.2d at 17 quoting 18 U.S.C. § 1964[c] [emphasis added in the original]). The seven elements constituting a RICO claim must be pleaded with particularity. (*Fekety v. Gruntal & Co.*, 595 N.Y.S.2d 190, 190 [1st Dep't 1993]).

To allege a pattern of racketeering activity for purposes of RICO, a plaintiff must plead at least two racketeering acts, as those acts are defined under 18 U.S.C. § 1961(1), within a ten-year period. (*East 32nd St. Assocs. v. Jones Lang Wootton USA*, 191 A.D.2d 68, 72 [1st Dep't 1993]). Acts of mail fraud and wire fraud under 18 U.S.C. § 1341 and 18 U.S.C. § 1343, respectively, are racketeering acts within the meaning of RICO. In addition:

> The United States Supreme Court has held that, by its use of the word "pattern", the statute requires not merely a multiplicity of predicates, but that those predicates are ordered by means of "the relationship they bear to each other or to some external organizing principle" and that "they amount to or pose a threat of continued criminal activity".

(*East 32nd St. Assocs.*, 191 A.D.2d at 72-73 *quoting H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 238, 239 [1989]).

The requisite relationship between predicates may be established where the alleged predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." (*East 32nd St. Assocs.*, 191 A.D.2d at 73). As far as the requirement of continuity is concerned, a plaintiff may satisfy the

requirement of continuity "in various ways, including a showing that the predicate acts, in and of themselves, extended over a sufficiently substantial period of time." (*Id.*). Alternatively, a plaintiff may satisfy the requirement of continuity by showing that the predicate acts "establish a threat of continued racketeering activity." (*Id.* at 73-74). Such "open-ended continuity" may be demonstrated, for example, by a showing that the predicates themselves contained a specific threat of repetition, such as a showing that they were part of a series of regularly scheduled extortionate demands. (*Id.*).

RICO claims are subject to a four-year statute of limitations and accrue when the plaintiff discovers, or should have discovered, the injury. *Agency Holding Corp., v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987).

Here, the proposed Third Amended Complaint fails to allege any of the elements of a RICO claim. Specifically, the proposed claim fails to specifically identify the predicate acts of racketeering activity in which the defendants allegedly engaged or to describe any pattern of criminal conduct. Furthermore, the proposed pleading alleges that Plaintiffs were first injured in 2010 when the Board denied Fletcher's application to purchase Apartment 50. Since this claim was not raised until over five years after the first alleged injury in 2010, the proposed RICO claims are also time-barred.

As for the proposed claim of civil conspiracy, New York does not recognize an independent cause of action for conspiracy to commit a civil tort (*see Romano v. Romano*, 2 A.D. 3d 430, 432 [2nd Dept 2003] ("a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort"). To establish a claim of civil conspiracy, the plaintiff must "demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Abacus Fed. Sav. Bank v. Lim*, 75 A.D. 3d 472, 474 [1st Dept 2010]). Here, absent any primary tort, the proposed claim of conspiracy fails as a matter of law.

Furthermore, even if Plaintiffs' proposed new claims were not time-barred, Plaintiffs now seek to add new claims and new parties more than four years after the commencement of this action in February 2011, more than three years after Plaintiffs served the Second Amended Complaint in August 2011, more than six months from the Plaintiff's declaration that discovery was completed and the Note of Issue was filed, and nearly three months after Defendants filed the instant motion for summary judgment. Plaintiffs do not provide any excuse for their delay in seeking to add

additional claims and additional defendants in an amended pleading at this late stage of litigation. In addition, the new causes of action asserted in Plaintiffs' proposed Third Amended Complaint are based on factual allegations that are completely distinct from those contained in the Second Amended Complaint. Plaintiffs' new claims and allegations, therefore, would require reopening all depositions regarding Plaintiffs' new allegations and claims, which are unverified by an individual with personal knowledge and not supported by any deposition testimony. Defendants have diligently pursued discovery, engaged in substantial motion practice—including a motion to strike Plaintiffs' Note of Issue, and have incurred tremendous legal fees in the course of litigating this action to the threshold of trial. Permitting Plaintiffs to add new claims, new theories, new factual allegations, and new parties on the eve of trial would significantly prejudice the existing Defendants, particularly where, as here, Plaintiffs fail to provide any excuse to justify adding new claims and new parties in an amended pleading at this juncture.

