

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S  
severally subscribing shares of certain policies listed  
herein, *et al.*,

Plaintiffs,

- against -

BDO SEIDMAN LLP,

Defendant.

Index No. 651032/2011

**CERTIFICATE REQUESTING  
ENTRY OF JUDGMENT IN  
ELECTRONICALLY FILED CASE**

Alyssa Ziegler, an attorney admitted to the Bar of the State of New York and counsel for plaintiffs in the above-captioned electronically-filed case, does hereby request that Justice O. Peter Sherwood's Decision and Order, dated July 27, 2012, and entered on August 1, 2012, be co-signed by the County Clerk and entered as a Judgment in the appropriate manner. Pursuant to CPLR 5017(a), I do hereby certify that the following documents shall constitute the Judgment Roll for this Judgment. Each document is identified by title of the paper, the date filed with the electronic filing system, and the number of the paper as listed on the New York State Court's Electronic Filing System List of Papers Filed.

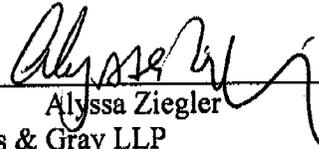
**FILED**  
AUG 14 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Title of Document	Date Filed	New York State Courts Electronic Filing System Number
Summons and Complaint	April 18, 2011	1
Answer	March 29, 2012	29
Notice of Motion for Summary Judgment	April 2, 2012	30
Memorandum in Support of Plaintiffs' Motion for Summary Judgment	April 2, 2012	31
Plaintiffs' Statement of Undisputed Material Facts	April 2, 2012	32
Affirmation of Alyssa Ziegler in Support of Memorandum in Support of Plaintiffs' Motion for Summary Judgment	April 2, 2012	33
Affidavit of Gregory Bridges in Support of Plaintiff's Motion for Summary Judgment	April 2, 2012	34
Affidavit of Stuart Pack in Support of Plaintiffs' Motion for Partial Summary Judgment	April 2, 2012	35
Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment	April 27, 2012	38
Defendant's Rule 19-a Counterstatement	April 27, 2012	39
Transmittal Affirmation of Robert A. O'Hare, Jr.	April 27, 2012	40
Reply Memorandum in Further Support of Plaintiff's Motion for Summary Judgment	May 10, 2012	41

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Transcript of Oral Argument, Taken on July 26, 2012	July 31, 2012	45
Decision and Order	August 1, 2012	46

Dated: New York, New York  
August 2, 2012



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*Attorneys for Plaintiffs*

**FILED**  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 49

Certain Underwriters at Lloyd's, et al.,

Plaintiffs,

INDEX NO. 651032/2011

-against-

MOTION DATE July 26, 2012

BDO SEIDMAN LLP.,

MOTION SEQ. NO. 003

Defendant.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

**FILED**  
AUG 14 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 27, 2012

O. Peter Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION |  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST |  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49**

-----X  
**Certain Underwriters at Lloyd's severally subscribing shares of certain policies listed herein; Gulf Insurance Company UK Ltd.; Lexington Insurance Company; Liberty Mutual Insurance Europe Ltd., as successor to Liberty Mutual Insurance Company (UK) Ltd. and Liberty International Insurance Company; QBE Insurance (Europe) Limited; Assicurazioni Generali S.P.A.; Kemper Indemnity Insurance Company; Swiss Re Specialty Insurance (UK) Ltd. formerly known as GE Specialty Insurance (UK) Ltd.;**

**Plaintiffs,**

**-against-**

**BDO SEIDMAN LLP,**

**Defendant.**

-----X  
**O. PETER SHERWOOD, J.:**

This is an action for a declaration that certain claims-made professional indemnity insurance policies issued to defendant, BDO Seiman, LLP ("BDO"), an accounting firm, and underwritten by plaintiff insurers, do not provide coverage for a Florida jury award and judgment of \$55 million in punitive damages. The policies are controlled by New York law.

