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COURT OF APPEALS

STATE OF NEW YORK

MERRILL LYNCH, PIERCE,
FENNER & SMITH INCORPORATED,

Respondent,

-against-

No. 160

GLOBAL STRAT, INC., ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
September 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 160, Merrill Lynch.

2 One second, counsel.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: Okay. How much - - -
5 do you want rebuttal?

6 MR. MANUEL: Yes, two minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
8 ahead, counsel.

9 MR. MANUEL: May it please the court,
10 Charles Manuel for appellants. We have here a
11 situation in which in a hotly contested litigation
12 that had gone on for many months and has continued
13 thereafter for many years in which the parties fought
14 on every issue, very intensely, a lower court made a
15 decision that had a major impact on parties who may
16 not have had any liability whatsoever.

17 JUDGE PIGOTT: Can - - - can I ask you - -
18 - I apologize for interrupting this, but it - - - it
19 seemed to me that when Judge - - - I guess it was
20 Judge Gammerman - - - you had made a motion to
21 dismiss - - -

22 MR. MANUEL: Correct.

23 JUDGE PIGOTT: - - - as to the individuals.
24 And that was pending.

25 MR. MANUEL: Yeah.

1 JUDGE PIGOTT: But the discovery went
2 forward with respect to the entities.

3 MR. MANUEL: Correct.

4 JUDGE PIGOTT: So even if you violated the
5 discovery, wouldn't the default be against the
6 entities, and not against the individuals?

7 MR. MANUEL: That's the - - -

8 JUDGE PIGOTT: Mean - - - assuming for a
9 minute that that - - - I know you're going to say
10 that it was outrageous to - - - to - - -

11 MR. MANUEL: It would be a distinct
12 possibility that it would go that way.

13 JUDGE PIGOTT: Why would it be against the
14 individuals when they still weren't even in the case,
15 and, of course, that showed up when one of them - - -
16 there was a judgment against him that had to be
17 vacated, because he was - - - because there's no
18 personal jurisdiction. But I thought the whole thing
19 in front of Gammerman was discovery with respect to
20 the entities.

21 MR. MANUEL: And that's exactly what it
22 was.

23 JUDGE PIGOTT: So even if everything they
24 said was true, I don't understand how you get - - -
25 then get personal judgments against somebody who the

1 discovery was not involved in.

2 MR. MANUEL: I'm having the same problem.

3 JUDGE PIGOTT: Okay.

4 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

5 MR. MANUEL: In any event, what happened
6 here at every level fell substantially short of
7 adequate justice. Justice Gammerman - - -

8 JUDGE GRAFFEO: Did you meet all of the
9 time frames that the judge set?

10 MR. MANUEL: Yes, we did. There was one -
11 - -

12 JUDGE GRAFFEO: For both the entities, as
13 well as the individuals?

14 MR. MANUEL: That's correct.

15 JUDGE SMITH: Well, did you - - - are you
16 literally saying you met all of them, or are you
17 saying the important one's the last one?

18 MR. MANUEL: We met the one deadline that
19 was set by the court, Your Honor.

20 JUDGE SMITH: Okay.

21 MR. MANUEL: There was one deadline set by
22 the court and that was January 20, 2008.

23 JUDGE GRAFFEO: That was February 20.

24 JUDGE SMITH: You did - - - you did blow a
25 few that were not set by the court.

1 MR. MANUEL: Yes. Yes. The deadlines that
2 counsel is talking about - - -

3 JUDGE GRAFFEO: That's the February 20th
4 one you're talking about?

5 MR. MANUEL: Correct. That's correct. And
6 the deadline that counsel is talking about on the
7 other side is their series of demands, the fact that
8 we were not able to produce - - -

9 CHIEF JUDGE LIPPMAN: Well, what did the
10 referee find?

11 MR. MANUEL: Very difficult to say. If you
12 take a look at his decision, there is a single
13 sentence that says anything whatsoever about this
14 particular matter. And what he said was, and go
15 figure, he said that the companies are in compliance
16 with the discovery demands. The individuals, who had
17 no separate records of their own, are not in
18 compliance.

19 JUDGE SMITH: Judge - - - can't - - -
20 shouldn't we infer from that that he didn't believe
21 you when you said you had no records?

22 MR. MANUEL: But how - - - how could he do
23 that, Your Honor, when the respondents, Merrill
24 Lynch, came in asking for depositions to test the
25 assertion that we made that the individuals had no

1 other documents, as against Merrill's assertion that
2 they did. That discovery, which was the only thing
3 Merrill was - - -

4 JUDGE SMITH: And at that point, they said,
5 we're not asking you for a default judgment.

6 MR. MANUEL: Exactly.

7 JUDGE SMITH: Yeah.

8 MR. MANUEL: They said that specifically in
9 their own papers. And so we cannot - - - yes,
10 inferences can be made, but how far can you stretch
11 the inferences to fill the gaps that exist in this
12 record? We've no discovery with no hearing.

