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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF

DUNN, AN ATTORNEY,

Appellant.

No. 23

20 Eagle Street
Albany, New York 12207
January 15, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Dunn.

2 Counsel, you'd like any rebuttal time?

3 MR. ZELERMYER: Please, Your Honor, two
4 minutes.

5 CHIEF JUDGE LIPPMAN: Two minutes. Go
6 ahead.

7 MR. ZELERMYER: Let me begin by suggesting
8 that the Appellate Division's application of
9 collateral estoppel to Judge Homer's decision didn't
10 pass the threshold for collateral estoppel, which is
11 a final order - - -

12 CHIEF JUDGE LIPPMAN: What - - - what's
13 your - - - your basic argument? That - - - that she
14 couldn't appeal until the underlying proceeding was
15 resolved by the federal court? Is that the heart of
16 - - - of why you think that that - - - that can't be
17 collateral estoppel?

18 MR. ZELERMYER: That - - - that's my - - -
19 that's my starting point. I think it ought to be the
20 ending point, but I'm prepared to - - -

21 JUDGE READ: Well, is that true?

22 MR. ZELERMYER: - - - go beyond that.

23 JUDGE READ: Is - - - I mean she can - - -
24 can't - - - she can appeal eventually, right?

25 MR. ZELERMYER: Well, eventually is - - -

1 is, of course, an undefined term that who knows how
2 long it may - - - may carry on.

3 JUDGE READ: What if - - - what if there -
4 - -

5 MR. ZELERMYER: And what I submit is - - -

6 JUDGE READ: What if there's a consent
7 order? Does that - - - I mean let - - - let's say I
8 said she can appeal - - - I'm assuming that the
9 litigation wraps up at some point. But what if
10 there's a con - - - some kind of consent agreement
11 reached with the SEC in the meantime? Does she have
12 a right to appeal then or does she lose it?

13 MR. ZELERMYER: Well, I think that as long
14 as a final judgment gets entered in the case in the
15 district court, she would be entitled to appeal. I
16 can't - - - I can't argue with it.

17 JUDGE READ: Okay. Yeah, even if that's
18 after trial or it's by consent.

19 MR. ZELERMYER: I think that's - - - I - -
20 - I think that that's clear that an attorney can
21 appeal once a final judgment has been entered.

22 JUDGE ABDUS-SALAAM: Why isn't this order -
23 - -

24 CHIEF JUDGE LIPPMAN: So - - -

25 MR. ZELERMYER: But we don't know when

1 that's going to be. These kinds of cases go on for
2 years and years.

3 JUDGE READ: So that's your - - - that's
4 your real argument. It's the fact not that she can't
5 appeal - - - take an appeal ever, but it could be a -
6 - - a very long time and unpredictable?

7 MR. ZELERMYER: It would be a long time.
8 It would be unpredictable. And it would be unfair.
9 It would be unfair - - -

10 CHIEF JUDGE LIPPMAN: Unfair because
11 meanwhile she's been censured?

12 MR. ZELERMYER: She's been censured and - -
13 - and a censure, even though it's not the - - - the
14 harshest form of discipline, is very serious. A
15 person can lose a job just by being censured. It's -
16 - - it's - - - you know, it is a severe form of
17 discipline to have to suffer for an indefinite - - -

18 CHIEF JUDGE LIPPMAN: So you're ready to go
19 through - - -

20 MR. ZELERMYER: - - - period of time.

21 CHIEF JUDGE LIPPMAN: You're ready to go
22 through a disciplinary proceeding now if they still
23 chose, assuming that we said they're not collateral
24 estoppel? They could go ahead tomorrow and - - - and
25 pursue the charges, right? And you'd have to defend

1 against them.

2 MR. ZELERMYER: I - - - I don't think
3 double jeopardy applies. I think that I - - - I
4 could not object on procedural grounds if the
5 Committee chose - - -

6 CHIEF JUDGE LIPPMAN: Right. You - - -

7 MR. ZELERMYER: - - - to try to actually
8 prove a case.

9 CHIEF JUDGE LIPPMAN: You would defend it,
10 right?

11 MR. ZELERMYER: Absolutely. And there is
12 another alternative which - - - which, you know, I
13 don't want to suggest how the Committee should do its
14 job. But in other departments, the - - - the notion
15 of reciprocal discipline is - - - is pursued when
16 cases arises in federal courts.

