

**Celauro v Celauro**

2009 NY Slip Op 32436(U)

September 25, 2009

Sur Ct, Nassau County

Docket Number: 342720

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK  
 COUNTY OF NASSAU

-----X  
 GAETANA CELAURO, Individually and as Sole Income  
 Beneficiary of the SALVATORE F. CELAURO REVOCABLE  
 TRUST and the SALVATORE F. CELAURO IRREVOCABLE  
 LIFE INSURANCE TRUST,

File No. 342720

Petitioner,

-against-

Dec. No. 487

WAYNE CELAURO, as Co-Trustee and Contingent  
 Remainderperson of the SALVATORE F. CELAURO  
 REVOCABLE TRUST and the SALVATORE F. CELAURO  
 IRREVOCABLE LIFE INSURANCE TRUST, and DIANE C.  
 CARTER as Co-Trustee and Contingent Remainderperson of the  
 SALVATORE F. CELAURO IRREVOCABLE LIFE  
 INSURANCE TRUST, et al.,

Respondents.

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In a proceeding for removal of certain trustees of two inter vivos trusts, the petitioner, Gaetana Celauro, previously moved for an order vacating the stipulation of discontinuance dated November 8, 2007. The stipulation of discontinuance provided that it was "with prejudice." By decision dated June 30, 2008, this court denied the petitioner's motion to vacate and entered a decree dated September 10, 2008. Thereafter, the petitioner appealed and, by decision and order dated January 27, 2009, the Appellate Division of the Supreme Court, Second Department, reversed the decree and remitted the matter to this court for an evidentiary hearing to determine (i) whether petitioner's prior attorney had the authority to execute the stipulation on her behalf, (ii) if he did, whether the authority was obtained under duress, and (iii) whether the petitioner ratified the stipulation by waiting more than three months before attempting to vacate it.

An evidentiary hearing was held from May 4 through May 7, 2009. Gaetana Celauro, Nathan Celauro, Joseph Giaimo, Thomas Killeen, John Oleske and Daniel Swick testified. In

addition, portions of Wayne Celauro's deposition testimony were read into the record.

Thereafter, the parties submitted post-trial memoranda of law. The parties agreed that Gaetana had the burden of proof on the issues of authority and duress and Wayne and Diane had the burden of proof on ratification.

### **Background**

The background facts can be found in the court's June 29, 2007 decision and order (Dec. No. 340). In brief, petitioner, Gaetana Celauro, is the widow of Salvatore F. Celauro, who died testate on July 18, 2004 while a legal resident of Florida, but who maintained another home with Gaetana in Glen Head, New York. They had four children, Nathan Celauro, Salvatore F. Celauro, Jr., Wayne Celauro and Diane Celauro Carter.

In his last will and testament dated October 26, 1992, Salvatore F. Celauro named Gaetana and Wayne the co-executors of his estate. The will was admitted to probate by the Florida courts on December 1, 2004, and letters issued to Gaetana and Wayne.

On May 2, 1991, Salvatore F. Celauro executed an irrevocable life insurance trust (Life Insurance Trust) in an agreement which named Wayne and Diane as trustees. Upon Salvatore F. Celauro's death, this trust was divided into five subtrusts for the benefit of Gaetana, Nathan, Wayne, Diane and Salvatore, Jr.

On October 15, 1992, Salvatore F. Celauro created a revocable trust (Exemption Trust) in an agreement executed by himself as grantor and himself and Gaetana as trustees. Pursuant to his will, Salvatore F. Celauro's estate is payable to the Exemption Trust. Wayne Celauro is the designated successor trustee and Nathan Celauro is the designated alternate successor trustee. Thus, at Salvatore F. Celauro's death, Wayne and Gaetana were the co-trustees. On July 29,

2004, Gaetana resigned as co-trustee and Nathan, by the terms of the instrument, became co-trustee with Wayne. The income of this trust is payable to Gaetana for her life. Wayne, Diane, Nathan and Salvatore, Jr.'s children are designated remainder beneficiaries.

It appears that these two trusts together own 18.8 percent of the combined shares of two closely-held family corporations, 4C Foods Corp. (4C) and Celauro Sales, Inc. (CSI). The balance of the shares are owned by Salvatore F. Celauro's nephew, John Celauro, and by various other Celauro family members and family trusts. Gaetana individually owns 1.48 percent of the shares of 4C and CSI. John Celauro is the current president of 4C. Nathan had been an employee of 4C since he graduated from college in 1978 and since 1986 had been sales vice president. He was dismissed in September 2005. Nathan commenced an employment lawsuit against 4C after he was terminated. The employment lawsuit was ultimately settled in 2007 by stipulation of settlement.

In addition to the removal proceeding, Gaetana commenced a derivative lawsuit against John Celauro. The derivative lawsuit had actually been commenced by Gaetana's husband, Salvatore, prior to his death. The derivative suit was essentially premised on John Celauro's use of an American Express card for non-corporate purposes and overpayment of compensation to Grace Gladstein, an employee of 4C with whom John had a relationship. The derivative lawsuit was similarly settled in 2007 and a stipulation of settlement was signed. Gaetana received \$460,000 in connection with that settlement.

In the removal proceeding, Gaetana sought Wayne's removal as co-trustee of both the Exemption Trust and the Life Insurance Trust and Diane's removal as co-trustee of the Insurance Trust on the grounds that they improvidently managed or injured the trust property committed to

their charge or, by reason of other misconduct in their office, were unfit for execution of their office (SCPA 711[2]) and that they violated or threatened to violate their trust (SCPA 711[10]).

Thereafter, Gaetana moved for an order granting summary judgment in the removal proceeding. The court determined that there were triable issues of fact that precluded granting summary judgment and denied Gaetana's motion *in toto*. A hearing was later scheduled for January 2008.

Prior to the hearing, a stipulation of discontinuance with prejudice, dated November 8, 2007, was filed with the court. It appears that the date on the stipulation is incorrect. The stipulation was actually executed on November 7, 2007. The stipulation was signed by Joseph O. Giaimo, Esq., of Giaimo Associates, LLP, as attorneys for "Plaintiffs," and by an attorney from the firm of Herrick, Feinstein, LLP, as attorneys for "Defendants." The matter was marked settled and taken off the court's trial calendar.

#### **Underlying Motion**

Three months later, Gaetana moved for an order vacating the stipulation of discontinuance. The arguments made in the underlying motion papers are outlined in the court's prior decision of June 30, 2008 (Dec. No. 238). Essentially, Gaetana argued that the stipulation of discontinuance should have been vacated because it was executed by her prior attorney, Joseph O. Giaimo, without her authority or consent. Gaetana asserted that the events that occurred on November 7, 2007, the date she asserts the stipulation of discontinuance was actually signed, were "pre-orchestrated to deprive me of my rights, and my former attorney was a participant in the plan." Gaetana claimed that Mr. Giaimo ran roughshod over her, berated and belittled her, excluded her from meetings with her adversaries, misled Nathan and her regarding 4C and CSI

shareholder meetings and that Mr. Giaimo's conduct violated her trust and was unethical. It is on that basis that Gaetana asked this court to vacate the stipulation.

Diane and Wayne argued in their papers submitted in opposition to the motion that John Celauro made it clear to Gaetana and Nathan on November 7, 2007 that John would not discuss rehiring Nathan unless the removal proceeding was discontinued with prejudice and that Mr. Giaimo also explained this to them. Mr. Giaimo told Gaetana and Nathan that he would not sign the stipulation unless they verbally approved this action in the presence of two attorneys from Herrick, Feinstein, Messrs. Swick and Oleske. Gaetana deferred to Nathan, who said that Mr. Giaimo could sign it. Thereafter, Mr. Giaimo, Gaetana and Nathan had a heated discussion. At Mr. Giaimo's request, Mr. Oleske rejoined the meeting. The argument continued. Mr. Swick left the room. Mr. Swick instructed Mr. Oleske that he was not to file the stipulation until he confirmed Gaetana's and Nathan's consent. Mr. Oleske asked Gaetana and Nathan if they assented to the filing of the stipulation. Gaetana once again deferred to Nathan, who again gave approval to file the stipulation. Both Mr. Oleske and Mr. Swick state that they did not hear from Gaetana or Nathan from that date until more than three months later after Gaetana moved by order to show cause to vacate the stipulation. Moreover, Wayne and Diane argued that Gaetana and Nathan were not mere babes in the woods. They participated in other lawsuits where stipulations had been executed, and Nathan was the director of those lawsuits.

## **THE HEARING**

### **Testimony of Gaetana Celauro**

Gaetana testified on direct examination that she commenced the removal proceeding against Wayne and Diane because Wayne was not being very cooperative. He was "playing

games” and she also was upset because Wayne signed the amendment that gave John control over the disposition of her shares. In Gaetana’s opinion, Wayne sided an “awful lot with John.” Gaetana testified that after her husband, Sal, died she was contacted by Mr. Giaimo in September 2004 regarding whether she wanted to continue the derivative lawsuit her husband had started. She said yes, but it was not until April of 2005 that she actually met with Mr. Giaimo. She further testified that Nathan was fired from his position at 4C as vice president of sales and was aware that thereafter he brought an employment lawsuit against 4C. According to Gaetana, at some point, she received a telephone call from Mr. Giaimo telling her that in order to settle Nathan’s employment case, she would have to withdraw the branch of the derivative case against Grace Gladstein, John’s girlfriend. In response, she told Mr. Giaimo in effect to do whatever Nathan said but the removal proceeding was to continue.