13 CHIEF JUDGE LIPPMAN: So how did we - - -
14 so how did we get where we are?

15 MR. MANUEL: Excuse me, Your Honor?

16 CHIEF JUDGE LIPPMAN: How did this happen,
17 then, in this circumstance?

18 MR. MANUEL: I - - - I - - -

19 CHIEF JUDGE LIPPMAN: An overzealous judge?
20 What - - - what do you think?

21 MR. MANUEL: Well - - -

22 CHIEF JUDGE LIPPMAN: From your
23 perspective, anyway.

24 MR. MANUEL: Justice - - - Justice
25 Gammerman has, indeed, a significant record of having

1 been reversed in situations where there were
2 particular defaults in discovery, but they did not
3 begin to approach the level of willful, contumacious,
4 bad faith that is required under - - -

5 JUDGE SMITH: Isn't it - - - I mean, but
6 isn't - - - I mean, isn't - - - wasn't - - - isn't
7 Justice Gammerman - - - I mean, wasn't he dealing
8 with a really serious problem that people in the
9 State Courts don't pay attention to deadlines. And
10 it drives practitioners crazy and it drives judges
11 crazy, and isn't it important to crack down on the
12 offenders when they - - - and maybe he - - - if he is
13 being firmer than some of the other judges, well, why
14 shouldn't we support him?

15 MR. MANUEL: Well - - -

16 CHIEF JUDGE LIPPMAN: Especially in this
17 age of, you know, very heavy case loads.

18 MR. MANUEL: Because - - -

19 CHIEF JUDGE LIPPMAN: Particularly in that
20 court - - - go ahead.

21 MR. MANUEL: Because sometimes, Your Honor,
22 it can just get too extreme. I agree with you.
23 There are a number of circumstances - - - there can
24 be many cases in which a party has come before the
25 court, has disregarded deadline after deadline after

1 deadline, the judge has come in and said, listen,
2 you're time is - - -

3 CHIEF JUDGE LIPPMAN: So your argument is
4 just too much here - - -

5 MR. MANUEL: It just went much too far - -
6 -

7 CHIEF JUDGE LIPPMAN: - - - too - - - too -
8 - - to take Judge Smith one step further, the judge
9 is trying to move cases - - -

10 MR. MANUEL: Yes.

11 CHIEF JUDGE LIPPMAN: - - - and - - - and
12 sometimes being very tough to move those cases. So
13 you're saying in - - - in this case, or in some other
14 cases, arbitrary, in just going too far in pushing,
15 pushing, pushing? Is that what this is all about?

16 MR. MANUEL: Correct, Your Honor.

17 CHIEF JUDGE LIPPMAN: The judge is moving
18 the cases, yet where do you draw the line as to how
19 far you go?

20 MR. MANUEL: Yes. I think that's exactly
21 right, Your Honor.

22 JUDGE GRAFFEO: Where - - - where was the
23 mis - - - where did the misstep occur? Because the
24 judge did appoint a special referee.

25 MR. MANUEL: Yes.

1 JUDGE GRAFFEO: That wasn't inappropriate.

2 MR. MANUEL: Correct.

3 JUDGE GRAFFEO: And I take it the special
4 referee had copies of all the documents or - - -

5 MR. MANUEL: Yes.

6 JUDGE GRAFFEO: - - - CD ROMs of everything
7 that had been exchanged.

8 MR. MANUEL: He had copies of the documents
9 and CD ROMs, but where it seemed to have gone astray
10 is at that level.

11 CHIEF JUDGE LIPPMAN: You think the referee
12 is doing the judge's bidding, is that what you're - -
13 - you're saying?

14 MR. MANUEL: No, no, not necessarily, Your
15 Honor.

16 CHIEF JUDGE LIPPMAN: Then what happened?

17 JUDGE GRAFFEO: Then what - - - what did
18 you want the referee to do?

19 MR. MANUEL: Well, here's what - - - here's
20 what - - -

21 JUDGE GRAFFEO: To schedule depositions?

22 MR. MANUEL: Schedule the depositions that
23 Merrill Lynch was asking for. Let Merrill Lynch
24 examine these individuals as to the individuals'
25 assertions, that they, in fact, had made full

1 production of everything that they had in their
2 possession, everything related to the company.