17 JUDGE PIGOTT: They don't have reciprocal
18 disc - - - discipline in this here? Isn't there a
19 rule for reciprocal discipline?

20 MR. ZELERMYER: There is a - - - a rule in
21 the Third Department that authorizes reciprocal
22 discipline. Yes.

23 JUDGE PIGOTT: Okay.

24 JUDGE ABDUS-SALAAM: And isn't that what
25 you have?

1 MR. ZELERMYER: Yes, but the - - - the
2 Third Department doesn't seem to use it in cases
3 arising in the federal court in New York. They only
4 use it for out-of-state cases. Other departments do
5 use it for cases arising in federal courts in New
6 York. There was just one a couple of months ago in
7 the First Department.

8 JUDGE PIGOTT: I think we've done it
9 before, too, is my recollection.

10 MR. ZELERMYER: I haven't - - - I haven't
11 found any, Judge Pigott. But the important
12 distinction, of course, between reciprocal discipline
13 and collateral estoppel is that there are some
14 defenses that can be used in reciprocal discipline
15 matters, including an infirmity of proof in the
16 proceedings below.

17 And of course we would argue that there is
18 a severe infirmity of proof in - - - in the
19 proceedings below. And I think that's part of what
20 underlies our - - - our position here. The - - - the
21 - - - you - - - you've said many times that fairness
22 is really important in analyzing collateral estoppel.
23 It's not one size fits all. You meet criteria X,
24 criteria Y, and criteria Z; collateral estoppel,
25 boom, end of discussion.

1 CHIEF JUDGE LIPPMAN: So you - - -

2 MR. ZELERMYER: That's - - -

3 CHIEF JUDGE LIPPMAN: You feel you haven't
4 had a real chance to contest these charges.

5 MR. ZELERMYER: We have not. And - - - and
6 the - - - the most central finding that underlies
7 this case, Judge Homer's finding that - - - that Ms.
8 Dunn received the annuity agreement - - -

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. ZELERMYER: - - - on July 21, 2010, has
11 never been the subject of - - - of litigation as
12 such. When the SEC moved for sanctions, they didn't
13 even argue that that happened. They argued that she
14 got an e-mail containing some of the terms of an
15 annuity agreement, but they didn't argue that she got
16 the annuity agreement.

17 The only way that crept into this is in
18 Judge Homer's actual alteration of Ms. Dunn's
19 declaration. If you compare pages 97 and 207 - - -
20 97, the declaration, 207 from Judge Homer's opinion
21 where he - - - he sounds like he's quoting paragraphs
22 3 and 4 of her declaration. He actually changes the
23 language. We know this because he puts brackets
24 around the changes.

25 JUDGE ABDUS-SALAAM: Counsel, does it - - -

1 does it matter that she didn't actually have the
2 annuity agreement? Or was it that she said she
3 didn't know about it at the time that she made her -
4 - - or she submitted her affidavit and then later
5 changed her - - - her testimony and said well, I had
6 an e-mail so I was aware of it. I didn't know
7 exactly what was in it, but I did know about it,
8 essentially.

9 MR. ZELERMYER: It was - - - it was very
10 important to Judge Homer in reaching - - - reaching
11 his conclusions. It was so important that he
12 characterized the annuity agreement as a smoking gun.
13 It was so important that he found that her prior
14 declaration was false because in fact, he concluded,
15 she received the annuity agreement on July 21. It
16 was so important that he wrote that she could not
17 have read the annuity agreement without appreciating
18 its significance.

19 JUDGE ABDUS-SALAAM: Are you saying that
20 she didn't have the annuity agreement by the time
21 that she changed her - - - her testimony,
22 essentially, that I didn't - - - I wasn't aware of
23 it? Are you saying she didn't have it and couldn't
24 have read it by then?

25 MR. ZELERMYER: Oh, by then, yes.

1 JUDGE ABDUS-SALAAM: Yeah.

2 MR. ZELERMYER: But he was referring to the
3 earlier period of time. He was referring - - - when
4 he said she couldn't have read it and failed to
5 appreciate its significance, he was talking about
6 July 21 and July 22, 2010. He wasn't talking about
7 September, he wasn't talking about November. He was
8 talking about July.