Gaetana further testified that on October 26, 2007 she received notice of a shareholders’ meeting scheduled for November 7th. She told Nathan she was going to the meeting. On October 27, 2007, Gaetana, Nathan and Mr. Giaimo met at Nathan’s house to review the notice. At the October 27th meeting, Gaetana expressed to Mr. Giaimo that she did not think he was working in her and Nathan’s best interest. In particular, she felt he was “very chummy” with the “other lawyers” (the lawyers at Herrick Feinstein who represented John Celauro and 4C) during John Celauro’s deposition. At that October 27th meeting, a list was composed of questions Nathan wanted asked at the shareholders’ meeting.

On the morning of November 7, 2007, Nathan picked his mother up and drove her to New York City to the offices of Herrick Feinstein. During the car ride, Mr. Giaimo called Nathan, and Nathan put the call on speaker so that Gaetana could hear what Mr. Giaimo was

saying. Nathan told Mr. Giaimo that Gaetana was in the car and that they were on their way to the meeting. Gaetana stated that Mr. Giaimo got “very excited” and said that Gaetana should not be at the meeting because she was going to “hurt everything or spoil something.” When they got to Herrick Feinstein’s offices, she and Nathan went upstairs to the lobby. Mr. Giaimo told Nathan that Gaetana should not be there. Nathan brought Gaetana downstairs to a coffee shop in the building where she waited for a long time. Nathan then came to get Gaetana and brought her upstairs to the reception area where she stated she waited for about a half hour. She was then brought by Mr. Giaimo from the reception area upstairs to a conference room. Gaetana testified that it was a large conference room with a long table. She sat at one end of the table, Nathan sat next to her and Mr. Giaimo was next to Nathan. “Another lawyer” was next to Mr. Giaimo. John Celauro, Wayne Celauro and her husband’s niece, Salvatrice, were also present. Gaetana testified on direct examination as follows with respect to the meeting:

“A. Well, I was looking around and thinking to myself, “Is this a shareholders’ meeting?” And then Joe Giaimo says “Don’t you have something to say to John?” So I didn’t have anything prepared or didn’t know what to say, what this was all about.

Q. So Mr. Giaimo asked you whether you had something to say to John?

A. Yes, I said to John, “John, you are a liar.”

\* \* \*

Q. What occurred next?

A. There was a lot of confusion. I think somebody came in with a paper and there was talking, and Giaimo wanted me to sign something and I didn’t know what it was. Here I am thinking this is supposed to be a shareholders’ meeting and so I said, “No, I wasn’t going to sign it.” And there was a lot of talking, confusion and yelling, and Mr. Giaimo was very excited and angry, and he was yelling, he was cursing, saying words that I don’t say, “f” words, “a” words, and anything else.

Q. Have you ever heard him use those kinds of words before?

A. The “f” word, yes.

Q. Had you ever heard him yell or scream before?

A. Yes, he did that in his office.

Q. You mentioned a piece of paper. What piece of paper?

A. I don't know. That is what I wanted to know. I saw enough of Judge Judy to know you don't sign anything unless you know what you are signing.

Q. Did anybody tell you what you were supposed to sign?

A. No.

Q. What occurred next?

A. Well, with all the screaming and yelling, people came in from the offices; people tried to calm Joe down because he was really yelling a lot and saying things, and it was so confusing. I feel it was like a circus. There were groups here and there; was noise, confusion, and some people were starting to go out, and I went out and I went out into the hall, and when I went out into the hall, it was a very wide hall, I could see people coming out from the offices and I recognized Chris Sullivan, and he was way, way down, and somehow I seemed to be ushered down towards that end and being told to sign this paper, and I wasn't going to because I didn't know what it was.

Q. What occurred next, if you recall; anything else?

A. I guess we just left. Oh, yes. I remember Joe Giaimo saying that he was going to sign the paper and if we didn't like it, we could sue him.

Nathan and I went home, and on the way home we were saying, "What was that all about?"

Q. Was there a phone call on the way home?

A. I don't remember.

Q. At anytime while you were there on November 7th, did you tell Joe Giaimo that he could sign something for you?

A. No.

Q. At anytime did you tell Nathan that whatever he wanted would be okay?

A. No. I said that to Nathan before in that February meeting.

Q. You mean the February talk with Giaimo concerning the employment litigation?

A. Uh-huh. No, Nathan can't sign anything for me."

Thereafter, Gaetana started looking for a new attorney because she was very unhappy with Mr. Giaimo. On November 28, 2007, she wrote a note to Mr. Giaimo, which read as follows:

"Just a note. Joe - Please send me your write-up of what occurred and what was said at the 4C stockholders' meeting of 11-7-07 and the so-called "conference" that followed.

The balance of your bill of 11-15-07 will be remitted when the above information is in my hand."

Gaetana testified that she wrote the note because she and Nathan did not know what had gone on November 7, 2007.

Gaetana also testified that she graduated from high school and, thereafter, went into business. When her children were young, she went to Farmingdale College for three years and studied English literature. She also attended Old Westbury College but eventually stopped because it became stressful due to certain physical problems she was experiencing. Later, she joined the “Over Sixty,” where she sat in on classes but did not receive college credit.

On cross-examination, Gaetana stated that she learned from her husband sometime in 2002 that he was suing John Celauro. After her husband died, she decided to continue that lawsuit after receiving a call from Mr. Giaimo in September 2004. Gaetana told Nathan that she was “thinking of going ahead, picking up where ... [her] husband left off.” Gaetana testified that, although she spoke to Mr. Giaimo in September about continuing the derivative suit, she did not actually meet with him until April of 2005. According to Gaetana, it was merely a coincidence that her meeting with Mr. Giaimo about continuing the derivative suit did not take place until after Nathan’s employment agreement with 4C had been signed.

Concerning her meeting with Mr. Giaimo in April of 2005, Gaetana testified that Nathan drove her to the meeting. She testified that Nathan did not participate in the first meeting even though Mr. Giaimo’s notes reflected that Nathan was present. After further questioning, Gaetana testified that Nathan was there but not actually in the room. She stated that Nathan might have said hello to Mr. Giaimo and been called in, but “[h]e wasn’t there to make any decisions or authorize anything.” Gaetana testified that there were, in fact, other meetings before the lawsuit

was filed and that Nathan might have been present at those meetings since “Nathan knew about some particulars.” Gaetana testified as follows:

“Q. Was it your practice in meetings with Mr. Giaimo and your son Nathan to allow your son Nathan to discuss the details with Mr. Giaimo and give him ideas as to what he should do?

A. Yes, because I gave him the authority to do that.

Q. So if Mr. Giaimo came to you after discussing these matters with your son and said, “Should we go forward with this, Mrs. Celauro?” would you go forward with it as long as Nathan said it was the right idea?

A. If I thought, yes.

Q. Was there ever a case where Nathan wanted to do something with respect to one of your litigations where you told him “No, I don’t want to do that”?

A. He didn’t want me to go ahead with the lawsuit and I said that I was going to go ahead.

Q. He wanted you to wait until he had an employment contract; right?

A. I don’t know what he wanted.

Q. Do you recall –

A. I wasn’t going to make him make any decisions. I was going to make the decisions.”

Gaetana testified that she made Nathan her “secretary” which meant “[t]hat he was going to do all the paperwork for me and such, whatever needed to be done. I didn’t want to get involved with that.” She also testified that Nathan took care of her financial matters because she did not want to do “that kind of thing.” She testified that Nathan was not authorized to do anything except what she asked him to do. When asked whether throughout this litigation she gave Nathan authority to act on her behalf, she answered yes. She also testified that she left Nathan to take care of things.

When asked on cross-examination why she dismissed Grace Gladstein from the derivative suit, Gaetana testified:

“Q. Well, you did decide to dismiss Grace Gladstein from your derivative suit; right?

A. If that is what he needed to do, that is what I told Giaimo, do what Nathan said.

Q. Did Nathan ever say to you directly, “Mom, I need you to dismiss Grace Gladstein from the lawsuit”?

A. No I wasn’t involved.

Q. You simply told Mr. Giaimo that “Whatever Nathan needs done or thinks is best, you do that Mr. Giaimo,” is that correct?”

A. Uh-huh. Yes.”

Additionally, Gaetana testified that, although she was of the belief on October 27, 2007 that Mr. Giaimo was conspiring with John Celauro and his lawyers against her interests, she continued to use him to represent her at a shareholders’ meeting which she thought was very important and, after the November 7th meeting, Mr. Giaimo continued to represent Gaetana and Nathan in connection with negotiating the possible sale of their 4C stock.

Regarding the November 7, 2007 meeting, Gaetana testified that she wanted to attend the shareholders’ meeting even though she was aware that she did not control a majority of the shares. On cross-examination, Gaetana described the meeting as follows:

“Q. At some point you arrived at the offices of Herrick Feinstein, my law firm, is that correct?