The primary policy, which insures BDO and governs all of the commercial professional indemnity policies involved here, covers the period June 1, 2001 to June 1, 2004. Section III, titled "Exclusions" provides, in relevant part:

This policy excludes:

3. to the extent it is uninsurable by law: -

- (a) any claim or claims for fines, penalties, punitive or exemplary damages imposed by a judgement [sic] or any other final adjudication.

The facts, which are undisputed, are described in the court's Decision and Order, dated February 28, 2012, and will not be recounted here except as necessary. In the closing paragraph of

**DECISION AND ORDER**

**Index No. 651032/2011**

that decision, the Court stated: "It appears that the parties' dispute does not require further factual development. Nevertheless, while plaintiffs' allegations may have prima facie merit (*see e.g., Soto v State Farm Ins. Co.*, 83 NY2d 718 [1994]), the merits of their case are not presently before the court on this pre-answer motion to dismiss".

On March 29, 2012, BDO served and filed its answer in which it interposed as affirmative defenses: (1) failure to state a cause of action; (2) failure to allege a proper claim for declaratory judgment; (3) claim is premature; and (4) plaintiffs have suffered no cognizable damages.

On this motion for summary judgment plaintiffs seek a judgment declaring that there is no coverage for the punitive damages portion of the verdict and judgment issued in an action in a Florida district court action titled *The Estate of George E. Batchelor, et al v BDO Seidman, LLP* (Case No. 02-07135-CA04 [Fla. 11<sup>th</sup> Cir. Ct.] [the "Batchelor Action"]). In that action, a jury awarded compensatory damages of \$36,670,000.00 and punitive damages of \$55,000,000.00. BDO has filed a Notice of Appeal from the judgment which appeal is pending in the Florida Third District Court of Appeal.

In opposition to plaintiffs' motion for summary judgment, defendant argues that there is a factual issue precluding summary judgment concerning whether the determination in the Batchelor Action is in conformity with Florida law and, therefore, until the appeal is resolved, this court is in no position to determine the appropriateness of the underlying judgment. Defendant further avers that until the basis of the punitive damage award is determined by the Florida appellate courts, this court cannot determine whether those damages are uninsurable under New York law.

In a written agreement in this litigation, dated June 15, 2011, the parties consented to litigate this claim in the New York Supreme Court Commercial Division and to apply New York law to the question of whether the punitive damage award is covered by the insurance policies issued by plaintiff insurers to BDO.

## ***DISCUSSION***

### **A. Standard of Review on Summary Judgment**

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see, CPLR 3212 [b]; Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the

party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra; Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

#### **B. Punitive Damages/Choice of Law Rules**

Public policy of New York precludes insurance indemnification for punitive damages "whether the punitive damages are based on intentional actions or actions which, while not intentional, amount to 'gross negligence, recklessness, or wantonness'" (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 200 [1990], quoting *Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 400 [1981]) "or 'conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard'" (*id.* quoting *Hartford Acc. & Indem. Co. v Village of Hempstead*, 48 NY2d 218, 227 [1979]). The New York Court of Appeals has stated that to allow indemnification of such damages would defeat the purpose of punitive damages which "is solely to punish the offender and to deter similar conduct on the part of others" (*Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 316 [1994]). New York public policy should not be applied any differently solely because a punitive damages award has been rendered in another state (*see Home Ins. Co.*, 75 NY2d at 201). In addressing this important area of the law, the Court of Appeals

formulated a two-part test to decide whether an out-of-state punitive damages judgment was indemnifiable in New York. A court must first examine the "nature of the claim, including the degree of wrongfulness for which damages were awarded in the foreign State" to determine whether the award may be considered "punitive" in nature. The court must then examine "State's law and policy relating to punitive damages in order to properly ascertain whether reimbursement would offend our public policy" (*id.*).