3 JUDGE GRAFFEO: But what if the referee
4 felt you weren't going to produce the individuals?

5 MR. MANUEL: There was no basis.

6 JUDGE GRAFFEO: I mean, they're all - - -
7 most of them are out the country, right?

8 MR. MANUEL: Yes, but they had been in this
9 country quite regularly, except for Albert Nasser,
10 and I would like to spend a couple of minutes - - -

11 CHIEF JUDGE LIPPMAN: So the referee moved
12 too quickly?

13 MR. MANUEL: I'm sorry?

14 CHIEF JUDGE LIPPMAN: The referee moved too
15 quickly?

16 MR. MANUEL: He moved - - - actually moved
17 quite slowly. It was ten-and-a-half months between
18 the referral of the matter to the referee and his - -
19 -

20 CHIEF JUDGE LIPPMAN: Well, I mean, in
21 terms of drawing a judgment on you.

22 MR. MANUEL: Yes, because all the - - -

23 CHIEF JUDGE LIPPMAN: Making a judgment.

24 MR. MANUEL: All the referee did, he had us
25 there; he had a pile of papers from us, a pile of

1 papers from Merrill Lynch. He had Merrill's request
2 for depositions, which presumably would have been
3 followed by a hearing. And to answer your earlier
4 question - - -

5 JUDGE GRAFFEO: And had there been - - - if
6 I could just ask you - - -

7 MR. MANUEL: Yes.

8 JUDGE GRAFFEO: Had there been dates set
9 for depositions?

10 MR. MANUEL: No. They - - - Merrill did
11 not - - -

12 JUDGE GRAFFEO: He put no notices of
13 depositions.

14 MR. MANUEL: - - - attempt to set dates;
15 they did not move to compel the depositions. The
16 referee did not respond to the request for
17 depositions; it never happened.

18 CHIEF JUDGE LIPPMAN: Quick - - - quickly,
19 do - - - do Albert.

20 MR. MANUEL: Yes, very simply - - - and
21 this is very important. The record is simply wrong.
22 The findings of the Appellate Division are wrong as
23 to Albert Nasser. And I think this is extremely
24 important. Here's what they said.

25 The Appellate Division said that there was

1 a record of trading activity by Albert Nasser that
2 brought him within jurisdiction in New York, even
3 though he resided in Argentina. His account had
4 always been at Merrill Lynch in Sao Paulo. Then, at
5 the very, very end, Merrill's counsel said in their
6 brief here, that it was three months before the
7 debacle in mid-March of 2008, but in fact, it was
8 only the month before, where in other papers, they
9 said it came up.

10 In any event, the accounts came up from Sao
11 Paulo to New York. Mr. Nasser never came to New
12 York.

13 JUDGE SMITH: Did he - - - did he - - - did
14 he communicate with his broker in New York during
15 that month?

16 MR. MANUEL: Counsel, in his affirmation -
17 - - I - - - in an affirmation by the attorney, said
18 that he made about five calls to his broker during
19 that period, whether it was one month or three
20 months. It's unclear from their papers.

21 JUDGE SMITH: What did - - - what did - - -
22 what did Mr. Nasser say on that subject?

23 MR. MANUEL: Mr. Nasser said he did not
24 have any - - -

25 JUDGE SMITH: He said - - - he said - - -

1 he said never picked up the phone, never dialed 212.

2 MR. MANUEL: He said he did not - - - I
3 can't say he never picked up the phone, Your Honor.
4 But he did not pick up the phone with sufficient
5 regularity to meet the test of the case law.

6 JUDGE SMITH: Did he - - -

7 JUDGE RIVERA: But the - - - but the
8 Merrill Lynch - - - he knew that this Merrill Lynch
9 representative was now in New York, did he not?

10 MR. MANUEL: No.

11 JUDGE RIVERA: He understood that, did he
12 not?

13 MR. MANUEL: No, he did not, Your Honor - -
14 -

15 JUDGE RIVERA: He did not?

16 MR. MANUEL: - - - and he said so in his
17 affidavit, whereas counsel - - -

18 JUDGE RIVERA: Well, where did he think he
19 was - - -

20 MR. MANUEL: I'm sorry.

21 JUDGE RIVERA: Where did he think they
22 were, still in Sao Paulo?

23 MR. MANUEL: Yes. He's an older man.
24 Right now, I believe he's eighty-six years old. He's
25 in very, very ill health. And at the time, he was

1 not doing particularly well, either. But - - -

2 CHIEF JUDGE LIPPMAN: Counsel, what do - -

3 -

4 MR. MANUEL: I'm sorry.

5 CHIEF JUDGE LIPPMAN: What about Scarlett?

6 MR. MANUEL: Yeah, I'm sorry.

7 CHIEF JUDGE LIPPMAN: Scarlett.

8 MR. MANUEL: Scarlett, yes.

9 CHIEF JUDGE LIPPMAN: Quickly, go ahead.

10 MR. MANUEL: All right. College student.

11 Had nothing whatsoever to do with - - -

12 JUDGE SMITH: They - - - they didn't serve
13 a discovery demand on her, did they?

14 MR. MANUEL: And they did not even serve a
15 discovery demand. Here she is to live for the rest
16 of her life with a judgment that can never be paid.