A. Uh-huh.

Q. And at some point you were told to stay away from the meeting; correct?

A. Yes.

Q. Did Mr. Giaimo say to you that he wanted you to stay away because he thought you were going to antagonize John Celauro and damage Nathan’s chances of getting his job back?

A. I didn’t understand what was going on there.

Q. Did Mr. Giaimo ever tell you that Nathan was going to plead with John to get his job back?

A. I didn’t know that was what was going to go on. I still felt I was going for a shareholders’ meeting.

Q. When you arrived at the –

A. Whatever he arranged with Nathan, I don’t know.

Q. At some point you arrived at the conference room; right?

A. Yes.

Q. When you went in, what did you say to John Celauro?

A. What I said?

Q. What did you say?

A. I said to him that he was a liar.

Q. Let me ask you this. If Mr. Giaimo had been hoping to get Nathan's job back and kept you away because he thought you would antagonize John Celauro –

A. I didn't know that.

Q. He didn't tell you that is why he wanted you to stay away?

A. No. I didn't know what he wanted. I didn't know -- when I went in there, I didn't know what it was all about.

Q. After you arrived, at some point did anyone tell you that there was a discussion going on as to whether perhaps Nathan could get his job back?

A. Yes, it seems like that they were talking about some kind of job. He had Nathan begging and apologizing. What was that all about?

Q. Did John Celauro or Nathan or Mr. Giaimo ever say anything along the lines of that Nathan could get a meeting about getting his job back if you ended the removal proceeding?

A. I don't know anything about that. I don't know.

Q. Do you recall if –

A. That whole thing was so confusing.

Q. I understand.

A. I also said that I didn't know you were there. That is how confusing it was.

Q. Do you remember now that I was there?

A. No, I don't remember. You told me that you were there.

Q. So you don't remember me holding up a stipulation of discontinuance and telling you that I wasn't going to file this unless you approved it?

A. No, I don't.

Q. You said earlier that Mr. Giaimo was screaming and swearing; correct?

A. Yes, he was.

Q. Did you feel pressured by this to go along with whatever he said because he was screaming and swearing?

A. No.

Q. Is that because you saw him scream and swear lots of times before?

A. Yes. I just ignored him.

Q. So it wasn't that confusing then if Mr. Giaimo's histrionics weren't bothering you. What else was confusing?

A. The whole thing was confusing. Why was he screaming and yelling and cursing? Why was this commotion?

Q. You testified earlier that Mr. Giaimo wanted you to sign something?

A. Yes. They kept saying -- other people were saying about signing something. What is it? I didn't know.

Q. Are you sure that Mr. Giaimo was telling you to sign something or was he telling you to agree to him signing something?

A. I don't know. With all that noise and confusion, I don't know.”

With respect to what happened after the November 7th meeting, she testified “I don’t remember anything. I don’t remember talking to anybody. I remember just looking out the window and wondering what was all this about.” Gaetana also testified that she understood that when she settled the derivative suit, a stipulation of discontinuance had been filed which meant that the suit was over and that when Nathan settled his employment case that it was over for good.

Gaetana initially testified that she did not learn a stipulation of discontinuance had been signed until she met with her new attorneys, Farrell Fritz, P.C. After further questioning, she modified her testimony as follows:

“Q. Can you think of any reason why you needed to get a new lawyer?

A. I guess that I wanted to retry it, this case.

Q. So perhaps you did know before Mr. Morken told you that this case had been discontinued?

A. I really don’t know. All I know that it wasn’t until John Morken told us that the case was -- the case was discontinued with prejudice; right?

Q. The case was discontinued with prejudice.

Before you saw Mr. Morken, did you understand it was discontinued but you didn’t know if it was with prejudice?

A. That is probably it, yes.

Q. Do you remember who told you that it was discontinued?

A. No, I don’t remember that.

Q. Do you remember when they told you?

A. No.”

### **Wayne Celauro**

Portions of the deposition testimony of Wayne Celauro were read into evidence.

According to Wayne Celauro, he was present at the meeting on November 7, 2009, but he was not present for the conclusion when the stipulation was signed by Mr. Giaimo.

### Testimony of Nathan Celauro

Nathan Celauro testified that the whole purpose of commencing the removal proceeding against Wayne and Diane was to protect the stock. The removal proceeding was the “steak” and everything else was the “sizzle.” Mr. Giaimo told Nathan that the removal proceeding was a “slam dunk.” Mr. Giaimo and Nathan discussed bringing a summary judgment motion in the removal action and moving the proceeding at a fast pace. Nathan, in fact, at one point, admonished Mr. Giaimo for giving adjournments to the other side which delayed the proceeding. Mr. Giaimo kept Nathan informed about court conferences and the discovery schedule. Nathan had conversations with Mr. Giaimo regarding the petitioners’ first demand for discovery and inspection. Mr. Giaimo asked Nathan for his assistance and discussed with him what documents they needed. When summary judgment was denied, Nathan said it was decided they would pursue a two-front attack in the Appellate Division and this court.

It was at the time the summary judgment motion was denied that Nathan spoke to Mr. Giaimo about his billing. Nathan told Mr. Giaimo that he was a “little heavy handed” on the bill. Nathan was concerned because Mr. Giaimo had made a reference to the Celauros as his “annuity client.” According to Nathan, Mr. Giaimo also inquired as to Gaetana’s ability to pay his bills, which Nathan thought was inappropriate.

Concerning the notice of the shareholders’ meeting received on October 26, 2007, Nathan testified that he and Gaetana received a letter from Mr. Swick regarding an amendment to the certificate of incorporation. After he and his mother reviewed the letter, he called Mr. Giaimo. Nathan referred to the amendment as a “heinous act of betrayal” on Wayne’s part. After receiving the letter, Nathan was “all over Mr. Giaimo.”

Mr. Giaimo came to Nathan's home on October 27, 2007. Nathan and Gaetana were very concerned because the proposed changes to be made to the certificate of incorporation would result in Nathan's and Gaetana's exclusion from future shareholders' meetings. At the October 27, 2007 meeting, Gaetana told Mr. Giaimo she did not think he was working in her and Nathan's best interests. Nathan was unaware his mother was going to say this to Mr. Giaimo. Nathan remarked that his mother "says whatever she wants, you can't tell her anything." At the meeting, Gaetana, Nathan and Mr. Giaimo reviewed an appraisal Mr. Giaimo had received from Herrick Feinstein. They also discussed a list of questions that were to be asked at the shareholders' meeting. Mr. Giaimo told Nathan and Gaetana that he was going to Florida and would not be there for the shareholders' meeting.

Mr. Giaimo left for Florida. While he was there, Nathan spoke to him by phone. During one conversation, Mr. Giaimo told Nathan that Mr. Swick indicated that there might be a "global family rapprochement." Mr. Giaimo informed Nathan that he might have to "take a tongue lashing, so John could save face with Wayne at the meeting." They would have the family rapprochement meeting first and if that worked out the certificate of incorporation amendment might be put on hold. Nathan getting his job back was part of the family rapprochement meeting. Mr. Giaimo told Nathan that if he paid for the change in his airfare, he would come to be a mediator with respect to the family end of the business.

On November 7th, Nathan picked up his mother and drove to the city. He received a telephone call from Mr. Giaimo, which he put on speaker so his mother could hear. Mr. Giaimo was upset when he heard Gaetana was going to the meeting. He thought she was going to mess things up. Mr. Giaimo told Nathan to take Gaetana to Macy's. Gaetana said she was not going

to Macy's. Mr. Giaimo called again and told Nathan to leave Gaetana downstairs. Gaetana and Nathan went up to the twenty-first floor. They saw Mr. Giaimo, and he was animated. Gaetana then went into the ladies' room. Mr. Giaimo told Nathan he had spoken to John for a half-hour and made progress. Mr. Giaimo told him to bring Gaetana downstairs to the coffee shop.

Nathan brought his mother downstairs and went back upstairs. Nathan was concerned about the passage of time so he called Mr. Giaimo in the conference room. Mr. Giaimo told Nathan he had everything under control and to wait fifteen more minutes. Nathan went back downstairs to get his mother and then came upstairs with her. Nathan told the receptionist that he and his mother were shareholders and they wanted to go to the shareholders' meeting. Chris Sullivan, of Herrick Feinstein, then appeared and brought Nathan upstairs while Gaetana waited in reception. Nathan asked Chris Sullivan about the shareholders' meeting, and to his surprise and shock, Chris Sullivan, responded that it had already taken place. Nathan described the events thereafter as follows:

"A. Then I walked into a meeting and into -- into a really big conference room with glass windows all across, I call it like a fishbowl, and it is two doors on either side and a really long conference table and I walk in -- oh, back up, whoa, what else did Mr. Giaimo say, I forgot that.

Mr. Giaimo said that when -- I forgot that, when I first got there, mom went to the lady's room and he said you just got to take a tongue lashing, there is certain things he said I was supposed to take credit for, and I told Joe I said Joe, this is -- wait a minute, this is not true, this is -- not part of the script here, and he said don't worry about it, it is a privileged conversation, I agreed with Mr. Swick, it is a privileged conversation, you can say anything you want and nothing is going to be held against you, and I said are you sure, and he said yes, two attorneys can do that.