The *Home Insurance Co.* case involved an underlying products liability action commenced in Illinois alleging that administration of a drug manufactured by American Home Products caused serious injuries to a two-year-old boy. The plaintiff in the underlying case obtained a verdict which included a punitive damage award of \$13 million. The punitive damages portion of the award was affirmed by the intermediate appellate court which rejected the defendant's argument that the punitive damages verdict was contrary to the weight of the evidence. American Home Products' insurer, Home Insurance Company, commenced an action in New York seeking a declaratory judgment that it was not required to indemnify American Home Products for the punitive damages portion of the Illinois verdict. On appeal from a federal court decision finding that New York law was not applicable to the issue, the United States Court of Appeals for the Second Circuit for the certified the question to the New York Court of Appeals, namely, "Would New York require the insurer to reimburse the insured for punitive damages awarded against the insured on the out-of-state judgment in this case?"

The Court of Appeals held that both New York and Illinois law prohibited indemnification of punitive damages and thus concluded that there was no barrier to applying New York law barring indemnification of the punitive damages portion of the Illinois judgment. The court stated that "[i]n deciding whether there should be indemnification for the [out-of-state] punitive damages verdict as affirmed by the appellate court, we should assume that the judgment was made in conformity with prevailing Illinois law" (*Home Ins. Co.*, 75 NY2d at 203). In reaching its determination, the court noted that at the time of its decision an appeal of the decision of the Illinois intermediate appellate court was pending before the Illinois Supreme Court which court "ha[d] recently emphasized that '[b]ecause of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded'" (*id.* at 203).

conduct that is “so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.”

“Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future” (*W.R. Grace & Co. v Waters*, 638 So. 2d 502, 504 [Fla. 1994]). In Florida, the law is well settled that “[p]unitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for rights of others” (*Owens-Corning Fiberglass Corp. v Ballard*, 749 So. 2d 483, 486 [Fla. 1999]; see also *BDO Seidman, LLP v Banco Espirito Danto Intl.*, 38 So. 3d 874 [Fla. 2010]; and *Hardiman v Stevens*, 2011 WL 1480401 [M.D. Fla. 2011]).

In instructing the jury in the Batchelor Action, the trial judge essentially tracked the statutory language and stated that if the jury found in favor of the plaintiff, it “must decide whether in addition to compensatory damages, punitive damages are warranted as punishment to BDO Seidman and as a deterrent to others.” The jury was first instructed that it had to determine whether punitive damages were warranted based upon “clear and convincing evidence that BDO Seidman was guilty of intentional misconduct or gross negligence which was a substantial cause of loss to the [plaintiffs]”. The court then proceeded to provide the statutory definitions of intentional misconduct and gross negligence (*id.* pp. 4555-4556). The jury found upon the requisite standard of clear and convincing evidence that punitive damages were warranted against BDO.

Review of both Florida’s statutory and decisional law confirms that there is no significant difference between the law of New York governing punitive damages and comparable law in Florida. Under both State’s laws, the purpose of punitive damages is the same, namely, to punish conduct having a high degree of moral culpability and to serve as a warning to others in the future. Thus, conduct like that for which the jury found BDO guilty such that awarded of punitive damages was warranted, would also support a jury verdict in New York awarding punitive damages. It follows that insurance coverage for the punitive damages awarded in the Batchelor Action would be contrary to New York public policy.

Under such circumstances, the fact an appeal is pending before the Florida Third Circuit Court of Appeals will not preclude a decision on the motion for summary judgment in this case. Defendant has presented no reason for this court to question the regularity of the Florida proceedings or the legitimacy of the Florida judgment awarding punitive damages. In arguing that an issue of fact precluding the grant of summary judgment exists, defendant relies upon an unpublished opinion of the Superior Court of Delaware, New Castle County, (*see Hoechst Celanese Corp. v National Union Fire Ins. Co. of Pittsburgh, PA* (1994 WL 721646)). That case involved an action by Hoechst Celanese Corp. seeking indemnity from its insurers for punitive damages awarded against it in California and Texas and a declaratory judgment that the policies at issue provided coverage for punitive damages. While citing *Home Insurance Company* for the proposition that the Delaware court should assume that the judgments in the California and Texas actions were in conformity with the law their respective State, the court declined to grant the insurers' motion for summary judgment dismissing the complaint because appeals were pending in both actions. Specifically, the court held that "the assumption that these judgments were in conformity with the law is premature" and that the court could not accept the propriety of the judgments "when the cases have yet to be reviewed by their own State courts" (*id.* at \*2 [8]).

