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VIA NYSCEF AND HAND DELIVERY October 4, 2018

Re: *Melcher v. Greenberg Traurig LLP et ano.*,
Index No. 650188/2007

Hon. O. Peter Sherwood
Supreme Court of the State of New York
60 Centre Street
New York, NY 10007

Dear Justice Sherwood:

We represent Defendants Greenberg Traurig LLP and Leslie D. Corwin (collectively, the "Defendants") in the above-captioned action. On September 27, 2018, the Appellate Division, First Department issued its decision (the "September 27 Decision") modifying in part but otherwise affirming this Court's August 15, 2017 order granting Defendants' motions *in limine* with respect to Plaintiff's damages experts.[1] Pursuant to the permission provided in Your Honor's August 31, 2017 order,[2] Defendants now respectfully renew their request to file a summary judgment motion which they believe will resolve the remaining issues in this case.

Defendants' contemplated motion is particularly appropriate in the context of this case. The Appellate Division's decision makes clear that potentially recoverable damages are just a small fraction of the amount Plaintiff has sought and that to prevail Plaintiff must prove that Defendant had "actual knowledge" that the May 21 Amendment was fabricated. Plaintiff's

[1] While the September 27 Decision states that it modified this Court's order to the extent of allowing plaintiff's expert, Mr. Lupkin, to testify as to legal fee damages that were proximately caused by the alleged deceit, that same relief was granted by the Court in its August 15 order. *See* Aug. 15, 2017 Order (Dkt. No. 424) at 4 ("Nothing in this Decision and Order is intended to prohibit Messrs. Simon, Kaufman, Conner or Lupkin from presenting proper expert testimony. The parties may present new reports that are not inconsistent herewith . . . .").

[2] The August 31, 2017 decision states, "[r]egarding defendants' oral request for leave to reargue their request for leave to file a second motion for summary judgment, the requested relief is DENIED without prejudice to renew the request within 30 days after the Appellate Division decides plaintiff's appeal." Aug. 31, 2017 Order (Dkt. No. 430) at 5.

expert's report shows that Plaintiff's total legal fees from February 17, 2004 to May 11, 2009 were no more than $1,648,898.81,[3] and the First Department has ruled if Plaintiff succeeds on his claim, he may recover only the portion of this amount that he can establish was proximately caused by the allegedly deceitful use of the May 21 Amendment in this time period. Plaintiff's counsel has said previously that, even trebled, such amount is too small to justify further prosecution of this case. July 18, 2017 Hr'g. Tr. (Dkt. No. 411) at 65:20-21 ("Your Honor today basically dismissed Mr. Melcher's case and there's no point in going forward . . . ."). Although Plaintiff may now try to take a different stance, it is clear that the cost and expense to the parties as well as the use of judicial resources in completing pretrial tasks and proceeding to trial would be very substantial in comparison to the amount at issue. At the same time, this matter need not and should not proceed to trial, as Defendants are entitled to judgment in their favor as a matter of law on the undisputed facts. There will be no undue delay: Defendants' motion can be briefed and decided in a matter of weeks. By comparison, Plaintiff delayed this case for the past year to pursue his appeal of this Court's rulings.

I. Summary Judgment Should Be Granted

To establish his cause of action under Judiciary Law § 487, Plaintiff must prove intentional deceit by Defendants. In the context of this case where Plaintiff's allegations are based on alleged knowing use of purportedly fabricated evidence,[4] Plaintiff bears the heavy burden to establish that Defendants had "actual knowledge" of the falsity of the May 21 Amendment. More specifically, as the First Department held in the September 27 Decision: "To be clear, Corwin vigorously denies that he knew that the 1998 writing was fabricated at any relevant time. Corwin further contends that he reasonably believed the representations of his client (Fradd) that the document was genuine, and that its burning had been accidental, through the point at which the decision was made not to offer it at trial as evidence of the alleged amendment of the operating agreement. To prevail on his claim under § 487, of course, Melcher must prove that Corwin had 'actual knowledge' that the 1998 writing was fabricated at some point before the decision was made not to use it at trial." *Melcher v. Greenberg Traurig LLP*, Index No. 650188/07, at 6 n.3 (1st Dep't Sept. 27, 2018) (citing *Facebook, Inc. v. DLA Piper LLP*, 134 A.D.3d 610, 615 (1st Dep't 2015)). With the

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[3] *See* Expert Report of Jonathan D. Lupkin, Esq. (Dkt. No. 376, Ex. 1) ¶¶ 90, 139. This figure is calculated by subtracting the amount Mr. Lupkin contends is owed if the date from which damages are to be calculated is February 17, 2004 from the amount he contends is owed if the starting date is May 11, 2009.

[4] As Plaintiff has explained, "[Defendants] are being sued for presenting as genuine phony evidence which their client had recently fabricated, and then intentionally heated over his kitchen gas stove to (successfully) fry of[f] the chemicals that would have allowed a forensic chemist to prove his fraud to a scientific certainty." Mar. 24, 2017 Ltr. from J. Jannuzzo to Court (Dkt. No. 352) at 1.

completion of discovery it is clear that, on the undisputed facts, Plaintiff cannot meet that burden and that summary judgment for Defendants should be granted.