So I was supposed to agree to whatever John said, I was supposed to say yes. Okay, so I went upstairs, and I walked into the first thing I did now, remember Sullivan said to me this was the -- shareholder had already occurred, but I don't believe Mr. Sullivan, he is the -- then he said okay, so I said I thought he was just breaking my horns. So I walked into the meeting and said hello to everyone, and

the first thing I said was is this the shareholder meeting, because I didn't want to exclude mom. Giaimo wanted mom out of there, I wasn't sure what was going on. So Mr. Swick from Herrick Feinstein said no, we already had that meeting. So I said wait a minute, I got questions, and Mr. Swick said well, your attorney said you didn't want to attend, so take it up with him.

So I looked at Joe Giaimo and he rolls his eyes and I kind of thought I knew what that meant because Mr. Swick is an extremely sarcastic guy, and he and I have always had this mutual dislike for each other. He was always my adversary so I -- just said okay, just part of the tongue lashing I got to take, okay, I'll take it and I would do anything, anything to get the family back together, anything to get John Celauro to honor his word, honor the memorandum of understanding, that's what my father wanted.

He wanted that, he agreed to that, and he wasn't going to file this suit unless they changed that, and they changed that, and my father filed, and that's why he filed September, '03. He was still alive to file it, and Joe Giaimo baited me, he knew that's what was important to us, and he baited me, he baited me, and I believed him.

So we went, I went up to the meeting and I took the tongue lashing, and I had to humiliate myself, and I humiliated myself, and then Mr. Giaimo says to John, you know, well, we are thinking of ending the suit. Ending the suit? And I said -- I'm thinking don't say anything yet, don't say anything yet, so finally Joe is talking. I said Joe can I speak to you outside, and he says okay so we go outside and I go what the hell are you doing, what are you doing, we are not ending this suit, and he starts screaming, don't be a F'ing asshole, I'm not going to hurt your mother, I'm like your father, he kept saying I'm like your father I'm not going to hurt your mother.

Q. Let me stop you. You need to take a break?

A. No.

Q. I'm going to ask you to speak slower.

A. Okay.

Q. Go ahead and continue with this discussion. You are outside with Mr. Giaimo.

A. I'm outside with Mr. Giaimo, and he says, he keeps saying I said what are you doing, he is -- just kept saying, well, we will just put it on hold, and I said I don't want to put it on hold, we put it on hold enough of the -- this was supposed to be done in '06, this was everything, this was it, the stock, the protection of the stock, the protection of my parents' assets was everything, and he kept putting it on hold. I didn't think there was need for putting it on hold.

Q. Put what on hold, what were you referring to, or was he referring to, if you know?

A. The removal case.

Q. Continue, please.

A. So I said well, how long we put it on hold, and he said just trust me, just trust me, I'm not going to answer any more of your questions. So I kept trying to ask him questions and he said I'm not going to answer any more questions, let's go back in the room.

So we go back in the room and he spoke for about a minute or two about the virtues of Italian families, and how we are going to put them back together, and it is terrible that my mother isn't speaking to a son, and you are the nicest family here, and let bygones be bygones. At that point I said can we bring mom into the conversation, and they said sure, sure, sure, so then Wayne and Sally exited, and Mr. Swick and Mr. Giaimo exited together, on one side, and I was left there with John; and I spoke to John.

Now he is my cousin, I have worked with him, known him for years. I worked with him -- so I said John, let's cut to the chase, okay, I did what I had to do, can we get this back together, can we get our family back together, and he said, he says I can't see past the elephant; and he just looks at me and he says I can't see past the elephant, and I was like, you know, I don't know, I was so confused, what we were doing, we were going to have a meeting, or not have a meeting, we are getting it back together, Giaimo said that we were going to do this, have the reproachment [sic], okay then - -

Q. Let me stop you there. This conversation with John, where did it take place?

A. We were the only two left in the conference room. Sally and Wayne walked out, I don't know where they went, Giaimo and Swick walked out together.

Q. Was your mother there yet?

A. No, she was -- mom was still down in the waiting room, that's why I said can we bring her up here if we are going to get the family back together, she is the matriarch, let's get the family back together, I'm desperately -- want our family back together.

Q. Go ahead, continue.

A. So then mom comes up and we all reconvene -- and I think that -- some of the places switched, I think now John was sitting next to mom or whatever -- so mom says hello and we all sit down and Joe Giaimo says to mom you got anything you want to say to John, and she comes John you are a liar, and I was shocked and she says well, he shoots back I got no respect for you, for anything you have ever done, and he says you sued me, and your husband was just as bad, and then he says, and then he says and you didn't even recognize Wayne's adopted child, and mom says well, which is not true by the way, but mom says well, I didn't even know he had an adopted child. Why didn't he tell me, and Wayne screams out well as far as I'm concerned my mother died in 2004, and this is what is going on. This was the reproachment [sic]?

So now I mean it was -- it was like the Sopranos without the bullets. It was like back and forth that's what was happening, and it just -- then

oh, I remember, mom says you have been stealing from the business, and Wayne says - - mom says you have been stealing from the stockholders, you been stealing from the business for many years, your father stole from us and Wayne screams out what do you know from business, all you know is about the dogs and cats, and then it just erupted, and then Giaimo is trying to say let's get the family back together, let's take -- let's hold, and I pulled Joe out.

Now you got to understand this is total chaos now going on. Giaimo starts screaming you know we need to sign a stip, we need to sign a stip, he just kept saying we need to sign a stip, and he is screaming and mom is saying I'm not signing anything, and it was just total chaos. Giaimo was screaming don't be F'ing assholes, don't be F'ing assholes, people from the Herrick Feinstein offices were coming out, women with horrified looks on their faces. This guy was screaming at the top of his lungs, and I don't know what to do I mean I didn't know what we were doing, it -- just didn't know what we were doing so I pulled over at one point.

Q. Pulled what?

A. I pulled Joe over at one point, I said who, what is going on here. He said don't worry, I'm not going to hurt your mother, trust me, and I said I don't want you signing anything, and he said well I'm going to sign it, and if you don't like it, you can sue me for malpractice.

I said Joe, what the hell, what are you doing, what's going on here. He says well, you want me to be your attorney or not. I said yes, you are our attorney, but why do we need to sign a stip. I was confused, we had so many stips of the removal, of the delay in what do you call that there, the three week period, the - - what, who do you call it, well, when you stip to put it on hold, so many times, mom didn't need to sign anything. A postponement, that's what - - we had done it many times, we had spoken about how we were supposed to finish it in '06, December, '06 and then it didn't start until February. So every time you did something he called it a stip.

I stipped with Herrick Feinstein, like today, you stipped that Chris Sullivan, didn't have to come in, because he is going to agree that he said Nat asked me a question on the way up. So because we stip means he doesn't have to come in so everything you guys do is a stip. So he said we are just going to stip. So - -

Q. Did he say stip for what?

A. Yes, to me he said stip we shall going to put it on hold.

Q. Keep going.

A. So then at one point I said all right, I got to hit the head, and then as I was doing that, Swick and Oleske were trying to escort my mother away from me, as I was going to the men's room - - they got a really nice office, Herrick Feinstein, there is the fish bowl then a lot of offices with a lot of women who came in when Giaimo was screaming, and then I was going to the men's room, and they were pulling mom towards John Oleske's office, the second one from

Sullivan's office, Sullivan has the corner office, Oleske is next. I said mom, don't go sign anything because I didn't know what - - I don't trust Dan Swick and I obviously don't trust Mr. Oleske.

Q. What occurred next?

A. So then it was total chaos. Giaimo telling me you are going to hurt your mother, he pulled me over, you are going to hurt your mother I'm like your father I'm not going to hurt your mother, don't be an a -- you know, F'ing asshole, don't be F'ing asshole, you are going to hurt your mother, you don't know what you are doing, I'm the attorney, and I'm like what's going on here, what's going on here.

Q. Had you ever heard Joe Giaimo yell or scream before?

A. Yes. Not like that, though.

Q. Once, or more than once?

A. More than once.

Q. How about swearing?

A. Yes, I heard him swear, but not like this. I mean I never heard him swear - - he swears in his own office, everybody does, I guess, but not in somebody else's office, this was total unprofessional behavior, and at that point I was becoming very disenchanted. What are you going to do? Is this the way a professional attorney is supposed to conduct himself with clients, why are you asking us in front of the adversary, what kind of pressure are you putting on me here.

Q. What occurred, you went to the bathroom, what occurred next?

A. Then mom came back and I asked did you sign anything. She said no. I said don't sign anything, and then Wayne was saying how he had to leave at 2 o'clock and he left at 2 o'clock, and then mom, Giaimo and I were still arguing, Swick had come in, another attorney had come in, I don't know who he was, went out or maybe he wasn't an attorney, some ladies walked in, walked out, it was just total chaos. Oleske walked in and walked out."

After the November 7th meeting, Nathan made phone calls and sent e-mails to Mr. Giaimo because he wanted to know whether the shareholders' meeting had, in fact, happened. Mr. Giaimo told Nathan that he did not waive any of their rights he just put it "on hold." They discussed the meeting with John Celauro scheduled for November 29th about global rapprochement and him getting his job back and who would be on the board. If there was no rapprochement, then they would sell the stock.