Accordingly, Plaintiffs' cross-motion to amend is denied.

Wherefore, it is hereby

ORDERED that Defendants' motion for summary judgment is granted and the Second Amended Complaint is dismissed as against All Defendants in its entirety, and the Clerk is directed to enter judgment accordingly ("Mot. Seq. 31"); and it is further

ORDERED that Plaintiffs' cross-motion for summary judgment in their favor is denied ("Mot. Seq. 31"); and it is further

ORDERED that Plaintiffs' cross motion to amend the Second Amended Complaint is denied ("Mot. Seq. 31"); and it is further

ORDERED that Plaintiffs' motion for an Order requesting that the Court "consider the documents attached hereto as Exhibit C, that is the Fletcher Affidavit and Exhibits thereto, in its determination of the Defendant's motion for Summary Judgment and/or (at the very least) the Plaintiff's Cross Motion for various relief" is denied (Mot. Seq. 32); and it is further

ORDERED that Defendants' counterclaims are severed and shall continue.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: SEPTEMBER 11, 2015

EILEEN A. RAKOWER, J.S.C.

FILED
SEP 14 2015
NEW YORK
COUNTY CLERK'S OFFICE

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[i] Following are the exhibits annexed to Defendants' counsel's affirmation:

- Ex. 1: Fletcher's April 23, 2010 Application
- Ex. 2: Excerpts of deposition transcript of Fletcher (February 19, 2013, February 20, 2013, April 25, 2013, July 2, 2013)
- Ex. 3: Apt. 52 Closing Document
- Ex. 4: March 22, 2007 Board Minutes
- Ex. 5: Excerpts of deposition transcript of Robb (February 14, 2014)
- Ex. 6: Deposition Transcript of Craig Hatkoff
- Ex. 7: Penthouse B Closing Document
- Ex. 8: Room 271 Closing Document
- Ex. 9: Apt. 92 Purchase Application
- Ex. 10: Barnes' Affidavit in Support of Opposition to Motion for Preliminary Injunction
- Ex. 11: Apartment 92 Contract of Sale
- Ex. 12: Apartment 92 Closing Documents, including the Proprietary Lease & Consent Agreement
- Ex. 13: Room 189 Closing Information Sheet
- Ex. 14: Room 188 Subscription Agreement
- Ex. 15: Minutes of the Regular Board of Directors Meeting of The Dakota, Inc., June 21, 2007
- Ex. 16: Minutes of the Regular Board of Directors Meeting of The Dakota, Inc., June 3, 2008
- Ex. 17: The Dakota, Inc. By-Laws
- Ex. 18: Contract of Sale as contained in Fletcher's April 5, 2010 Application
- Ex. 19: Excerpts of deposition transcript of Goldsmith (July 23, 2010)
- Ex. 20: Excerpts of deposition transcript of Barnes (April 15, 2013)
- Ex. 21: Email from McFarland to Goldsmith, dated February 13, 2010
- Ex. 22: Email from Goldsmith to McFarland, dated February 16, 2010
- Ex. 23: Letter to the Board of The Dakota regarding Sale of Apartment 66
- Ex. 24: Email from B. Barnes to Fletcher, attaching letter from Financial Committee regarding application
- Ex. 25: April 14, 2010 email from Fletcher to Goldsmith