9 JUDGE READ: Well, we're - - -

10 MR. ZELERMYER: July 21 and 22, 2010.

11 JUDGE READ: We're talking about the - - -
12 the merits now, but to get back to - - - to - - - to
13 the - - - the question about unappealability or
14 appealability, what's the rule that you're asking for
15 us? Because if - - - if it is appealable eventually,
16 it's not non-appealable. So what kind of a rule are
17 you asking us to - - - to - - - what are you asking
18 us to say in our opinion about what the rule should
19 be and why, in this case, there should- - it - - -
20 there wasn't a full and fair opportunity?

21 MR. ZELERMYER: I'm - - - I'm going to
22 answer that in - - - in a couple of different ways,
23 Judge Read. First, I'm --I'm- - - I believe that the
24 - - - the rule ought to be that collateral estoppel
25 has to follow reviewability. That there cannot be

1 collateral estoppel effect given to a decision that
2 is not reviewable at the time collateral estoppel
3 effect is sought.

4 JUDGE READ: Okay.

5 MR. ZELERMYER: If I - - - I think that's a
6 clear, clear statement. But I also think that just
7 as this court has distinguished among standards for
8 evaluating whether it's fair to apply collateral
9 estoppel, the court has looked both at the nature of
10 the proceeding in which collateral estoppel is
11 requested and the nature and - - - and conduct of the
12 proceeding, the prior proceeding. And this - - -
13 there's not one inflexible standard here. If
14 anything, we give a harder look, clearly, to criminal
15 cases where it's more - - - the standard for applying
16 collateral estoppel is more rigorous. And I submit
17 that the - - - that a higher standard ought to be
18 applied in attorney discipline cases as opposed to,
19 say, civil cases - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MR. ZELERMYER: - - - because the stakes
22 are so much higher.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 You'll have your rebuttal.

25 MR. ZELERMYER: Thank you.

1 CHIEF JUDGE LIPPMAN: Let's hear from your
2 adversary.

3 MR. GAYNOR: Good afternoon, Your Honors.
4 May it please the court, my name's Michael Gaynor for
5 the Committee on Professional Standards.

6 CHIEF JUDGE LIPPMAN: Counsel, what would
7 be the big deal if you had to go and bring charges?
8 If that's what you want to do, why don't you do it,
9 when she cannot appeal this - - - this ruling right
10 now? Why is that unfair? If you want to bring her
11 up, bring her up and - - - and - - - and what's the
12 big deal? You have a little delay but you can do it.

13 MR. GAYNOR: Judge Lippman, this court in
14 1988, in the Staatsburg Fire District case, mentioned
15 and it specifically stated that the fundamental
16 inquiry as to whether re-litigation should be
17 permitted - - - and any proceeding involves competing
18 policy interests. And this court specifically said
19 that the - - - one of the cons - - - three
20 considerations: fairness to the parties,
21 conservation of the resources of the court, and the
22 societal interest in consistent and accurate results.

23 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
24 here - - - let's take the first issue, which really
25 seems to me is the most relevant when you have an

1 attorney who's been censured. It's a pretty serious
2 thing.

3 MR. GAYNOR: Absolutely, Your Honor.

4 CHIEF JUDGE LIPPMAN: Why wouldn't, just a
5 basic matter of fairness, you want to conduct a
6 proceeding, go ahead. Why - - - when - - - when,
7 again, your - - - your adversary contends that they
8 haven't had a fair change - - - chance to rebut these
9 - - - these charges.

10 MR. GAYNOR: Two-fold, Your Honors. Number
11 one, the underlying litigation in this SEC matter in
12 which Ms. Dunn was a party - - -

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MR. GAYNOR: - - - in which it was
15 litigated for months, Judge Homer determined by clear
16 and convincing evidence - - -

17 JUDGE PIGOTT: We know all that. But - - -
18 but - - -

19 MR. GAYNOR: But - - - but as far as what's
20 at - - -

21 JUDGE PIGOTT: - - - it's a civil - - -
22 it's a civil case.

23 MR. GAYNOR: Correct.

24 JUDGE PIGOTT: This isn't a criminal case.
25 This is like - - - this is like we were - - - we were

1 talking about Allstate and a homeowner.

2 MR. GAYNOR: Sure.

3 JUDGE PIGOTT: SEC should be risen to the -
4 - - you know, to the level of being, you know, the
5 U.S. Attorney or involved in a criminal case here.
6 We're fighting over money. She's - - - she's
7 involved in this thing in the way that we all seem to
8 know. I don't think, you know, what goes on in a
9 civil case ought to be treated the way something that
10 goes on in a - - - in a criminal case in which - - -
11 I don't know what's right or wrong about her - - -
12 her testimony there.