After receiving Mr. Giaimo's November 15, 2007 bill, Gaetana told Nathan she was not paying it and she was getting a new attorney. She even took out the phonebook to find one. Based upon referrals, she ultimately contacted Farrell Fritz on November 29th.

The meeting with John Celauro occurred on November 29, 2007 at the Columbus Club. Nathan did not attend. On November 30, 2007, Nathan called Mr. Giaimo two times and both times he was rushed off the phone. Mr. Giaimo told him it was not going to work. He was not getting his job back. Nathan called him again on December 1st and was rushed off the phone. On December 2nd, he called Mr. Giaimo but did not speak with him. On December 4th, a meeting was held at Nathan's house with Mr. Giaimo, Gaetana and Nathan. On December 5th, Nathan received a letter wherein Mr. Giaimo stated:

“Once again as I have stated over and over, I did not participate in any shareholders meeting. The day was spent begging John to reemploy you. Of course, you and your mother attended and came into the room to make your own presentation and you would recall that you were very upset.”

Nathan testified that he did not actually see the stipulation of discontinuance until mid-December 2007.

On cross-examination, Nathan testified that he met Mr. Giaimo for the first time in September or August 2002. He met with Mr. Giaimo and his father to discuss the derivative suit, and he provided answers to Mr. Giaimo's questions. He admitted that he might have told Mr. Giaimo on September 27, 2004 after Mr. Giaimo had contacted Gaetana about continuing the derivative suit that there was a “plan of action” and to put everything on hold until he heard from him. Nathan also testified that he might have told Mr. Giaimo not to serve John Celauro - to do nothing more inflammatory. Introduced into evidence was an e-mail to Mr. Giaimo from Nathan

which said he had a long discussion with Gaetana and she was more than willing to go forward with the derivative suit as soon as the employment contract was signed.

Nathan also testified that he sent Wayne a list of the conditions Gaetana wanted satisfied before she would drop the derivative suit. Nathan testified that Gaetana wanted Nathan on the board and the money repaid by John, but neither of these items appeared on the list because that was not necessarily what Nathan wanted. Nathan also testified that his mother forgets things due to her age. He also believed that Mr. Giaimo doctored his notes concerning his representation of the Celauros.

With respect to his involvement in the derivative suit, Nathan said it was a “balancing act.” He testified that he had a discussion with Mr. Giaimo at Mr. Giaimo’s office in 2005 about a summons and complaint versus a summons with notice. Nathan testified that he was in another room when Mr. Giaimo had discussions with Gaetana and that he would answer some questions, but did not participate. Nathan did instruct Mr. Giaimo to send a copy of the complaint to the editor of the Modern Grocer. Nathan also confirmed that he had a key to Mr. Giaimo’s office. He sent e-mails to Mr. Giaimo advising Mr. Giaimo of issues that needed to be addressed and to exert pressure.

Admitted into evidence was an e-mail from Nathan to Mr. Giaimo dated April 26, 2007 in which he told Mr. Giaimo to make sure that he could be present in the depositions. If he could not, he said they would have to “submit an amended complaint or start a new suit and move to consolidate.”

Concerning his role in his mother’s affairs, Nathan testified on cross-examination as follows:

“A. No, what we discussed was she liked to say I’m the boss, he is the secretary, what I’d like to say was I kind of didn’t like the secretary role, I would say we are in a war here, mom is General Eisenhower, I’m General Patton, and Mr. Giaimo was General Montgomery. Unfortunately, Mr. Giaimo turned out to be Benedict Arnold.

Q. Let’s use your analogy. You are saying that you were General Patton, driving across France, okay, executing a tactical plan, but your mother was General Eisenhower, and she was coming up with the D-Day Invasion, and large scale strategy for what lawsuit should be filed when and who should be called; these kind of things?

A. She is the one pulling the trigger and making those decisions, yes.

Q. In the sense of pulling trigger, you mean Mr. Giaimo would come to her and say Gae, should we do this?

A. My mother would also consult with Mr. Giaimo, as she said, the lawyer.

Q. But would Mr. Giaimo come to her and say Mrs. Celauro, should we do it?

A. Absolutely.

Q. Would she then ask, does Nathan say it is okay, or did she ask you Nathan, should we do this?

A. She would consult with me.

Q. Would she do what you said?

A. Not all the time, that’s why - -

Q. Did you, yesterday, would it surprise you that yesterday Mrs. Celauro testified in fact she always followed your recommendations?

A. That would surprise me in the sense that it is not entirely accurate, but my mother is losing her memory, so ...

Q. I see, well again - -

A. No, no, she is still losing it.

Q. Is this another instance in which testimony she gave yesterday shouldn’t be believed because she is losing her memory?

A. What did she say, always?

Q. I asked her yesterday whether or not there was ever an instance in which she, you, gave her a suggestion or said what you thought you should do, she should do, if there was ever an instance in which she said no, I don’t want to do that and overruled that; and she said no, there wasn’t?

A. I would then suggest she may have forgotten there were times.”

With respect to the settlement agreements he had signed in prior litigations, Nathan testified that he signed a settlement agreement in connection with his employment case. It was his understanding that settlement agreements basically end cases. In addition, he recalled that a stipulation of settlement was signed by him and his mother in the derivative suit. That settlement agreement stated that the attorneys for the parties would sign a “standard form stipulation of

discontinuance with prejudice.” Despite the fact that the stipulation was signed on July 31, 2007, Nathan testified that on November 7, 2007 when the stipulation of discontinuance with prejudice in the removal proceeding was signed he did not understand the concept “with prejudice.”

Nathan also testified that when he went into the conference room on November 7, 2007, he acted contrite, but he did not actually feel contrite. He also told John he had blackmailed him, even though it was not true in an effort primarily to get the family back together and as an aside to get his job back. Nathan testified that Mr. Giaimo told him that the removal case had to be put “on hold” to continue the conversation with John. Nathan asked if he meant a “time out” and Mr. Giaimo said yes, like a time-out. Regarding the signing of the stipulation of discontinuance, Nathan testified as follows in response to questions from Mr. Oleske:

“Q. Do you remember Mr. Giaimo calling his office to get them to fax something to our office?

A. I remember Mr. Giaimo getting on the phone a couple of times. I don’t know to whom he got on the phone with.

Q. Do you remember me arriving in the conference room with a piece of paper?

A. I saw you pop in and out, or stick your head in once, but you know, do I remember it precisely, you coming in with a paper, I don’t know if you came in with a piece of paper, I don’t know, there was so much commotion.

Q. There was - - what kind of commotion?

A. A lot of screaming and yelling.

Q. By Mr. Giaimo?

A. Without a doubt.

Q. And you couldn’t concentrate because of that?

A. That’s part of it.

Q. Would it surprise you to learn your mother testified she had no problem concentrating because she had heard Mr. Giaimo scream a million times before?

A. Yes, because she told me many times that that day was like a circus, and she wasn’t signing anything, and, you know.

Q. So if you don’t remember me coming in the room, you don’t remember me putting the paper down in front of Mr. Giaimo to sign, do you?

A. I didn’t see Mr. Giaimo sign.

Q. Do you remember me putting the piece of paper down in front of him.

A. What piece of paper?

Q. A piece of paper.

A. I don't recall, Mr. Oleske, if you did or not. I don't recall, there are so many -  
- you were inside, outside, I was out with my mother.

Q. You just forget?

A. What?

Q. You just forgot the whole thing?

A. Didn't say that. There is just so much going on, you can't absorb it all.

Q. You don't remember whether I was there or not.

A. I saw you were there, you are the second office, from - -

Q. How do you know that's my office that you described - -

A. Because I noticed you were escorting my mother at one point when I was going to the men's room, which is right outside kind of that office there.

Q. Are you saying I was with your mother by myself?

A. No, there was Mr. Swick there, I think, and they were - - she was being - - led down or - -

Q. You are saying that myself and another attorney from Herrick Feinstein were leading your mother someplace without Mr. Giaimo or yourself, and you don't know where we were leading her?

A. I didn't say without Mr. Giaimo.

Q. Was Mr. Giaimo with us?

A. He was between me, I was going over there to the men's room, the fish bowl was here, you have all the offices, the men's room is over there if I'm correct.

Q. Just tell me - -

A. And your office, if this is the fish bowl looking out your office is down there, second one down, and Sullivan has the corner office, and there are three desks between the fish bowl, and the end where Sullivan's office is, there are two or three desks where assistants - -

Q. My question is was Mr. Giaimo with me and Mr. Swick while we were leading your mother someplace?

A. He may have been like right behind you.

Q. So maybe we weren't walking alone with her. Do you know where we were going?

A. Mr. Oleske, I don't know - -

Q. Were you concerned that your mother was being led away by two attorneys from the other firm who you believe perhaps were conspiring with John Celauro illegally? Why didn't you stop us?

A. Did I say you were conspiring with - -

Q. You suspected, you said.

A. I said I didn't know the legal definition of it.

Q. Regardless of the legal definition, why didn't you stop people who you had questions about leading your mother away?

A. I said, mom don't go and sign anything.

Q. You said that before we led her away?

A. As she was walking towards - -

Q. But you didn't question why we were leading her away?

A. I didn't think that my mom was going to sign anything, she had already said I'm not signing anything.

Q. But what business did she have with me and Mr. Swick?

A. I don't know what business you had with my mother, Mr. Oleske.

Q. Do you think I illegally conspired to - - to get your mother to sign documents in secret; is that what you are saying?