- Ex. 26: Minutes of the Corporate Space Committee Meeting of The Dakota, Inc., April 14, 2010
- Ex. 27: Email from B. Barnes to A. Fletcher, April 15, 2010
- Ex. 28: Fletcher's Affidavit in Support of Motion for Preliminary Injunction, March 2, 2011
- Ex. 29: Loan Documentation for Loan Number 1088035308
- Ex. 30: Loan Documentation for Loan Number 1088035294
- Ex. 31: Loan Documentation for Loan Number 1088035319
- Ex. 32: The Dakota, Inc. Finance Committee Minutes, April 28, 2010
- Ex. 33: Excerpts of deposition transcript of Nitze (August 6, 2013, August 7, 2013)
- Ex. 34: Excerpts of deposition transcript of Sternberg (July 16, 2014)
- Ex. 35: Excerpts of deposition transcript of Rydzewski (February 4, 2014)
- Ex. 36: Minutes of the Regular Meeting of the Board of Directors, May 2, 2010
- Ex. 37: Excerpts of deposition transcript of Luss (February 5, 2014)
- Ex. 38: Excerpts of deposition transcript of Mallow (May 27, 2014)
- Exhibit 39: Excerpts of deposition transcript of B. Fletcher (June 24, 2014)
- Ex. 40: April 23, 2007 email from R. Robb to Board Members of The Dakota
- Ex. 41: June 24, 2010 letter from Levine to Board of Directors, The Dakota
- Ex. 42: Email from M. Kaba to Fletcher and B. Fletcher, April 10, 2010
- Ex. 43: Email chain between Fletcher and M. Kaba, April 5, 2010
- Ex. 44: Email Chain between B. Fletcher, Fletcher, and T. Ladner, February 11, 2010
- Ex. 45: Email chain among Fletcher, J. Shows, and D. Kiely, March 1, 2010
- Ex. 46: Email from Fletcher to M. Kaba, March 26, 2010
- Ex. 47: Email from Fletcher to M. Kaba, February 14, 2010
- Ex. 48: Email from B. Fletcher to Fletcher, September 18, 2009
- Ex. 49: Letter from FAM to Grant Thornton LLP, July 15, 2010
- Ex. 50: Excerpts of deposition transcript of Denis Kiely (July 12, 2013_
- Ex.: Email from M. Kaba to B. Fletcher and Fletcher, May 10, 2010
- Ex. 52: Email from M. Kaba to Fletcher and T. Ladner, May 11, 2010
- Ex. 53: Minutes of the Regular Board of Directors Meeting of the Dakota, Inc., July 7, 2010
- Ex. 54: Email from B. Fletcher to Mallow and Barnes, August 25, 2010
- Ex. 55: Email from B. Fletcher to Barnes, September 8, 2010
- Ex. 56: Minutes of the Board Meeting of The Dakota, Inc., September 8, 2010
- Ex. 57: Email from Barnes to Mallow, November 3, 2010
- Ex. 58: Email from Fletcher copying Dakota shareholders and attaching Levine letter (Exhibit 41), dated August 18, 2010
- Ex. 59: Email from Fletcher copying Dakota shareholders and attaching Levine letter (Exhibit 41), dated August 19, 2010
- Ex. 60: Letters from The Dakota, Inc. Board to certain shareholders, dated September 14, 2010
- Ex. 61: Plaintiff's Responses and Objections to Defendants' First Set of Interrogatories, April 2, 2012
- Ex. 62: An unaudited internal FAM Statement of Financial Condition as of March 31, 2010
- Ex. 63: Email from J. Shows to T. Marsh, April 22, 2010
- Ex. 64: Statements of bank accounts held by FAM at HSBC
- Ex. 65: Email from E. Lieberman to J. Tang, attaching a spreadsheet entitled, "FAM FFLP Capital Activity"
- Ex. 66: Email from S. Turner to M. Kaba, Kiely, and Fletcher, June 8, 2010
- Ex. 67: Email from Fletcher to M. Kaba and T. Donahue, July 14, 2010
- Ex. 68: Email from M. Kaba to Fletcher, D. Kiely, June 11, 2010
- Ex. 69: Confidential Memorandum Relating to Participating Shares of FIA Leveraged Fund, dated October 9, 1998
- Ex. 70: Email from S. MacGregor to Fletcher, S. Turner, Kiely, and Kaba, March 10, 2010