13 But all I could think of is all of my time
14 as practicing law, how many judges who would really
15 want to get upset with - - - with me or something
16 decides that they're going to sanction me and the
17 Appellate Division Fourth Department's going to
18 collaterally estop me from saying the judge was
19 wrong, the facts are wrong, the circumstances were
20 wrong, and I want a hearing and be told that I can't.

21 MR. GAYNOR: Your Honors, I - - - I think -
22 - - or, Judge Pigott, I think with respect to the
23 hearing issue, I think it would be unburdensome to
24 have the Committee on Professional Standards appear
25 at a disciplinary hearing, obtain a certified copy of

1 the underlying record - - - but, you know, we
2 wouldn't stop there because that may be prima facie
3 evidence, but, in fact, is it conclusive? Would it
4 be reasonable for the Committee on Professional
5 Standards to bring in Judge Homer as a witness? I
6 don't think so.

7 JUDGE PIGOTT: No. Of course not. It's a
8 civil case. What - - - what - - - what struck me was
9 you were willing to wait, what, almost a year?

10 MR. GAYNOR: We did that, Your Honor. I
11 don't - - - I - - -

12 JUDGE PIGOTT: I know. I know. My - - -
13 my question about that is then it must have been
14 important to you that you wanted to know what - - -
15 what was going to happen at that appeal. And for
16 some reason, at the end of a year or thirteen months,
17 whatever it was, it didn't become important anymore.
18 And it - - - and it just seems odd that - - - that it
19 was important enough for you to delay it for this
20 long and then you decide it's no longer important and
21 we're going to go forward. And we're going to use
22 collateral estoppel.

23 MR. GAYNOR: Well - - -

24 JUDGE PIGOTT: It sounds like you were
25 taking a shortcut.

1 MR. GAYNOR: Well, Your Honors, I'm reading
2 the - - - the Appellate Division decision which
3 granted our motion for collateral estoppel. In my
4 reading of the Appellate Division decision, the
5 Appellate Division said that the mere pendency of an
6 appeal should not matter for purposes of collateral
7 estoppel. My reading of the Appellate Division's
8 decision in the context - - - that this had been
9 pending for sixteen months.

10 And you're right, Your Honors, we consented
11 to that being adjourned, but we also, in a few of our
12 letters, which are - - - are in our appendix, we
13 noted the fact that the mere pendency of an appeal
14 would not have precluded us from bringing a
15 collateral estoppel motion even while this matter's
16 up to the Second Circuit.

17 CHIEF JUDGE LIPPMAN: Yeah, but what I
18 don't understand is this is what you do.

19 MR. GAYNOR: And - - -

20 CHIEF JUDGE LIPPMAN: You bring
21 proceedings. What - - - is it so burdensome to do
22 your job and to making the case if you - - - if you
23 want to try and censure them and take whatever
24 evidence, you conduct it however you want. Why isn't
25 this - - - what - - - what strikes me about it is why

1 isn't is just unfair?

2 MR. GAYNOR: You're - - - you're - - -
3 Judge Lippman, you're right. This - - - this is a
4 fairness issue.

5 CHIEF JUDGE LIPPMAN: I'm - - - I'm - - -

6 MR. GAYNOR: It is a fairness issue.

7 CHIEF JUDGE LIPPMAN: So explain to me why
8 it's fair that you don't give the attorney an
9 opportunity to defend herself? If you're right,
10 you're right and then you go and censure her, do
11 whatever you want to do.

12 MR. GAYNOR: Agreed. But I think under the
13 circumstances of this case, what we actually would be
14 doing is re-litigating basically the same operative
15 facts which was previously litigated in federal
16 court.

17 JUDGE PIGOTT: Well, then you shouldn't - -
18 -

19 JUDGE READ: Yeah, but she had - - - she
20 had no - - - it has - - - it hasn't - - - it's not
21 reviewable in federal court - - -

22 MR. GAYNOR: I understand that, Your Honor.

23 JUDGE READ: - - - at this point. And we
24 don't know when it will be, right? It's - - - it's
25 still - - -

1 MR. GAYNOR: That - - - that - - - that's
2 another - - - this is a very unique case, very
3 unique. And - - - and I think that - - -

4 JUDGE READ: I mean, it doesn't sound like
5 it would be very burdensome for you to - - - to have
6 another - - - because it's not going to come up that
7 often.