A. I don't know.

Q. Okay. Do you have any way to know that the office you are talking about is my office, other than the fact I was leading your mother there, in some kind of suspicious circumstance that you didn't investigate?

A. I was in Herrick Feinstein office 25 times.

Q. How do you know that's my office?

A. I saw that you - - that was your office.

Q. Really, would it surprise you to learn my office isn't even on that floor?

A. Well, I saw you in that office, that's why I assume that's your office.

Q. But it was that office to which I and Dan Swick were leading your mother away for purposes you didn't know about?

A. I didn't know if you were leading them to that office, but there is that little hall

- -

Q. After - -

A. I wouldn't call it a hall, between the desks, the desks were like an island.

Q. At some point subsequent to that, did you speak with your mother again?

A. Yes.

Q. Did you ask her why did Mr. Oleske and Mr. Swick lead you away?

A. I don't think you - - I don't know if you led her away.

Q. Did you ask her what she did?

A. I said did you sign anything, and she said no.

Q. Did you ask her what else she did?

A. I don't remember, Mr. Oleske.

Q. Would you have asked her, beyond whether she signed something, would you have asked her under those circumstances what she was doing with us?

A. I don't - - well, Mr. Giaimo was there too, so it wasn't like you were just - - you two were just escorting her, but she was being, maybe encouraged is a better word, if you would like, to come over here, like - -

Q. Okay, now do you recall at any point me saying to you while you were sitting next to your mother, I am not going to file this piece of paper unless I hear you two say that you agree to it?

A. No, I did not.

Q. You don't remember that?

A. No, I do not.

Q. Do you recall at some point after everyone had left the conference room, or after you and your mother left the conference room, that you were standing by a hallway that led to the elevator leaving Herrick Feinstein, and that you were in a discussion with myself, and Mr. Swick?

A. I don't remember that.

Q. Do you remember Mr. Swick leaving for the last time that day, and pointing to me and saying, don't file that unless they ratify it, or words to that effect?

A. I don't remember that, but I do remember he left an hour before, or 45 minutes before we concluded.

Q. But you don't remember me holding this document at any point, you don't remember me telling you and your mother that you had to approve it? You don't remember any of this? Are you sure it didn't happen, or you just don't remember?

A. I don't remember it happening, but I would suspect it didn't.

Q. That's fine. Through all of this, is it true that at the most, you thought Mr. Giaimo was giving away an extension?

A. Yes.

Q. Of the case?

A. Yes.

Q. You never thought I was going to end the case?

A. No, Mr. Morken told me that.

Q. He wasn't going to drop the case?

A. What do you mean by drop.

Q. He wasn't going to end it, terminate it, discontinue the case?

A. No, he was not."

On cross-examination, Nathan was asked why his affidavit dated February 21, 2008 submitted with respect to the underlying motion used the word "rehiring" or "rehiring meeting" nine times if Nathan's primary purpose was not to get rehired. According to Nathan, it was just a term "we elected to use there, but it is reproachment [sic] ..." Nathan was also asked to compare his affidavit with his testimony and to explain why his affidavit never mentioned that Mr. Giaimo used the words "time out." Nathan replied that the affidavit was written by an attorney whereas his testimony was his own words. On redirect, Nathan stated that his affidavit was incomplete.

Nathan also testified that he graduated college in 1978 from the University of Buffalo. He majored in International Business. He then began working in sales as 4C and eventually

became vice president of sales until September of 2005 when he was discharged. He also testified that after being terminated from 4C, he became a real estate agent and obtained his series 66 (investment advisor) and 7 (stockbroker) licenses.

#### **Testimony of Thomas Killeen**

Thomas Killeen, a partner at Farrell Fritz, testified that he received a telephone call on November 29, 2007 with respect to representing Gaetana and Nathan Celauro. A formal retainer letter was sent to the Celauros on December 5, 2007, which was signed by them on December 7, 2007. A supplemental retainer letter was sent out on December 28, 2007.

#### **Testimony of Joseph Giaimo**

Joseph Giaimo testified that in October or September of 2007, Nathan told him to drop the appeal because they had spent too much money and his mother was running out of money. He also added not to do any more work on the removal proceeding. Mr. Giaimo had no notes reflecting these conversations. A note dated October 12, 2007 reflected that Nathan told him he was running out of money and he was going to lose his house in Florida.

After the October 27, 2007 meeting at Nathan's house and prior to the November 7, 2007 meeting at the offices of Herrick, Feinstein, Mr. Giaimo was in Florida and communicated with Nathan by telephone. Giaimo testified that Nathan told him:

“A. Okay. I want you to come up here. For what, Nat. The stockholders meeting. Well, I can't take part in it. No, he says, I want you to come up here, and that's - - this is the place for me, for you to try to get my job back. Linda<sup>1</sup> had been on the phone with him, he said I want my job back. Linda said we want to sell the stock. Then Nathan said he wanted to sell the stock. Then Linda said we got to sell the stock. Because they had no money; and then I called him back, because this was on the speaker, I think my wife walked in, I'm in the bedroom, where I had the speaker on the damn

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<sup>1</sup>Linda Celauro is Nathan's wife.

phone, and he is telling me he is going to kill himself, he is going to commit suicide, this the fifth time he told me he is going to kill himself, and scaring me, and I call him back and I said, I want to talk to you without Linda being present. Do you want me to go up there to get your job back, or sell the stock. He says I want my job back, I want my job back.

Okay, that's what I'm going up there for, that's why I went back, to get his job back, not for the stockholders meeting, and not to talk about stock, about selling Gaetana's stock, it was Gaetana's stock, not Nat's, not Linda's."

Mr. Giaimo flew back to New York. On November 7, 2007, he arrived at the offices of Herrick Feinstein. The first person he had a discussion with was John Celauro. It took place in the reception area and lasted ten minutes. Mr. Giaimo testified that he went to the November 7th meeting solely for the purpose of pleading for Nathan's job. Nathan had absolutely nothing going for him. John Celauro told him privately that he would not even meet with Mr. Giaimo or Nathan about the possibility of rehiring Nathan unless the removal proceeding was discontinued and the trust would have to pay the legal fees. Mr. Giaimo told him he did not think it would be a problem because:

"Nat put a complete hold to the appeal from the denial of the motion for summary judgment that I had made, and he had really been urging me not to spend more legal fees than had been spent, and there was an enormous amount of legal fees, and he expressed they were bleeding, his mother was running out of money, so I hope I answered your question. It was a condition of meeting, it was not a consideration, quid pro quo."

Then Mr. Giaimo went into a conference room with John, Wayne, Sally and Mr. Swick. Nathan joined the meeting later and then Gaetana joined. At some point, Wayne left. According to Mr. Giaimo, when Gaetana came in she was angry. He and Nathan had been on "their knees" with John and Gaetana "undid it." At some point, Mr. Giaimo and Nathan went into the hall. They were upset because Gaetana had gone too far. He told Nathan that even though Gaetana had gotten angry, John would still consider meeting with them if they discontinued the removal

proceeding. Mr. Giaimo told Nathan it was up to him, but if he really wanted to try and get his job back that was the condition. Mr. Giaimo testified as follows:

“Q. In fact, you had volunteered, you had mentioned, you had stated in the earlier conference before Nat even joined you, that they would be willing to do this?

A. I didn't volunteer anything of the sort. He suggested, he asked for it and I said that wouldn't be a problem, but I didn't volunteer anything.

Q. Had Gaetana told - -

A. I didn't bring it up.

Q. Before you brought it up?

A. I didn't bring it up.

Q. Okay, before you stated - - the first time you stated that neither Gaetana nor Nathan were present; correct?

A. Stated what?

Q. That that would be no problem.

A. He brought up to continue - -

Q. Who?

A. John brought up removal - - I never brought up - - I never said, hey, we will stop the removal. John said I'm not going to meet unless Nat agrees to discontinue - - or Gae, agrees to discontinue the removal.

I said that's not going to be a problem, that's exactly what I said. I didn't think it was going to be a problem.

Q. Well, as the course of the day wore on, Nat kept changing his mind about whether it was a problem or not a problem, did he not?

A. No, not until - - no, not about that. No okay, we will give it up, okay, it wasn't until the last moment when we went back into the room, Gae was there, and he said somebody brought up the word discontinuance, stipulation - - I don't know if it was John Oleske was in the room at that time, or Dan Swick. Stipulation of discontinuance was mentioned for the first time. Certainly not by me, and that Nat at that point asked what does that mean. I said let's go outside.

Q. So overall - -

A. I didn't finish my answer, do you want me to finish the answer?

Q. Overall - -

THE COURT: Finish your answer.