- Ex. 71: Global Hawk Settlement Agreement, dated August 23, 2010
- Ex. 72: Faxes signed by Kiely requesting a full redemption of Global Hawk shares, March 29, 2010
- Ex. 73: FIA Leveraged Fund Notice of Compulsory Redemption, April 1, 2010
- Ex. 74: Fletcher's 2010 California, Connecticut, New York, and Federal Income Tax Returns
- Ex. 75: FAM's 2010 California, Connecticut, New York, and Federal S Corporation Tax Returns
- Ex. 76: Notice of Federal Tax Lien issued in California, and relating to 2010 tax liabilities of Fletcher, dated as November 30, 2010
- Ex. 77: Notice of Federal Tax Lien issued in New York, and relating to 2010 tax liabilities of Fletcher, April 25, 2014
- Ex. 78: Transcript of videotaped 2008 FAM Presentation to LPF
- Ex. 79: Judgment, *In re FIA Leveraged Fund*, FSD 0013 of 2010 (ASCJ) (Grand Ct. Apr. 23, 2012) (Cayman Is.), Dated as April 23, 2012
- Ex. 80: Winding Up Petition, *In re Fletcher Income Arbitrage Fund, Ltd.*, FSD 0087 of 2012 (Grand Ct. June 8, 2012).
- Ex. 81: Winding Up Order, *In re Fletcher Income Arbitrage Fund, Ltd.*, FSD 0087 of 2012 (ASCJ) (Grand Ct. July 4, 2012).
- Ex. 82: Email from Rydzewski to Goldsmith, T. Ponzo, Fletcher, C. Hatkoff, and Weinberg, dated March 19, 2007
- Ex. 83: Email from Todd Fletcher to B. Fletcher, dated December 18, 2009
- Ex. 84: 2007, 2008, and 2009 Tax Information for Applicants for Apt. 66
- Ex. 85: Financial Statement of the Applicants for Apartment 66
- Ex. 86: Apartment 66 Purchase Application
- Ex. 87: Letter from H. Olson to The Dakota, Inc. Board of Directors, regarding application to purchase Apartment 66, dated April 14, 2009
- Ex. 88: Email from Fletcher to Rydzewski, dated October 10, 2007
- Ex. 89: Minutes of the Regular Meeting of the Board of Directors of The Dakota, Inc., June 15, 2009
- Ex. 90: Email from J. Shows to Fletcher, dated February 19, 2010
- Ex. 91: Email from H. Russell to T. Parry, June 11, 2010
- Ex. 92: Email from B. Fletcher to Kiely dated March 28, 2010
- Ex. 93: Email from B. Fletcher to Kaba and Fletcher dated March 28, 2010
- Ex. 94: Email from B. Fletcher to Kiely and Fletcher, dated June 5, 2010
- Ex. 95: Email from Barnes to Fletcher, dated September 15, 2010
- Ex. 96: Email from B. Fletcher to Barnes, dated September 22, 2010
- Ex. 97: Email from Barnes to Fletcher, dated September 14, 2010
- Ex. 98: Email from Fletcher to Barnes, dated October 18, 2010

[ii] Following are the exhibits annexed to Plaintiffs' counsel's affirmation:

Exhibit B: Proposed Third Amended Complaint

Exhibit C: Verified Complaint

Exhibit D: Second Amended Verified Complaint

"Additional Exhibits":

- In re Saad Investments Finance Company (No. 5) Limited, United States Bankruptcy Court For The District of Delaware, February 3, 2010
- Deposition transcript of John M. Angelo, February 4, 2014
- 3 Louisiana pension fear big losses from $100 million in investments," NOLA.com, dated July 23, 2012
- Direct testimony/affidavit of Fletcher submitted in In re: Soundview Elite, Ltd., et. al., United States Bankruptcy Court, Southern District of New York, filed/entered on December 11, 2013