8 MR. GAYNOR: Agreed, Your Honor. But - - -
9 but I think in terms of the - - -

10 JUDGE RIVERA: The point of - - - of not
11 applying collateral estoppel is exactly right. That
12 - - - that she's going to have an opportunity to
13 present whatever facts or defenses that she wants to
14 present. That's - - - that's the point.

15 MR. GAYNOR: The - - - the - - - the
16 countervailing argument once again that I just would
17 bring up to the court is is she is - - - you know,
18 she has had her day previously before the litigation
19 - - -

20 CHIEF JUDGE LIPPMAN: But she hasn't
21 finished her day.

22 JUDGE PIGOTT: So - - - so you - - -

23 MR. GAYNOR: Well - - -

24 JUDGE PIGOTT: You could - - - you could
25 put in the record and say we now rest, and then she

1 can get up and say whatever she wants to say, and you
2 should object if it's been asked and answered and
3 whatever.

4 MR. GAYNOR: Theoretically, that can
5 happen, Your Honors, but in terms of the process, in
6 terms of granting her a hearing, the possibility
7 exists that an independent fact finder appointed by
8 the Appellate Division could come in and review the
9 record, review her testimony, review her story now in
10 terms of this annuity agreement and in terms of,
11 like, when she had it, when she discovered it, and
12 whatever else. But the possibility exists that an
13 independent fact finder could come in and - - - and
14 could find that Judge Homer was wrong.

15 JUDGE READ: So what?

16 JUDGE RIVERA: So what?

17 MR. GAYNOR: Well, I - - - I - - - I think
18 - - -

19 JUDGE RIVERA: But that - - - that's not a
20 factor in the collateral - - -

21 MR. GAYNOR: Well - - -

22 JUDGE RIVERA: - - - in - - - in this
23 particular decision. You're asking - - - your point
24 is, we might lose.

25 MR. GAYNOR: We - - -

1 JUDGE RIVERA: Which is her point, too, by
2 the way, because she thinks that - - - that the
3 decision was wrong initially and she thinks she can
4 show that to you.

5 MR. GAYNOR: We may lose, but this is - - -
6 this is - - - this is the brunt of the argument. We
7 may lose, but you would - - - what you would have
8 would be two inconsistent decisions.

9 JUDGE PIGOTT: Sure.

10 MR. GAYNOR: And - - - and - - - and that -
11 - - I think the societal interest - - -

12 JUDGE PIGOTT: Well, let me give you an
13 example. There was a judge on the JCC who was
14 sanctioned. She wanted to - - - she wanted to appeal
15 to this court. We weren't here. So she - - - she
16 appealed her censure and they removed her from the
17 office. So I mean, this has a downside for - - - for
18 Ms. Dunn here too. But what you're looking for is
19 fairness, it seems, and - - - and let's see where the
20 chips fall.

21 JUDGE RIVERA: Well, what - - - what if - -
22 - let's - - - let's go the other way.

23 MR. GAYNOR: Sure.

24 JUDGE RIVERA: So let's say you - - - you -
25 - - you apply collateral estoppel. Again, you've

1 already found her in violation. You censure her.
2 She eventually gets to appeal, she actually finally
3 gets to challenge this in federal court and she wins.

4 MR. GAYNOR: I think at that point - - -

5 JUDGE RIVERA: What relief, if any, does
6 she have at that time? To come back to you and say
7 you were wrong?

8 MR. GAYNOR: I think - - - I think the
9 inquiry is, how do you unring the bell at that point.

10 JUDGE PIGOTT: Um-hum.

11 MR. GAYNOR: And I - - - and I think that -
12 - -

13 JUDGE RIVERA: So isn't it more fair to at
14 least give her the opportunity now, before the
15 censure, to - - - to present some defense or present
16 whatever argument she wants to present?

17 MR. GAYNOR: Our argument is, Your Honor,
18 simply is that for - - - for purposes of imposing and
19 reviewing attorney discipline - - -

20 JUDGE RIVERA: Um-hum.

21 MR. GAYNOR: - - - and her credibility,
22 which was central to the issue in this case, that the
23 Appellate Division had before it enough information.
24 Judge Homer, again, concluded by clear and convincing
25 evidence after months of litigation as to her

1 misconduct, and I think the Appellate Division was
2 right in reviewing the record and in terms of
3 assessing her conduct as it applies to the New York
4 Rules of Professional Conduct.

