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October 14, 2011

Via U.S. Mail and Electronic Mail

Kenneth P. Thompson, Esq.
Thompson Wigdor LLP
85 Fifth Avenue
New York, NY 10003

Re: Diallo v. Strauss-Kahn, No. 307065/11 (Sup. Ct. Bronx Co.)

Dear Mr. Thompson:

We write regarding the subpoenas *duces tecum* that Plaintiff served upon the following third parties in connection with this matter on October 4 and 5, 2011:

- Accor North America;
- Air France USA;
- the New York County District Attorney's Office;
- the International Monetary Fund;
- McCormick & Schmick's Seafood Restaurant;
- the New York City Taxi & Limousine Commission;
- the Office of the Chief Medical Examiner;
- The Port Authority of New York and New Jersey; and
- Sofitel Corporation.

As you know, on September 26, 2011, Defendant filed and served pursuant to CPLR § 3211 a motion to dismiss the Complaint in its entirety. Pursuant to CPLR § 3214(b), the filing and service of Defendant's motion to dismiss the Complaint automatically stayed all disclosure in this action pending determination of the motion. The subpoenas were served upon the aforementioned third parties in violation of the automatic stay of disclosure and are improper. The subpoenas must be withdrawn.

Please advise us by October 21, 2011, whether you have informed the aforementioned third parties that Plaintiff's subpoenas have been withdrawn. If you do not withdraw the

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subpoenas, we intend to seek the intervention and assistance of the Court.

Sincerely,

William W. Taylor, III
William W. Taylor, III *WWT*

- c: Stephen M. Ryan, Esq., Accor North America and Sofitel Corporation
Joan Illuzzi-Orbon, Esq., New York County District Attorney's Office
John McConnell, Esq., New York County District Attorney's Office
Peter G. Neiman, Esq., International Monetary Fund
Trey Thomas, Esq., McCormick & Schmick's Seafood Restaurant
Meera Joshi, Deputy Commissioner for Legal Affairs/General Counsel, New York City
Taxi and Limousine Commission
Darrell B. Buchbinder, Esq., The Port Authority of New York and New Jersey
Joan Gabel, US Counsel, Air France
Mimi Mairs, Office of Chief Medical Examiner

Index No. 307065/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

NAFISSATOU DIALLO,

Plaintiff,

v.

DOMINIQUE STRAUSS-KAHN,

Defendant.

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Index No.: 307065/11

MOTION TO VACATE AUTOMATIC STAY

THOMPSON WIGDOR LLP

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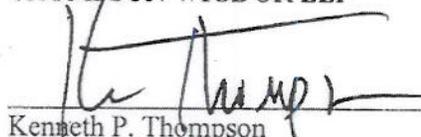
Attorneys for Plaintiff

Dated: October 24, 2011
New York, New York

Respectfully submitted,

THOMPSON WIGDOR LLP

By:


Kenneth P. Thompson
Douglas H. Wigdor

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Counsel for Plaintiff

To: William H. Taylor III
Shawn P. Naunton
ZUCKERMAN SPAEDER LLP
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Telephone: (212) 704-9600
Facsimile: (212) 704-4256

Counsel for Defendant

4. The crux of this dispute is that Defendant has served non-party subpoenas and engaged in non-party document discovery even after filing his motion to dismiss, but is attempting to prevent Plaintiff from doing the same. Defendant is attempting to manipulate the legal system by using the stay provision of CPLR 3214(b) to prevent Plaintiff from securing material evidence. Moreover, given the utter lack of merit of Defendant's motion to dismiss, Defendant's refusal to agree to document discovery, or even non-party document discovery, demonstrates that the motion to dismiss was filed only as a tactic to delay the advancement of this case.