If the holding of the Delaware Superior Court is based on its interpretation of the New York Court of Appeals decision in *Home Insurance Co.*, this court respectfully disagrees. In fact, the New York Court of Appeals rendered its determination in *Home Insurance Co.* after an intermediate appellate decision was rendered, and while the appeal to the Supreme Court of Illinois was pending. The fact that an appeal is pending in the Batchelor Action is not grounds for failing to decide the summary judgment motion.

#### **CONCLUSION**

Accordingly, plaintiff's motion for summary judgment must be granted. There is no coverage under the professional indemnity policies issued to BDO by plaintiffs for the punitive damages portion of the jury verdict in the Batchelor Action. Accordingly, it is hereby

**ORDERED** that the motion of plaintiffs for summary judgment on the first cause of action for a declaration that as a matter of New York public policy and pursuant to the "Exclusions" clause of the relevant insurance policies, there is no coverage for the punitive damages portion of the jury verdict in the Batchelor Action is GRANTED; and it is further

**ADJUDGED and DECLARED** that plaintiffs herein are not obligated to provide coverage for the punitive damages portion of said jury verdict; and it is further

**ADJUDGED** that plaintiffs do recover from the defendant, BDO Seiman LLP, costs and disbursements upon the submission of an appropriate bill of costs as taxed by the Clerk, and plaintiffs have execution therefor.

*in the amount of \$455.00*

This constitutes the decision and order of this court.

**DATED: July 27, 2012**

**ENTER,**

  
**O. PETER SHERWOOD**  
J.S.C.

  
Clerk

**FILED**  
AUG 14 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

GS1032111

Parties Addresses.

20 I
S A 1 L E
Gulf Insurance Company UK Ltd 485 Lexington Avenue, 6th Floor New York, NY 10017
Lexington Insurance Company 100 Summer Street Boston, MA 02110
Liberty Mutual Insurance Europe Ltd. 3rd Floor, Two Minster Court Mincing Lane London United Kingdom EC3R 7YE
QBE Insurance (Europe) Limited Plantation Place 30 Fenchurch Street London United Kingdom EC3M 3BD
Assicurazioni Generali S.p.A. 100 Lemman Street London United Kingdom E1 8AJ
Kemper Indemnity Insurance Company One Corporate Dr. Lake Zurich, IL 60047

→ is successor to Liberty Mutual Insurance Company (UK) Ltd. and Liberty International Insurance Company.

**FILED**

AUG 14 2012

NEW YORK  
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Swiss Re Specialty Insurance (UK) Ltd.  
30 St Mary Axe  
London  
United Kingdom  
EC3A 8EP

→ formerly known as GE  
Specialty Insurance (UK) Ltd.

**Defendant's Address:**

BDO Seidman, LLP  
100 Park Avenue  
New York Ny 10017

**FILED**  
AUG 14 2009  
NEW YORK  
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S  
severally subscribing shares of certain policies listed  
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Plaintiffs,

- against -

BDO SEIDMAN LLP,

Defendant.

Index No. 651032/2011

BILL OF COSTS

(Costs of Plaintiffs)