17 JUDGE SMITH: So is it - - - is it - - - is
18 it - - - is it part of your argument that if they
19 entered a default judgment against somebody who never
20 got a discovery emand - - - demand, maybe they - - -
21 they were not being meticulous enough?

22 MR. MANUEL: I dare say that that is the
23 case.

24 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
25 have your rebuttal. Let's hear from your adversary.

1 Counsel, what about Albert and Scarlett
2 first - - -

3 MR. SCHACTER: Sure.

4 CHIEF JUDGE LIPPMAN: - - - and then you
5 get to your - - -

6 MR. SCHACTER: Let's start - - - I do it in
7 reverse order.

8 CHIEF JUDGE LIPPMAN: Yes, let's do it.

9 MR. SCHACTER: Number one, Scarlett. It is
10 correct, and we were - - - it was we who pointed this
11 out that a document, of course, had not been served
12 on Scarlett personally. However, she was a
13 representative of Global Strat. She was the
14 beneficiary of the trust that owned Global Strat and
15 because of that, she was required to participate in
16 discovery and produce documents that she had that
17 related to the claims against Global Strat.

18 CHIEF JUDGE LIPPMAN: Whether or not there
19 was a demand on her.

20 MR. SCHACTER: Whether or not there was a
21 demand to her, because there was a demand to Global
22 Strat, she was required to produce those documents.

23 CHIEF JUDGE LIPPMAN: Okay, what about - -
24 - what about Albert, and then you go.

25 MR. SCHACTER: As to Albert on

1 jurisdiction, there were actually a number of factors
2 that pointed to jurisdiction. First of all, it is
3 not correct that Albert said he didn't test - - -
4 that he didn't speak by phone with a broker. In
5 fact, he said, "Thereafter" - - - meaning after the
6 accounts were transferred to New York. "Thereafter"
7 - - - this is Record 1232 - - - "my only contact with
8 plaintiff's New York office was by telephone. I have
9 never visited New York or transacted with" - - -

10 JUDGE SMITH: Did - - - did he say that he
11 didn't know he was talking to New York when he was -
12 - -

13 MR. SCHACTER: No, no, not at all. So it's
14 a short affidavit. He doesn't say - - - he doesn't
15 say that at all. And he - - -

16 JUDGE RIVERA: Who initiated the calls?
17 Merrill Lynch?

18 MR. SCHACTER: I'm sorry?

19 JUDGE RIVERA: Merrill Lynch initiated the
20 calls? Is it correct he was responding to calls?

21 MR. SCHACTER: The record doesn't indicate
22 that, but I don't think Merrill Lynch initiated the
23 calls, and therefore, I think, to call New York from
24 Argentina, you need to dial a U.S. country code, but
25 - - -

1 CHIEF JUDGE LIPPMAN: That's - - -

2 MR. SCHACTER: - - - I can't say that level
3 of detail is available.

4 CHIEF JUDGE LIPPMAN: If he had - - - if he
5 had one call, is that enough?

6 MR. SCHACTER: Well, under the Deutsche
7 Bank decision, I think yes is the answer, but there
8 were more than one calls. And my - - - my
9 affirmation - - -

10 JUDGE SMITH: Well, wait. I'm referring to
11 the page you were refer - - - so she - - - he says
12 "Any meetings, telephone calls or other
13 correspondence I had with Ms. Pimentel occurred while
14 she was in Brazil, not in New York."

15 MR. SCHACTER: That - - - no, that - - -
16 Ms. Pimentel is the branch manager, not the broker.

17 JUDGE SMITH: I see.

18 MR. SCHACTER: The brok - - - she stayed in
19 Brazil.

20 JUDGE SMITH: I see.

21 MR. SCHACTER: The broker is Claudia
22 Schraurer (ph.).

23 JUDGE SMITH: Okay.

24 MR. SCHACTER: That's referenced in
25 paragraph 3. Claudia Schraurer moved to New York in,

1 I think, on December 17th, 2007, if I'm not mistaken.
2 So thereafter, the communications were with her. So
3 under Deutsche Bank - - -

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MR. SCHACTER: - - - any communication that
6 - - - that leads to a transaction, and there were
7 here, telephone calls, e-mails, and substantial
8 trading during the first quarter of February 2008, to
9 the tunes of tens of millions of dollars. That all
10 happened in the first quarter. Under Deutsche Bank,
11 this is an easy and clear case. There's jurisdiction
12 over Albert.