- Letter dated February 2, 2015 from Chung to Sanchez regarding discovery
- Affidavits of Barnes, Goldsmith, and Robb in opposition to Plaintiffs' motion for preliminary injunction
- Online article, "Buddy Fletcher/Financial Genius- or a Fake?," Boston Magazine, March 2012
- Online article, "Circuit Holds Parties to $1.5 Billion Filing Error," New York Law Journal, 1/22/2015
- Online article, "Dakota Co-op Board is Accused of Bias" New York Times, February 1, 2011
- "DAKOTA005377 – Degrees" – no documents follow
- Online article, "50 Million Gift Aims to Further Legacy of Brown Case," New York Times, May 18, 2004
- E-mail chain between Rydzewski to Robb, June 22, 2007, Subject: "Re: Inspire Pharma"
- E-mail chain between Hullin and Rydzewski, March 22, 2008, Subject: "Re: update"
- Email from Fletcher to Kiely, April 25, 2007, Subject: "Today's Board Conference Call" (FL PRIV_000052)
- Online article, "Evercore Partners: Bankers of the Apocalypse," September 22, 2010 (unknown source)
- Printout from Wonkblog, "The FBI director just quoted from Avenue Q's 'Everyone's a Bit Rascist.' That's huge," February 12 (unknown year)
- Online article, "Ex-Hedge Funder's Apartment Gets $29.6 Million," FINalternatives Daily Newsletter, December 13, 2012,
- Verified Petition in Dakota v. Fletcher, L&T 14NO88851, 12/23/2014, and Amended Verified Answer
- Verified Petition in Dakota v. The Bettye R. Fletcher Trust; Fletcher, Trustee, L&T 14NO88852, dated December 24, 2014, and Amended Verified Answer
- Printout from internet regarding "Executive Team" of Guzman & Company
- "F.B.I. Director Speaks Out on Race and Police Bias – NYTimes.com"
- Online article, "Fairfax's Once-Sprawling Racketeering Suit Shrinks as Hedge Funds Drop Out, Bloomberg, March 1, 2012,
- Photographs
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- Direct Testimony Affidavit of Fletcher on Motions to Dismiss, Convert, or Appoint a Trustee, filed December 3, 2013

Attached to Samuel C. Kitchens' affirmation filed in opposition to Plaintiffs' cross motion and in further support of Defendants' motion for summary judgment are the following exhibits:

- Ex. 99: Plaintiffs' Verified Complaint dated January 31, 2011
- Ex. 100: Plaintiffs' Amended Verified Complaint dated April 6, 2011
- Ex. 101: Plaintiffs' Second Amended Verified Complaint dated August 22, 2011
- Ex. 102: Defendants' Verified Answer and Counterclaims dated November 14, 2011
- Ex. 103: Redline Comparison of Proposed Third Amended Complaint and Second Amended Complaint
- Ex. 104: March 2, 2015 So-Ordered Stipulation
- Ex. 105: Email from J. Shields to Sanchez dated March 10, 2015
- Ex. 106: Email from J. Yonks to Chung and Sanchez dated March 16, 2015
- Ex. 107: Excerpts of Deposition Transcript of Rydzewski, February 13, 2013
- Ex. 108: Excerpts of Deposition Transcript of John Angelo, February 4, 2014
- Ex. 109: Verified Petition, Index No. 14NO88851, dated December 23, 2014 and Verified Petition, Index No. 14NO88852, dated December 23, 2014
- Ex. 110: Amended Verified Answer, Index No. 14NO88851, dated February 19, 2015
- Ex. 111: March 9, 2015 Decision and Order, Index No. 088851/2014 and March 9, 2014 Decision and Order, Index No. 088852/2014