5 JUDGE RIVERA: Well, let me ask you
6 something. What - - - what - - - just as a
7 hypothetical, what if he had not made these findings
8 and found that she had been in violation and - - -
9 and you, however, thought she was, that she should be
10 censured? Would you be barred from proceeding simply
11 because a judge in the federal court, which they have
12 - - - no one has appealed yet, there's no review yet
13 - - - found otherwise?

14 MR. GAYNOR: I don't think so.

15 JUDGE RIVERA: If you really thought you
16 had the proof?

17 MR. GAYNOR: I - - - I - - - I think that
18 would be arguably not bar us, Judge Rivera.

19 JUDGE RIVERA: So - - - so you don't get
20 barred, but she does?

21 MR. GAYNOR: Well, I - - - I don't think -
22 - - I think she's been barred. But she's been barred
23 - - -

24 JUDGE RIVERA: Well, by you, but that's - -
25 - that's - - -

1 MR. GAYNOR: Right, right. Your - - - Your
2 Honors, listen, at the end of the day, this court and
3 courts throughout the state - - - this - - - this
4 case is about fairness. And there's a tension
5 between the unfairness to Ms. Dunn in terms of the
6 fact that, you know what, we have this appeal out
7 there. We have no idea when it's going to be
8 decided. And that puts her in a tough position. But
9 the countervailing argument, Your Honors, is is that
10 there is this tension and there's a public interest
11 in terms of - - -

12 CHIEF JUDGE LIPPMAN: Yeah. But you could
13 carry out that public interest without having a
14 collateral estoppel ruling. You can go and bring
15 your proceeding. That's what you - - - you exist
16 for. And win or lose, at least the person has their
17 day in court. We all want our day in court.

18 MR. GAYNOR: I - - - I get back to the
19 Staatsburg case, Your Honor, Fire District case where
20 the - - - the - - - the case mentioned the
21 conservation of resources of the court.

22 JUDGE PIGOTT: I can't - - - I can't find -
23 - - I know your light's on but I - - - I can't find
24 what I thought I had here. But the - - - the judge
25 said that - - - gave the SEC the right to refer her

1 to - - - to your committee, right?

2 MR. GAYNOR: Judge Homer in his - - - his
3 opinion directly referred the matter to the Committee
4 on Professional Standards.

5 JUDGE PIGOTT: Okay. Did the SEC?

6 MR. GAYNOR: No.

7 JUDGE PIGOTT: Okay.

8 CHIEF JUDGE LIPPMAN: Okay. Thanks,
9 counsel.

10 MR. GAYNOR: Thank you. Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

12 MR. ZELERMYER: Only two brief points, Your
13 Honor. First of all, Judge Rivera's question, I
14 think, really highlights something. I'd like to just
15 read a sentence or a part - - - part of a sentence
16 from the court's opinion in the - - - the Haly - - -
17 Hal - - - Halyalkar case.

18 "The fact that the doctrine is sought to be
19 employed offensively by a nonparty to the prior
20 litigation may, in some situations, raise legitimate
21 concerns about the fairness of its application."
22 That's at page 90, I believe, of the opinion, the - -
23 - the a - - - 532 N.Y.Supp.2d at page 90.

24 So second, and really last, is the notion
25 that Mr. Gaynor has suggested several times that

1 Judge Homer reached his conclusion after months of
2 litigation. Well, Ms. Dunn wasn't a party to the
3 underlying litigation. She wasn't a party to months
4 of litigation. She got to submit a brief after the
5 SEC moved for - - - for sanctions against her. She
6 submitted a brief. There was no hearing. She didn't
7 get to call any witnesses. She didn't get to cross-
8 examine any witnesses. The hearing that was held in
9 November, she wasn't a party. She testified. She
10 was a witness. She wasn't allowed to examine or
11 cross-examine or call any witnesses.

12 She didn't engage in months of litigation.
13 She had an opportunity to submit one brief. That was
14 it. That's all the hearing she's had. It's unfair.

15 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
16 you.

17 MR. ZELERMYER: Thank you.

18 CHIEF JUDGE LIPPMAN: Thank you both.

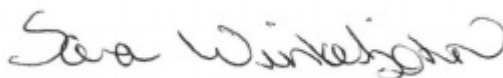
19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Dunn, an Attorney, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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Date: January 20, 2015