On their motion, Defendants will show that the following facts are undisputed:

1. Defendants deny knowledge that the May 21 Amendment was fabricated. To the contrary, they have consistently averred that they believed and continue to believe that the document was genuine.

2. Defendants' client, Brandon Fradd ("Fradd"), repeatedly swore to the genuineness of the May 21 Amendment and to the oral modification that it memorialized.

3. Defendants' privileged communications with their former client, Fradd, have been disclosed as a result of Fradd's waiver of privilege provided as part of his settlement with Plaintiff. There is nothing in these intimate and private communications that remotely suggests knowledge of the alleged fabrication. Quite to the contrary, all of these communications—from Fradd to Defendants, from Defendants to Fradd, and between Defendants themselves—evidence Defendants' belief in the genuineness of the May 21 Amendment.[5]

4. Other than the Plaintiff, no one ever told Defendants that the May 21 Amendment was not genuine or that Fradd was not to be believed.

5. Defendants retained experts, all of whom supported the genuineness of the May 21 Amendment. A qualified ink expert told Defendants that he was able to test the age of the ink in Fradd's signature on the May 21 Amendment notwithstanding the partial burning of the document and that the ink was at least more than eight months old (and potentially much older). This expert evidence directly refuted Plaintiff's contention that the May 21 Amendment was created in late 2003 after the dispute between Fradd and Melcher arose. This expert maintained and reiterated his opinion after reviewing the report of Plaintiff's expert.

6. Defendants had opinions from two other experts that further supported their client's position. A qualified fire expert told Defendants that the partial burning of the May 21 Amendment could have been accidental as testified to by Fradd, disputing the opinion offered by Plaintiff's fire expert. And Defendants received the opinion of a qualified accounting expert that the percentage ownership interest reflected in the May 21 Amendment

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[5] For example, Fradd wrote in one email to Defendants that the May 21 Amendment "is not a fraud and it correctly states [the] agreement that Melcher and I followed for 5.5 years." Jan. 6, 2006 Email from B. Fradd to C. Heller (GT 03820). Corwin likewise evinced his belief in the genuineness of the May 21 Amendment by writing to Fradd: "keep plugging away –the truth will shine through." Feb. 10, 2004 Email from L. Corwin to B. Fradd (GT 04106).

was consistent with the information that was available to Fradd and Melcher in May of 1998, again disputing expert evidence offered by Plaintiff.

7. Defendants were also aware of the five-year course of dealing between Fradd and Melcher in which all of the objective evidence supported Fradd's position that he and Melcher agreed in May 1998 to amend their profit sharing agreement precisely as was recited in the May 21 Amendment. This course of dealing included Melcher's receipt of payments, and related tax records, in accord with the amended profit sharing formula reflected in the May 21 Amendment, as well as three letters from Fradd to Melcher in which Fradd described the amended profit sharing agreement, without any letter or other writing from Melcher disputing that the deal was just as Fradd contended.

Given these undisputed facts, Plaintiff cannot establish "actual knowledge" of the alleged falsity of the May 21 Amendment. To be sure, Plaintiff will present the fact and expert evidence known to the Defendants that supported Plaintiff's position that the document was not genuine and was intentionally burned by Fradd.[6] But individually and in aggregate Plaintiff's alternative facts at most show that there was a litigable issue as to the genuineness of the May 21 Amendment. As a matter of law, they are insufficient to show "actual knowledge" that the document was fabricated.

In the *Facebook* case, the First Department affirmed dismissal of a Section 487 complaint because the well-pleaded facts did not support the allegation of "actual knowledge" of the falsity where those alleged facts did not constitute "conclusive proof" of the falsity of the document at issue. 134 A.D.3d at 615; *accord Brookwood Companies, Inc. v. Alston & Bird LLP*, 146 A.D.3d 662, 668 (1st Dep't 2017) (dismissing Section 487 case where "the facts alleged do not support a finding of an intent to deceive"). This Court has correctly observed that *Facebook* was decided at the pleading stage based on a failure to assert non-conclusory allegations of an intent to deceive. *See* Mar. 28, 2017 Hr'g. Tr. (Dkt. No. 364) at 12. The Court has also stated that the Section 487 claim is like one for fraud. *Id.* But neither observation is any obstacle to summary judgment in this case. Instead, the Appellate Division has not hesitated to grant summary judgment in Section 487 cases where, as here, the plaintiff fails to raise a triable fact as to an alleged violation. *See, e.g., Schloss v. Steinberg*, 100 A.D.3d 476, 476 (1st Dep't 2012); *Cosmetics Plus Group, Ltd. v. Traub*, 105 A.D.3d 134, 141 (1st Dept 2014); *Emery v. Parker*, 107 A.D.3d 635, 636 (1st Dep't 2013). And summary judgment similarly is routinely granted in fraud cases where the facts do not support a finding of intent to defraud. *See, e.g.*, *Stuart Silver Associates, Inc. v. Baco Dev.*

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[6] For example, Plaintiff will adduce evidence that there was no copy of the document in the files of the law firm that Fradd testified drafted the May 21 Amendment and no footer on the document showing that the document had been prepared on the firm's computers. But, as those same lawyers have made clear, the lack of such evidence shows only that the law firm could not affirmatively vouch for the document, not that the document was a fake as Plaintiff claimed.