5. CPLR 3124(b) provides that, "service of a notice of motion under rule 3211 . . . stays disclosure until determination of the motion unless the court orders otherwise." The Court has broad discretion to lift the automatic statutory stay imposed by Section 3214(b) and courts have exercised that discretion in circumstances where there is simply a "legitimate need for discovery." *Reilly v. Oakwood Heights Community Church*, 269 A.D.2d 582 (2d Dep't 2000) ("although the stay is automatic, a court can direct otherwise if there is a legitimate need for discovery"); *Arthur Glick Truck Sales, Inc. v. H.O. Penn Mach. Co.*, 798 N.Y.S.2d 707 (N.Y. Sup. Ct. 2004) (ordering responses to document requests during pendency of motion to dismiss); *Shovak v. Long Is. Commercial Bank*, 829 N.Y.S.2d 546 (2d Dept. 2006) (where the trial court permitted discovery in purported class action despite a pending motion to dismiss, the court "providently exercised its discretion in granting the plaintiff's application to vacate the automatic stay of discovery"). Thus, the stay on discovery may be vacated upon exercise of the Court's discretion.

I. CHRONOLOGY OF EVENTS

6. The chronology of events leading up to the filing of this motion shows how Defendant is attempting to use the automatic stay to his tactical advantage at Plaintiff's expense. Specifically, on August 8, 2011, Plaintiff filed and served the Complaint on the Defendant. As a

result of service of the Complaint on that day, Defendant's deadline to respond was August 28, 2011. However, on August 26, 2011, Defendant moved for a 30-day extension of time to respond to the Complaint until September 26, 2011. In that motion, Defendant made it clear that "counsel is considering filing a motion to dismiss the complaint in its entirety. The additional time is requested in order to research and write such motion." (A true and correct copy of the Affirmation of Shawn Naunton is attached hereto as Exhibit C.) Thus, as early as August 26, 2011 (but more likely much earlier), Defendant intended to move for dismissal and trigger a stay of discovery.

II. DEFENDANT HAS ENGAGED IN DISCOVERY

7. Defendant thereafter used that extension of time to engage in discovery. For example, on September 6, 2011, Defendant served two non-party subpoenas on Accor North America and Accor Worldwide, respectively (together "Accor"), which owns and/or operates the Sofitel Hotel where Defendant sexually assaulted Plaintiff. Though Plaintiff was aware that Defendant had served subpoenas while a motion to dismiss was intended to be filed, Plaintiff did not object to the service of the subpoenas because there is a legitimate need to preserve the requested evidence.

8. Additionally, Defendant made the return date of those subpoenas September 26, 2011, the same day that Defendant's motion to dismiss was due to be filed. Clearly, Defendant made the Accor subpoenas returnable on that date so that immediately upon receiving a response, he could file the motion to dismiss and stay discovery, which was a transparent attempt to get an unfair tactical advantage over Plaintiff.

9. However, on September 26, 2011, Accor only provided formal written responses and a partial document production and specifically advised Defendant that *additional documents would be forthcoming*. Specifically, Accor stated, "The defense has provided a deadline of only 20 days.

Accor has not been able to complete its collection and production within the time provided, but expects to complete a majority of its production on the return date, and will produce the remaining records within 30 days of the date of service." (A true and accurate copy of Accor's written response is attached hereto as Exhibit D at ¶9 (emphasis added)). Therefore, Defendant knew that additional document production pursuant to the subpoenas would continue after the motion to dismiss had been filed. Defendant, however, did not withdraw the subpoenas.

10. Although Accor provided written subpoena responses and partial document production to Defendant on September 26, 2011, Defendant did not provide Plaintiff with any portion of the response until October 13, 2011. However, on October 13, 2011, Defendant provided Plaintiff *only* with Accor's document production and *not* with the formal written responses. (A true and correct copy of an email from S. Naunton to D. Gottlieb dated October 13, 2011 is attached hereto as Exhibit E). Plaintiff's counsel then inquired as to whether formal written responses were provided by Accor, and Defendant subsequently provided those to Plaintiff as well. *Id.* Upon receiving the formal written responses, it immediately became clear why they had been withheld -- because the above-quoted section definitely showed that Defendant continued to engage in discovery and did not withdraw an active subpoena after the motion to dismiss had already been filed.