COSTS	\$	DISBURSEMENTS	\$
Costs before note of issue (CPLR 8201(1)[NYCLS])	200.00	Fee for index number (CPLR 8018(a))	210.00
Costs after note of issue (CPLR 8201(2)[NYCLS])		Referee's fees (CPLR 8301(a)(1), 8003, 8001(d) and 4321)	
Trial, inquest or assessment of damages (CPLR 8201(3)[NYCLS])		Commissioner's compensation. (CPLR 8301(a)(2))	
Additional allowance as of right (CPLR 8302(a)-(c)[NYCLS])		Clerk's fee, filing notice of pendency or attachment (CPLR 8018(e) and 8021(a)(12))	
Additional allowance in court's discretion (CPLR 8303[NYCLS])		Clerk's fee cancelling notice of pendency (CPLR 8021(a)(12))	
Motion costs (CPLR 8202[NYCLS])		Entering and docketing judgment (CPLR 8301(a)(7) and 8016(a)(2))	
Appeal to Appellate Division before argument (CPLR 8203(1)[NYCLS])		Paid for searches (CPLR 8301(a)(10))	
Appeal to Appellate Division for argument (CPLR 8203(2)[NYCLS])		Affidavits and acknowledgments (CPLR 8009)	
Appeal to Court of Appeals before argument (CPLR 8204(1)[NYCLS])		Serving copy summons and complaint CPLR 8001(c)(1) and 8301(d)	
Appeal to Court of Appeals for argument (CPLR 8204(2)[NYCLS])		Request for judicial intervention	45.00
Total Costs	200.00	Fee for filing motion	
Costs	200.00	Note of issue (CPLR 8020(a))	
Disbursements	255.00	Paid referee's report (CPLR 8301(a)(12))	
Total	\$455.00	Certified copies of papers (CPLR 8301(a)(4))	
		Satisfaction piece. (CPLR 5020(a) and 8021(a)(7))	
		Transcripts and filing. (CPLR 8021)	
		Certified copy of judgment (CPLR 8021)	
		Postage (CPLR 8301(a)(12))	
		Jury fee (CPLR 8020(c), (d))	
		Stenographers' fees (CPLR 8002, 8301(d))	
		Sheriff's fees on execution (CPLR 8011(b), 8012 and 8301(a)(8))	
		Sheriff's fees on attachment, arrest, etc. (CPLR 8011(a))	
		Clerk's fees, Court of Appeals (CPLR 8301(a)(12))	
		Paid copies of papers (CPLR 8016(a)(4))	
		Motion expenses (CPLR 8301(b))	
		Fees for publication (CPLR 8301(a)(3))	
		Serving subpoena (CPLR 8011(c)(1) and 8301(d))	
		Paid for Register's search (CPLR 8301(a)(10))	
		Attendance of following witnesses (CPLR 8001(a)(b)(c)[NYCLS] and 8301(a)(1))	
		Total Disbursements	255.00

I HEREBY CERTIFY THAT I HAVE  
 ADJUSTED THIS BILL OF COSTS AT  
 \$455.00  
 AUG 14 2012  
 CLERK

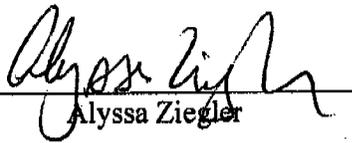
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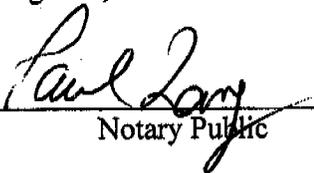
State of New York )  
                                  : ss.  
County of New York )

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that I am associated with Ropes & Gray LLP, the attorneys of record for the plaintiffs in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and each of the persons named as witnesses, attended as a witness on the trial, hearing or examination before trial the number of days set opposite their names; each of these persons resided the number of miles set opposite their names, from the place of the trial, hearing or examination; and each of these persons necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from, the same place of trial, hearing or examination; and copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

  
Alyssa Ziegler

Sworn to before me  
August 2, 2012

  
Notary Public

PAUL LANG  
Notary Public, State of New York  
No. 01LA4824339  
Qualified in NEW YORK County  
Commission Expires JULY 31, 2014

**FILED**  
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Index Number: 651032/2011

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S  
severally subscribing shares of certain policies listed  
herein, *et al.*,

Plaintiffs,

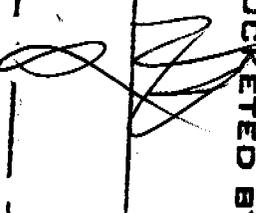
- against -

BDO SEIDMAN LLP,

Defendant.

JUDGMENT

Ropes & Gray LLP  
1211 Avenue of the Americas  
New York, New York 10036-8704  
Telephone: (212) 596-9000  
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DOCKETED BY  


1-10

**FILED AND  
DOCKETED**

AUG 14 2012

AT 12:34 P.M.  
N.Y., CO. CLKS OFFICE