A. So we go outside. Nat, you've agreed we are going to put an end to the removal proceeding in order for us to get your job back, it is to consider it. A stipulation of discontinuance is what you normally do when you end a lawsuit; because he had been involved in that in his own case, in his employment case, he had been involved in it over and over, and he knew it, he says that's what's going to happen here? I said that's up to you. Now he said I'm not too sure I want to do it. I said okay. At this point I become frustrated, and I don't know what he wants to do, and I'm not going to discontinue a lawsuit and get malpractice, and be sued for malpractice, and I said to him wait a minute,

you have to do what you want, and I'll leave. We don't have to do anything, but I'm not going to force you to discontinue this suit and then get involved in a malpractice suit with you telling me that I shouldn't have done this; and I said - - somebody - - down the hall - - I think they had the stipulation of discontinuance before them, maybe John Oleske, and I started to say I'm going to leave, I'll leave; right there, and if you want, we can get another attorney, but I'm not going to go forward with this with you saying that you disagree with a stipulation of discontinuance, and he says it is okay, we will do it, we will do it. So he changed his mind again. Come back in, Gae is there, and - - the rest is foggy about the stipulation of discontinuance, I had to call the office, I don't know why I had to do it - -

Q. Let me get to that.

A. Okay.

Q. We will cover that. First question though, how many times did you go out in the hallway with Nathan?

A. Twice, first time might have been - - wait, wait, first time I think I went out was - - had to do with what John had said to me, had nothing to do with question of removal. It was what John was feeling, what I had said to him, that's the first time. Come in - -

Q. Do you recall testifying on April 22nd that, quote, unquote, "Anyway, he says okay, okay, go back in, and he is still not sure. We go back out again for the third time" - - recall that?

A. Okay, first time was when I finished with John, went out; second time I go out with him; and the third time is at the very end. Three times, yes, in and out three times. Am I wrong? I could be wrong, maybe it is twice. Very - - you know, you don't count those things as you are going along.

Q. By the way, was there yelling during your time at Herrick Feinstein on November 7?

A. Inside that, yes, there was yelling, Gae was yelling, John was yelling.

Q. Nathan was yelling?

A. You know, I don't think Nathan was yelling in that room, I don't think that occurred. I think Nathan was trying to hold back, because he had already made his plea. He was really - - no, I don't think Nat was yelling in that room, no, at the end.

Q. How about outside the room, was he yelling?

A. He was yelling at me.

Q. Outside the room?

A. Yes.

Q. In fact; isn't it a fact that Nathan was causing havoc?

A. Well, no, that's not true, causing havoc?

Q. Yes.

A. What does that mean? With me he was, nobody else.

Q. He was causing havoc with you?

A. Yes, he was making me crazy."

\* \* \*

A. Let me get this in perspective. Gaetana already agreed, this is after the last time I said I was going to just - - let's terminate this, because I didn't want to be sued for malpractice, and I said you can get another attorney. He then says okay, we will go forward, okay, we go back in the room, Gae, do you know what's going on, we are going to stop the removal proceeding. Whatever Nat wants, that's what we are going to do.

Now, somebody brings up the stipulation of discontinuance. I call the office, get a stipulation of discontinuance faxed in to Chris Sullivan, or whoever it was, and at that point it was brought to me for signature, but they wouldn't accept, I didn't sign it yet, but they wouldn't accept it unless Gae, because they knew we were going back and forth, unless Gae - - I don't even know if they wanted Nat there. Unless they said in front of them, do you agree that Mr. Giaimo can sign this, or Joe, and they said yes, and I signed it. No notes, no exchanges, no general releases, no nothing.

Q. So Gaetana said to you, gave you verbal consent, she said okay; correct:

A. She said that to whoever wanted that representation, it was Oleske or Sullivan, I don't remember who was there, I think it was a secretary sitting there too."

Mr. Giaimo denied that he ever told Nathan not to attend the shareholders' meeting. He testified that a shareholders' meeting did not even occur in his presence. Mr. Giaimo further testified that he did not ask for the condition of the rehiring meeting with John to be put in writing because:

"Why not - - we were at a family meeting, where I - - was the first one to beg for the job back and then Nat came in, and he started begging, he was crying, he confessed, he said yes, I tried to blackmail you, because John said you tried to blackmail me. He said yes, Nat was saying all these things, and then Gaetana came in, and cut the legs out from all of this by attacking John, okay. This was not a settlement of a lawsuit, I was there for one purpose. I was brought back from Florida, not to attend a stockholders meeting, I was brought back from Florida a day early from my vacation to plead for his job. Did I - - in front of everybody, say let me have that in writing? No, no, I did not. This was all - - all going on in this room with everybody present."

According to Mr. Giaimo, they had no choice but to trust John if Nathan wanted his job back. He said Nathan was actually elated when John agreed to go ahead with the meeting. Nathan told Mr. Giaimo he was saving Nathan's life. They talked about whether Nathan should attend the meeting with Mr. Giaimo and Nathan. Finally Nathan told Mr. Giaimo to go alone.

With respect to the November 29th meeting with John Celauro at the Columbus Club, Mr. Giaimo testified that he did not take notes. After dinner, he went upstairs with John to a cigar room. The conversation revolved around whether John would rehire Nathan. After the dinner meeting, he learned that Nathan was not welcome back, although he could not recall how or when he learned of it.

Mr. Giaimo testified that he never had a conversation with Nathan about putting the removal on hold. The lawsuit was either discontinued or it was not. The only thing he might have mentioned was put on hold was the sale of stock since they were talking about getting Nathan's job back.

With respect to the derivative suit, he said Gaetana's motivation was two-fold. She wanted to get even with John for what she believed her father-in-law had done and she wanted to get Nathan on the board. He characterized Nathan as having a personal vendetta against John because Nathan wanted to be on the board. When asked what Gaetana got out of the derivative and removal proceedings, Mr. Giaimo testified that she got \$460,000.00 and a chance for her son to get his life back. Mr. Giaimo also testified that he was surprised his firm had been paid \$700,000.00 by the Celauros. He also stated that it would have benefitted him if the removal proceeding did not settle because he was being paid handsomely.

On cross-examination, Mr. Giaimo testified that the derivative suit had been settled prior to summary judgment being denied. As part of that settlement, there was a provision that none of the underlying merits of the derivative case could be used in the removal. Mr. Giaimo testified that he reviewed the books and records of the trusts and found no defalcation by the trustees.

Although he still thought Gaetana had a case for removal, he acknowledged that the derivative settlement and the results of the books and records review deflated the case somewhat.

Mr. Giaimo also testified that Nathan told him what to do most of the time. Gaetana's standing instructions for handling her legal affairs was "[w]hatever Nat says to do, we do. He is the only one protecting me, whatever - he is the only one protecting my finances, whatever he wants, you do it." In fact, Mr. Giaimo had two settlement proposals to which Gaetana deferred to Nathan the decision to whether accept or reject those proposals. According to Mr. Giaimo, Gaetana always went along with Nathan. He described Gaetana as a very bright woman, who knew what she was doing, but who deferred to Nathan. Admitted into evidence was a note dated February 13, 2007 written by Mr. Giaimo's partner, Jade Fuller. Mr. Giaimo testified he was in Florida at the time and he did not want to agree to withdraw part of the derivative action without Gaetana knowing about it. During that conversation between himself, Jade Fuller and Gaetana, Gaetana said "whatever Nat wants to do, we should do. We will still go after Wayne and Diane in the removal proceeding." Gaetana was his client, but Nathan was her alter ego. He never knew of any differences between them. Additionally, Mr. Giaimo described Nathan's role in the litigations as follows:

"A. Nat was in my office five days a week, before me. Sometimes he would work alone, going through documents and I wouldn't charge him because I wasn't doing anything with him, on the phone, I never spent more time with one client in 48 years of practicing law. He was part of everything. He became an attorney, he - - he did - - helped me with interrogatories, because I didn't have the - - inside - - questions, what to ask, he would know what to do with respect to his siblings and the company, and Sally, and he helped me very much on discovery documents.

I'd say okay, you work on this, I was saving legal fees, and I used to say to him, you know, you are saving your mother an awful lot of money by doing this, this is true, and he would give me discovery documents and I would - - demands, and interrogatories, and even EBT questions. He was very helpful."

After the November 7, 2007 meeting neither Nathan nor Gaetana ever mentioned anything to Mr. Giaimo about the stipulation. He said Nathan's statement that the stipulation was a time-out - an extension - was untruthful. He also confirmed that Mr. Oleske requested Gaetana to indicate her assent a second time before he would actually file the stipulation.

**Testimony of John Oleske and Daniel Swick**

Mr. Oleske testified as follows regarding the November 7, 2007 meeting. According to Mr. Oleske, Mr. Giaimo told Gaetana and Nathan that he was not going to sign the stipulation unless they verbally approved his action in the presence of himself and Mr. Swick. Gaetana deferred to Nathan stating that the decision was up to him. Nathan then said words to the effect of go ahead and sign it to Mr. Giaimo. He could not recall Gaetana's precise words. With respect to the filing of the stipulation, Mr. Oleske testified that Gaetana likewise deferred to Nathan, who told Mr. Oleske words to the effect of "go ahead and file it."