13 CHIEF JUDGE LIPPMAN: What about the
14 broader issue?

15 MR. SCHACTER: Okay, on the broader issue,
16 our view is that - - - that the sanction was
17 appropriate in light of two factors. Number one, the
18 consistent - - - persistent, and continuing to this
19 day, refusal of the Nassers themselves to produce one
20 single document.

21 JUDGE SMITH: But they - - - but they say -
22 - - they say that all of their documents were in the
23 files - - - there were no separate files, that the
24 company fi - - - that all the documents were in the
25 company files. What in the record proves that that

1 is false?

2 MR. SCHACTER: They had e-mail. They all
3 used e-mail. Every single one of them used e-mails.
4 We put into the record sample e-mails that each of
5 them used. They did not produce any electronic
6 discovery. They did not go into their e-mail
7 accounts and look for e-mails.

8 JUDGE PIGOTT: I - - - I - - -

9 MR. SCHACTER: There's nothing - - -

10 JUDGE PIGOTT: Can you straighten this out
11 for me?

12 MR. SCHACTER: Sure.

13 JUDGE PIGOTT: It was the first question I
14 asked. If - - - if - - - if you sued General Motors,
15 and you've got to bring the president of General
16 Motors in on a deposition and he refuses to come, can
17 you get a personal judgment against him?

18 MR. SCHACTER: If he was a party to the
19 case.

20 JUDGE PIGOTT: No, he's not. And this - -
21 -

22 MR. SCHACTER: Well, he - - - but he was -
23 - - I'm sorry.

24 JUDGE PIGOTT: Well, in this case, there
25 was a motion to dismiss all of that that was pending,

1 so they hadn't filed an answer yet.

2 MR. SCHACTER: True.

3 JUDGE PIGOTT: And as I understand it, what
4 Gammerman said was, the discovery will go forward
5 with respect to the entities - - -

6 MR. SCHACTER: No.

7 JUDGE PIGOTT: - - - so they were being - -
8 - they were being - - - the discovery notice is
9 directed to them. The discovery that was going was
10 in respect to the entities, because they still
11 weren't technic - - - I mean, I realized you'd sued
12 them, but they still hadn't filed an answer, and then
13 - - - and - - - and there was a motion pending to
14 dismiss. So just as happened with, I think, was it -
15 - - Ezeq - - - one of them - - -

16 MR. SCHACTER: Ezequiel.

17 JUDGE PIGOTT: - - - a judgment is rendered
18 against him, and then he says, well, you don't - - -
19 we don't have any jurisdiction.

20 MR. SCHACTER: Well, actually that was
21 Albert, but - - -

22 JUDGE PIGOTT: Well, that - - - that - - -
23 I mean, it just seems to me - - -

24 MR. SCHACTER: Well, well, let me - - -
25 Judge Pigott, let me - - -

1 JUDGE PIGOTT: - - - just - - - just to set
2 the table for you - - -

3 MR. SCHACTER: - - - yeah, sure - - - let
4 me try to - - -

5 JUDGE PIGOTT: It seems - - - it just seems
6 to me you can't get a judgment against somebody
7 because they don't - - - they don't do what you want
8 in discovery with respect to a corporation.

9 MR. SCHACTER: I don't agree - - -

10 JUDGE PIGOTT: Okay.

11 MR. SCHACTER: - - - and let me explain
12 why. Number one, the judge's order was not specific
13 to which parties have to participate in discovery.
14 It's which claims are the subject of discovery.

15 JUDGE SMITH: But as to - - - as to - - -

16 MR. SCHACTER: And one of the claims - - -
17 sorry.

18 JUDGE SMITH: But as to those claims - - -

19 MR. SCHACTER: Yes.

20 JUDGE SMITH: - - - were not the - - - were
21 not the indiv - - - the Nasser individuals third
22 parties, rather than defendants?

23 MR. SCHACTER: In a sense, they were. I
24 guess it would be analogous - - -

25 JUDGE SMITH: If - - - if - - - if - - -

1 MR. SCHACTER: - - - but they weren't third
2 parties.

3 JUDGE SMITH: But didn't they at least have
4 an argument that they did not have the responsibility
5 of parties on those claims?

6 MR. SCHACTER: They had that argument and
7 the judge rejected it. And once the judge rejected
8 it, he was sub - - - those persons were subject to
9 the judge's orders regarding discovery. You cannot
10 be a conscientious objector to the fact and say - - -

11 JUDGE PIGOTT: Well, but would the judgment
12 then - - -

13 MR. SCHACTER: - - - I think the judge is
14 wrong, and not participate.

15 JUDGE PIGOTT: Would the judgment then be
16 to dismiss their third-party claim?

17 MR. SCHACTER: Well, it - - - again, it
18 wasn't a third - - - in a sense it's analogous to it,
19 but they were parties. Judges have authority to
20 direct parties, even if they filed motions to
21 dismiss, to participate in discovery. A stay is not
22 mandatory.