11. Although Plaintiff does not know the specific dates on which Accor completed its document production under the subpoenas, clearly it was during the pendency of the motion to dismiss. For instance, on October 6, 2011, Accor provided Defendant with a privilege log. It is likely that Defendant corresponded with and requested the privilege log from Accor even after the motion to dismiss was filed. (A true and correct copy of a letter from C. Showalter to S. Naunton dated October 6, 2011 is attached hereto as Exhibit F).

III. DEFENDANT'S ATTEMPT TO PREVENT PLAINTIFF FROM ENGAGING IN DISCOVERY

12. On October 6, 2011, Plaintiff served 10 subpoenas *duces tecum* on Accor North America, Air France USA, McCormick and Schmick's Seafood Restaurant, Sofitel Corporation, The Port Authority of New York and New Jersey, New York City Taxi & Limousine Commission, New York County District Attorney's Office, International Monetary Fund, Office of the Chief Medical Examiner, and Guidepost Solutions LLC. These subpoenas were served for no reason other than to secure and preserve material evidence in this matter. Defendant, however, now seeks to prevent compliance with these subpoenas by stating that discovery has been stayed pending resolution of the motion to dismiss. (A true and correct copy of correspondence from W. Taylor dated October 14, 2011 is attached hereto as Exhibit G).

IV. THE NEED FOR DISCOVERY

13. As stated in the Complaint, Defendant sexually assaulted Plaintiff on May 14, 2011, already more than five months ago. If a stay on discovery is imposed during the pendency of Defendant's motion to dismiss (and any appeal following denial of that motion), discovery would be on hold for an extremely lengthy period of time. It is highly likely that material evidence in the possession of non-parties could be destroyed pursuant to standard internal document retention policies, and this is even more likely for electronically stored information such as emails and other data. Additionally, the evidence requested pursuant to the subpoenas served by Plaintiff may not be subject to a litigation-hold as the subpoenaed entities are non-parties to this litigation and have different interests and document preservation obligations than the parties. Defendant also cannot claim any prejudice from Plaintiff engaging in non-party document discovery through the subpoenas that have been served.

14. Moreover, no utility is served by a stay of discovery in this matter. As pointed out by *Siegal, David*, Practice Commentaries, CPLR 3214, “[t]he provision is even occasionally overlooked.” See *Ichthyian Associates S.A. v. Bon Ami Co.*, 243 N.Y.S.2d 795 (1st Dep’t 1963) (stating that a motion for dismissal does not stay deposition without reference to Section 3214). However, Defendant will not consent to Plaintiff’s subpoenas because he wants to be able to secure and preserve the evidence he believes will help his case while at the same time prevent Plaintiff from doing the same. At a very basic level, this is inequitable.

15. Notably, though Defendant received responses to the Accor Subpoenas on September 26, 2011, Defendant did not produce the subpoena responses to Plaintiff until October 13, 2011. Clearly, Defendant does not believe a strict stay on discovery is necessary or appropriate given his recent disclosures to Plaintiff.

V. CONCLUSION

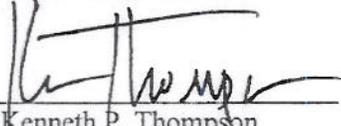
16. The fact remains that Defendant used an extension of time to file a motion to dismiss to engage in discovery and then did so after that motion was filed. Defendant is now attempting to unfairly prevent Plaintiff from also engaging in discovery. Moreover, substantial prejudice could result if Plaintiff is unable to secure material evidence from non-parties before its potential destruction. In contrast, there is no prejudice to Defendant in permitted Plaintiff to engage in discovery, other than that Plaintiff will secure evidence that supports her case. As a matter of fundamental fairness and equity, Plaintiff should be permitted to engage in discovery just as Defendant was able to do so.

WHEREFORE, Plaintiff respectfully requests an order that the automatic stay provision of CPLR 3214(b) is vacated and the parties may engage in document discovery during the pendency of Defendant's motion to dismiss, or in the alternative be allowed to serve subpoenas *duces tecum* on non-parties.

Dated: New York, New York
October 24, 2011

Respectfully submitted,

THOMPSON WIGDOR LLP

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