Mr. Oleske testified that at some point after he had been given the stipulation, he was called back by Mr. Swick, in part, because Mr. Swick was concerned about whether Gaetana and Nathan had reservations. The Celauros were discussing the matter with Mr. Giaimo. Mr. Swick left with an instruction that Mr. Oleske was not to file the document if Nathan and Gaetana did not again affirm their consent. Mr. Oleske stood there for some time. He repeated that he was not going to file the stipulation unless he heard them consent. Gaetana looked at Nathan and deferred to him. Nathan confirmed his assent to the filing. Mr. Oleske never received any communication after November 7th and up until he actually filed the stipulation that there were concerns, despite the fact that Nathan had previously called Herrick Feinstein many times before.

On cross-examination, Mr. Oleske stated that he did not know if Gaetana actually used the word “yes” or “okay,” but he left that room totally convinced she had assented.

Mr. Swick testified that John Celauro would not even entertain having a discussion about rehiring Nathan unless the removal litigation was dropped. He conveyed this to Mr. Giaimo prior to the November 7th meeting. Mr. Swick’s testimony confirmed the circumstances of the signing of the stipulation as testified to by Mr. Oleske.

### **Memoranda of Law**

After the hearing, both sides were permitted to submit a memorandum of law. In her post-trial brief, Gaetana argues that the testimony and documentary evidence demonstrate that Gaetana did not authorize Mr. Giaimo to sign the stipulation. Rather, she asserts despite Gaetana’s obvious confusion and Nathan’s loud protests, Mr. Giaimo signed the stipulation which was completely contrary to Gaetana’s needs. Gaetana argues that Mr. Giaimo completely lacks any credibility.

Respondents, Wayne Celauro and Diane Celauro Carter, argue that, as a threshold matter, the court should disregard all of Gaetana and Nathan’s testimony based upon their perjury and evasion. They argue that such testimony was filled only with lies and purported forgetfulness. The respondents claim there is a total lack of evidence supporting Gaetana’s allegation that she did not consent to the stipulation. The only testimony offered was conclusory testimony. Wayne and Diane argue Gaetana and Nathan are simply not credible and their version of what happened concerning the stipulation is ludicrous and insulting.

### Analysis

It is well-settled that a stipulation of settlement is a contract between the parties (*Hallock v State*, 64 NY2d 224 [1984]; *Gage v Jay Bee Photographers, Inc.*, 222 AD2d 648 [2d Dept 1995]; *Matter of McQuade*, 121 AD2d 780 [3d Dept 1986]). Stipulations are especially favored where the parties have been represented by counsel (*Matter of Stark*, 233 AD2d 450 [2d Dept 1996]; *Heimuller v Amoco Oil Corp.*, 92 AD2d 882 [2d Dept 1983]).

Although there is a strong policy in favor of stipulations, the court may in its discretion relieve a party from a stipulation upon a showing of those grounds necessary to avoid a contract such as duress, fraud, collusion, mistake or accident (*Matter of Hallock*, 64 NY2d 224 [1984]; *Macaluso v Macaluso*, 62 AD3d 963 [2d Dept 2009]; *Matter of Marquez*, 299 AD2d 551 [2d Dept 2002]; *Gage v Jay Bee Photographers, Inc.*, 222 AD2d 648 [2d Dept 1995]). In the absence of such a showing, the party seeking vacatur must demonstrate that her agent was without authority to enter into the settlement, and, therefore, no contract ever came into being (*Nash v Y and T Distributions*, 207 AD2d 779 [2d Dept 1994]). A party is not bound by a settlement entered into by his attorney unless the attorney had actual or apparent authority (*Collazo v New York City Health & Hosps. Corp.*, 103 AD2d 789 [2d Dept 1984]).

Here, the determinative issue is whether Mr. Giaimo had authority to execute the stipulation on behalf of Gaetana for it is established law that an attorney must be specifically authorized to settle and compromise a claim (*Matter of Lugin*, NYLJ, Apr. 12, 2006, at 34, col 3 [Sur Ct, Nassau County]). As to the creation of authority, words, acts and conduct of the principal are the basis thereof (*see generally* Seavey, Agency, §18). A leading treatise states:

“Authority to act as agent or to do any specified act can be created in a great variety of ways; any conduct of the principal communicated directly or indirectly to the agent is sufficient. Like offers of a contract, the interpretation may result in an agency not intended by the principal” (Seavey, Agency, §18).

Stated otherwise, actual authority (express or implied) may be created “by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal’s account” (Restatement [Second] of Agency §26 [1958]; *see also* Comment a [manifestation of authority, not the intent of the principal controls]).

It is well settled that a trier of fact in an evidentiary hearing has the unique ability to make credibility assessments based upon its opportunity to view the witnesses, hear their testimony and observe their demeanor (*Matter of Piterniak*, 16 AD3d 513 [2d Dept 2005]; *Jacoby, M.D., P.C. v Loper Assocs.*, 249 AD2d 277 [2d Dept 1998]).

In the instant case, the court is presented with two drastically different versions of the events of November 7, 2007. Gaetana and Nathan argue that the stipulation should be set aside because they did not authorize Mr. Giaimo to execute the stipulation on their behalf. Their claim, however, is contradicted by the testimony of Messrs. Giaimo, Oleske and Swick, which the court finds to be more credible. The testimony of Gaetana and Nathan was self-serving and contrived and also contradicted by the documentary evidence, consisting of numerous e-mails and notes. They testified in generalities regarding the events of November 7th - there was “chaos” -it was “loud.” At the hearing, Gaetana and Nathan both displayed selective memory and forgetfulness. On cross-examination, when Nathan did not know if he did or said something, he challenged counsel to provide him with documentary proof which would confirm whether he,

in fact, had. It was a thinly-veiled, yet almost masterful, attempt to ascertain whether counsel did, in fact, have contradictory evidence. As to Gaetana, at one point, the court advised her counsel to stop leading on direct testimony because credibility would certainly be a factor to be considered.

Additionally, the evidence shows that Nathan Celauro directed the day-to-day operations of his mother's lawsuits. He had become a quasi-attorney. He was familiar with discovery requests, pre-trial conference orders, motions for summary judgment, notices of appeal, and the difference between a summons with notice and a summons with complaint. At one point, he even suggested that a new lawsuit with him as a party be commenced to insure that he would be able to participate in depositions. His sophistication regarding legal matters was in fact remarkable. Moreover, Nathan believed he and his mother were waging war on John Celauro and 4C. He described his mother as General Eisenhower and himself as General Patton. In this war against John Celauro, Mr. Giaimo took instructions from Nathan because his marching orders from Gaetana were to do what Nathan wants. In other words, Gaetana wanted what Nathan wanted.

On November 7, 2007, the testimony, both oral and documentary, shows that Nathan desperately wanted his job back. Mr. Swick, John Celauro's attorney, advised Mr. Giaimo that the only way John would even entertain a discussion about rehiring Nathan was if the removal proceeding was discontinued. Nathan argued that his mother did not even want him to work at 4C. In fact, however, the testimony shows she actually wanted more for him, she wanted him on the board of directors. Gaetana testified on cross-examination that she might have known the document was a stipulation of discontinuance, but she claimed she did not know it was with

prejudice until her new attorney so advised. In addition, curiously, upon learning that Nathan would not be rehired, neither Gaetana nor Nathan contacted Mr. Giaimo to tell him to go full speed ahead with the removal proceeding.

There is no dispute that Nathan and Gaetana were vacillating regarding the stipulation. That is what prompted Mr. Swick to have Mr. Oleske reaffirm consent before filing it. Mr. Giaimo testified that Nathan often changed his mind and it drove Mr. Giaimo crazy and frustrated him. Nevertheless, Gaetana, by deferring to Nathan, assented to the stipulation twice during the meeting, once upon its signing and again when Mr. Oleske asked them to confirm their approval of the stipulation as demanded by Mr. Swick. Thus, the court concludes that Mr. Giaimo had actual authority to sign the stipulation.

Accordingly, the only other issue the court must consider is whether the authority was obtained under duress. In order to show duress, circumstances must be shown which prevented the exercise of free will (*Matter of Kanter*, 209 AD2d 365 [1st Dept 1994]). Nathan Celauro, in fact, testified that no one could tell his mother what to do, she made up her own mind. Nathan testified as to his mother's strong will. The testimony shows that Gaetana was an educated woman who worked in business. Gaetana herself testified that she was not affected by Mr. Giaimo's behavior, *i.e.*, cursing and screaming, because she was used to it. Thus, Gaetana has failed to show that the authority Mr. Giaimo had was obtained under duress. Her argument that Mr. Giaimo bullied her because he threatened to no longer represent her is meritless. She testified that prior to November 7th she was already dissatisfied with him because she felt he was not properly representing her interests. Also, before she claims she realized the stipulation ended the removal proceeding, she went out and retained a new attorney. In sum, Gaetana failed to meet her burden of proof on the issue of duress.

Having found that Mr. Giaimo had actual authority to sign the stipulation of discontinuance and that it was not obtained under duress, it is not necessary for the court to consider the issue of ratification.

The fact that Nathan did not get his job back is of no significance in determining whether the stipulation is valid. A court will not set aside a stipulation simply because in hindsight it turns out to be improvident (*Town of Clarkstown v M.R.O. Pump & Tank, Inc.*, 287 AD2d 497 [2d Dept 2001]). The fact that Nathan was not rehired has no bearing on whether Mr. Giaimo was clothed with authority.

Accordingly, the motion is denied in its entirety.

Settle decree.

Dated: September 25, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court