Corp., 245 A.D.2d 96, 99 (1st Dep't 1997) (reversing lower court's denial of summary judgment where purported evidence of intent to falsify returns projections was "legally insufficient"); *Waterscape Resort LLC v. McGovern*, 107 A.D.3d 571, 572 (1st Dep't 2013) (affirming summary judgment because plaintiff's affidavit was insufficient to establish scienter).

In *Facebook*, and now in this case, the First Department has held that where a Section 487 claim is based on use of an allegedly false document, the requisite intent can only exist if the Defendants had "actual knowledge" of falsity. *Facebook* further shows that the Defendants can have had "actual knowledge" of falsity only if the Defendants had received "conclusive proof" of the falsity of the document. This is consistent with logic – absent a lawyer's client telling the lawyer a document is false, a lawyer cannot possibly "know" the document is false without conclusive evidence of falsity. And that *must* be the rule in a Section 487 case; otherwise lawyers will become exposed to Section 487 claims for conduct that is consistent with the lawyers' duty of zealous advocacy. That duty of zealous advocacy is fundamental to our adversary system of justice, so much so that even a "lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Comment 8 to Rule 3.3 of the Rules of Professional Conduct (in effect through April 2009); *see* Comment c, REST. (3RD) OF THE LAW GOVERNING LAWYERS § 120 ("Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry."); Geoffrey C. Hazard Jr. et al., THE LAW OF LAWYERING § 32.21 ("Discretion to Withhold Evidence") ("[I]f the lawyer has reasonable doubts about the integrity of the evidence, but does not know it is false, then under Rule 3.3(b)(3) he has discretion whether to introduce it. . . ."). If a lawyer who "reasonably believes" but does not "actually know" that his client's document is fabricated is permitted by the ethical rules to use that document, he cannot at the same time be liable for violation of the criminal and civil provisions of Section 487. And lawyers, like those here, who believe in and have substantial support for the genuineness of a document, as a matter of law do not violate Section 487 when they use the document in litigation.

In sum, no rational juror could find, in light of the undisputed facts supporting the genuineness of the May 21 Amendment, that Defendants ever had actual knowledge of the document's alleged falsity. Defendants are entitled to summary judgment in their favor dismissing Plaintiff's action.

II. Defendants Should Be Permitted To Make Their Motion

A second summary judgment motion is appropriate and permitted "when evidence has been newly discovered since the prior motion" or "when other sufficient cause for the subsequent motion exists." *Varsity Transit, Inc. v. Bd. of Educ. of City of New York*, 300 A.D.2d 38, 39 (1st Dep't 2002). Defendants' contemplated motion readily meets this standard.

This is not a case where Defendants have made seriatim motions that should have been made at the same time.[7] Quite to the contrary, the only summary judgment motion Defendants ever made was a cross-motion to Plaintiff's summary judgment motion in August 2014, long before discovery was complete. At that time, the only cross-motion Defendants had available to them was based primarily on the legal argument that Plaintiff's Section 487 claims should have been brought in the underlying Apollo Action. Prior to the close of discovery, their motion based on the insufficiency of evidence would plainly have been premature, and rejected. *See, e.g.,* CPLR § 3212(f). Now Defendants' motion is ripe, and it should be heard. Indeed, the general policy against multiple motions for summary judgment has no application where a party "raised different arguments and adduced evidence that was not available at the time of the first motion for summary judgment." *Olszewski v. Park Terrace Gardens, Inc.*, 18 A.D.3d 349, 350 (1st Dep't 2005); *see also Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 A.D.2d 399, 399 (1st Dep't 2002).

Further, there is "other sufficient cause" for Defendants' summary judgment motion, namely the potential to dispose of this now reduced-in-size case, without burdening the Court or parties with the substantial effort and expense of a trial. *See Varsity Transit*, 300 A.D.2d at 39 (finding "sufficient cause" when the record demonstrated "that the matter can be further disposed of without burdening the resources of the court and movants with a plenary trial").

Defendants will file their summary judgment motion promptly and it can be briefed and decided in a matter of weeks, such that it will not unduly delay the ultimate disposition of this case.

We appreciate the Court's attention to this matter.

Respectfully,

Thomas C. Rice

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[7] Defendants sought leave to move for summary judgment promptly after Plaintiff filed his note of issue and statement of readiness; they renewed the request when Plaintiff obtained a stay pending appeal; and they now renew their request promptly after the September 27 Decision, well ahead of the 30 days granted by this Court.

cc: Jeffrey A. Jannuzzo, Counsel for Plaintiff (*via NYSCEF*)