23 JUDGE PIGOTT: But there was one here that
24 - - -

25 MR. SCHACTER: Well, there was a - - - but

1 the stay was of discovery with regard to the claims
2 against the individuals. As to the claims against
3 the companies, the individuals - - - and remember,
4 these were shell companies, had the - - - we're not
5 talking about General Motors.

6 JUDGE PIGOTT: Right.

7 MR. SCHACTER: We're talking about
8 companies that were created to hold and trade
9 personal assets of the Nassers.

10 JUDGE PIGOTT: But I - - - I - - -

11 MR. SCHACTER: There was no other place to
12 get documents from.

13 JUDGE PIGOTT: But it just occurred to me
14 that if I have to provide discovery, and it's with
15 respect to a corporation that I'm part of, I'm going
16 to do that. And I'll - - - anything that has to do
17 with it. I'm not going to give you my phone
18 conversation with somebody else. I'm not going to
19 give you mail that I had with somebody else. I'm
20 going to give you everything with respect to that
21 corporation. And if there's a problem with that,
22 then you can bring in - - - as you did - - - a
23 motion, you know, to compel.

24 But the judge decided to go even beyond
25 what you asked for and say, no, we're going to grant

1 a judgment against them, because as far as we're
2 concerned, even though you may have misunderstood, we
3 think it was intentional; we're not going to do it.

4 MR. SCHACTER: Well, this - - - this goes
5 to the issue of the depositions - - -

6 JUDGE PIGOTT: Right.

7 MR. SCHACTER: - - - and what it was we
8 asked for. The case was referred by Judge Gammerman
9 to a referee. He made clear he expected full
10 compliance, by all parties, and we can - - - we can
11 debate whether or not that was a good idea to require
12 the individuals to participate in discovery, but he
13 did it.

14 JUDGE PIGOTT: Right.

15 MR. SCHACTER: He ordered it. And the - -
16 - and there was no objection to that by the - - - by
17 the individuals. So the case went to the referee.
18 We said, we would like to know what the individual
19 Nassers did to try to comply with this. We asked for
20 - - - we had eighty-five categories of request. And
21 so, therefore, we said, please, to start, give us a
22 deposition. But the referee - - -

23 JUDGE SMITH: And he did - - - you did say,
24 at this point, we're not asking for a default.

25 MR. SCHACTER: That is correct. We

1 absolutely did say that. However, I think what the
2 referee was driven by was two things. The Nassers
3 said we don't have anything to produce, and that was
4 utterly implausible for the reasons I've described a
5 little bit and that - - - and further stated in our
6 brief, number one. Number two, the Nassers did not
7 submit an affidavit to the referee attesting that
8 they didn't have documents, and explaining what it
9 was that they did to try to look for them - - -

10 JUDGE SMITH: On your - - - on your - - -

11 MR. SCHACTER: - - - and without that - - -

12 JUDGE SMITH: On your first point - - -

13 MR. SCHACTER: Yes.

14 JUDGE SMITH: - - - that it's implausible.

15 You say it's implausible, and you submitted e-mails
16 to show that they - - - that they - - -

17 MR. SCHACTER: That they had e-mails.

18 JUDGE SMITH: Where is that in this record?

19 MR. SCHACTER: I believe it's - - - around
20 1100 of the record. I can try to get you the exact
21 citation. We attached a sample of, I think, five or
22 six e-mails.

23 JUDGE PIGOTT: While you're looking, it
24 struck me in the beginning that, you know,
25 everybody's playing some - - - you know, it's a

1 know, you were three days off.

2 MR. SCHACTER: Well, but that wasn't really
3 the situation here. First of all, it had been four
4 months since we had - - -

5 JUDGE PIGOTT: Well, it seemed like that's
6 what had fired up Judge Gammerman.

7 MR. SCHACTER: Well, it was, because what
8 happened is, we - - - we - - - we sent a letter to
9 Judge Gammerman, saying, hey, it's been four months,
10 we haven't gotten a document yet.

11 We appeared before him. Judge Gammerman
12 turned to Mr. Manuel, and said, when is the document
13 production going to start? That was on January 26th.
14 He said January 29th, three days later. Nothing came
15 in on that day.

16 I wrote a letter on Monday saying, Your
17 Honor, they didn't send a letter. And that's when
18 Mr. Manuel sent this letter talking about the package
19 that inadvertently wasn't delivered. And that wasn't
20 true and - - -

21 JUDGE PIGOTT: Well, who cares? I mean - -
22 -

23 MR. SCHACTER: I - - - I - - -

24 JUDGE PIGOTT: He's - - -

25 MR. SCHACTER: You know what? Your Honor,

1 I do care. I think it's important. I don't think
2 it's right to - - - to - - - to make a written
3 misrepresentation to a court and - - -

4 JUDGE PIGOTT: But he explained it. I
5 mean, I don't know if it went to Sally, and Sally had
6 a call from her vet, and it didn't get put on the
7 disk, and therefore it didn't get put in. I mean,
8 why don't we give somebody the benefit of a break
9 when we're talking about a ninety-million dollar
10 default?

11 MR. SCHACTER: Because what Mr. Manuel said
12 was not anything like that. He said there was a
13 package. He made a specific representation to the
14 court. He went in front of Judge Gammerman. He
15 persisted in saying that.

16 CHIEF JUDGE LIPPMAN: Can the judge - - -
17 can the judge sometime, in the haste of moving cases,
18 can they abuse their discretion?

19 MR. SCHACTER: I think judges can, for
20 sure, abuse their discretion. I don't think that
21 happened here.

22 CHIEF JUDGE LIPPMAN: In a very, very, very
23 large case like this, and I think there's two sides
24 of it - - -

25 MR. SCHACTER: Sure.

1 CHIEF JUDGE LIPPMAN: - - - when you talked
2 before about, gee, it's got to mean something, and
3 then on the other hand, sometimes a lot of it is kind
4 of bluster to move the parties along, and it's sort
5 of, oh, yeah, oh, yeah? We're going to do it. Is
6 there a point where a judge abuses their - - -

7 MR. SCHACTER: I think that point could
8 come in another case.

9 CHIEF JUDGE LIPPMAN: But what - - - what
10 this - - -

11 MR. SCHACTER: I don't think that happened
12 here, and I say that for two reasons. Number one,
13 the judge asked Mr. Manuel at the second conference
14 when he asked him again, when are you going to start
15 producing?

16 CHIEF JUDGE LIPPMAN: Right.

17 MR. SCHACTER: You tell me when you're
18 going to produce everything by. You - - - you pick
19 the date. And Mr. Manuel picked the date of February
20 20, eighteen - - - or sixteen days later.

21 CHIEF JUDGE LIPPMAN: Okay, and what's the
22 second point? Go ahead, counsel.

23 MR. SCHACTER: And the second point was
24 they didn't produce any documents - - - to this day
25 have not produced any documents.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. SCHACTER: The e-mails are - - -
3 started 11 - - - the record of 1115 - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. SCHACTER: These were just a few of the
6 samples that we had.

7 CHIEF JUDGE LIPPMAN: Thank you; thank you.

8 JUDGE RIVERA: Chief, may I just ask - - -
9 I'm sorry - - -

10 CHIEF JUDGE LIPPMAN: Oh, Judge Rivera.

11 JUDGE RIVERA: May I just ask, counsel, is
12 there any other point during the many, many apparent
13 warnings that you were citing to, that - - - that the
14 judge said that he would bring down this hammer on
15 them?

16 MR. SCHACTER: Yes. I said - - -

17 JUDGE RIVERA: This particular type of
18 sanction?

19 MR. SCHACTER: Yes, Judge Gammerman said
20 twice on February 4th, after the examination on the
21 subject of the package, he ended that by saying, let
22 me tell you, if you don't produce the documents by
23 the date you select, February 20th, this is what I'm
24 going to do. If you don't produce everything, I'm
25 going to enter - - - I'm going to refer it to a

1 referee and enter a default. At the end of the
2 hearing, about ten minutes later, after we discussed
3 some other issues, he said it again. So he said
4 exactly what was going to happen, and it did happen.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 JUDGE RIVERA: He said one day, twice.

7 MR. SCHACTER: He said it one day, and he
8 said it twice, and then he followed up, yes.

9 CHIEF JUDGE LIPPMAN: Okay.

10 JUDGE SMITH: Can I get - - - I - - -

11 CHIEF JUDGE LIPPMAN: Yes, Judge Smith.

12 JUDGE SMITH: I also have - - - have an
13 overtime question.

14 MR. SCHACTER: Sure.

15 JUDGE SMITH: Is it a problem that neither
16 the referee nor Justice Gammerman really said what he
17 found. I mean, you say they - - - they must have
18 found that there were - - - essentially, that there
19 were electronic documents that weren't produced, and
20 therefore their denials were incredible. Is it too
21 much to ask that they should at least say that before
22 they enter a hundred million dollar default judgment?

23 MR. SCHACTER: I - - - I think I wish the
24 referee had supplied some greater detail in his
25 opinion, but given the implausibility of it - - - and

1 it's not just the e-mails: bank records, tax
2 returns, any documents concerning the accounts. We
3 asked for a lot; certainly the requests were broad.
4 But because they were broad, it's not possible that
5 there aren't any documents. It's just isn't possible
6 - - -

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. SCHACTER: - - - and I think that
9 combined with the lack of an affidavit is really what
10 explains it.

11 CHIEF JUDGE LIPPMAN: Okay, thank you,
12 counsel.

13 MR. SCHACTER: Thank you.

14 CHIEF JUDGE LIPPMAN: Appreciate it.

15 MR. SCHACTER: Thank you.

16 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

17 MR. MANUEL: Thank you. Every document
18 that counsel is referring to, necessarily under the
19 court's orders, had to be a document related to the
20 companies. It had to be a company-related document,
21 that's what they - - -

22 JUDGE PIGOTT: Was that the dispute?

23 Because, I mean, as Mr. Schacter points, out the
24 demands included an awful lot of stuff that was - - -
25 that you would - - - you know, you may or may not say

1 it relates to the entity. They can relate to the
2 entities, but you obviously felt that they didn't.

3 MR. MANUEL: And everything that we had
4 related to the entities was produced, Your Honor.

5 JUDGE SMITH: You're - - - you're saying
6 that your e-mails or whatever did not relate to the
7 claims against the entities?

8 MR. MANUEL: Correct. Well, no, no, I'm
9 saying that the e-mails in question - - - whatever e-
10 mails may have existed or not existed, anything
11 related to the companies. So how then could the
12 referee say in one breath, the companies were in
13 compliance? The companies produced everything.

14 JUDGE PIGOTT: He said there was a failure
15 of proof on that, right?

16 MR. MANUEL: Exactly.

17 JUDGE PIGOTT: He said there was
18 insufficient proof that they didn't put - - - there's
19 proof that you did.

20 MR. MANUEL: We need a record here.
21 Something that someone can hang his hat on.

22 Now, with respect to jurisdiction, I want
23 to cite a couple of cases for your reading here.
24 First of all, here's what the Appellate Division
25 said. They said that jurisdiction existed over

1 Albert Nasser because of two factors. One was calls
2 to New York.

3 But it's been held in the Barington Capital
4 Group v. Arsenault case, cited in our brief, five
5 phone calls to the plaintiff's office in New York to
6 place orders for the purchase of stock were not
7 sufficient purposeful activity to force personal
8 jurisdiction.

9 Right in the record, on page 1232, the same
10 page cited by counsel, what did Mr. Albert Nasser
11 say? His understanding - - - older man who had dealt
12 with Merrill Lynch in Sao Paulo for many years - - -
13 was that the accounts were still there. He didn't
14 know in this one month window before the debacle
15 occurred that this transition had occurred, that in
16 his mind meant that he was calling New York. He had
17 no such conception. He states in his affidavit that
18 he understood his accounts were in Sao Paulo.

19 Next point made by the Appellate Division
20 with respect to jurisdiction. They are speaking to -
21 - - with respect to a single phone call, aside from
22 placing orders. That was a phone call in which
23 Merrill Lynch, not Mr. Nasser, was holding a meeting.
24 This is the day that Bear Stearns went down, and this
25 disaster occurred. Merrill Lynch calls a meeting.

1 They called a conference call, and they
2 asked Albert Nasser to participate in that call. It
3 was initiated by Merrill. We have the cases cited in
4 our brief that say that where the plaintiff initiates
5 the call, they cannot bring the defendant in for a
6 jurisdiction on that case.

7 JUDGE PIGOTT: Is Albert's - - - is
8 Albert's affidavit in the record?

9 MR. MANUEL: I'm sorry.

10 JUDGE PIGOTT: Is Albert's affidavit in the
11 record?

12 MR. MANUEL: Yes, it is. It includes the -
13 - -

14 JUDGE PIGOTT: If it is, I'll find it. I
15 don't mean to hold you up.

16 MR. MANUEL: Yes.

17 JUDGE RIVERA: And - - - and are you saying
18 there's nothing leading up to that call or during
19 that call that would otherwise have put him on notice
20 that, oh, that account is now in New York, or being
21 handled out of New York?

22 MR. MANUEL: Nothing whatsoever. And Your
23 Honor, Merrill does not cite one word allegedly
24 spoken by Albert Nasser in that phone call.

25 CHIEF JUDGE LIPPMAN: Okay, coun - - -

1 MR. MANUEL: There's nothing to suggest
2 what the separate account was. Thank you.

3 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
4 you both. Appreciate it.

5 MR. SCHACTER: Thank you.

6 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Global Strat, Inc., No. 160 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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