

AMP Servs. Ltd. v Walanpatrias Found.

2011 NY Slip Op 30351(U)

February 14, 2011

Supreme Court, New York County

Docket Number: 106462/04

Judge: Barbara R. Kapnick

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

PRESENT: Kapnick
Justice

PART 30m

AMP Services Limited

INDEX NO. 106462/04

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

Walan Patricia's Foundation

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion are decided
in accordance with the
accompanying memorandum decision*

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

FILED

FEB 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/14/11

[Signature]
BARBARA R. KARNICK J.S.C.
J.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----X
AMP SERVICES LIMITED as Trustee of
THE WALTER AND ANNA BRONNER TRUST,
as assignee of the Estate of Harry
JOSEPH, deceased, as assignee
of PETER BRONNER, MONICA BRONNER
KRANEPOOL, ROBERT BRONNER and KARIN
BRONNER,

DECISION/ORDER

Index No. 106462/04
Motions Seq. Nos.
008 & 011

Plaintiff,

-against-

WALANPATRIAS FOUNDATION a/k/a
DORAW and WALANPATRIAS SIFTUNG,

FILED

FEB 15 2011

Defendants.

-----X
BARBARA R. KAPNICK, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This action arises from the allegedly fraudulent transfer of a stock portfolio valued in excess of \$98,000,000 (the "Bronner Portfolio") from Lehman Brothers, Inc. ("LBI"), with principal offices in New York, to Lehman Brothers International (Europe) ("LBIE"), with principal offices in London.

Procedural History

Plaintiff AMP Services Limited ("AMP"), as trustee of the Walter and Anna Bronner Trust (organized under the laws of the Isle of Jersey, officially referred to as the Bailiwick of Jersey) brought an Order to Show Cause for a preliminary injunction which this Court signed on April 27, 2004 seeking to enjoin the Walanpatrias Foundation a/k/a DORAW and Walanpatrias

Siftung (collectively "Walanpatrias"), LBI, LBIE and Depository Trust & Clearing Corporation ("DTCC"), all of whom were originally named as defendants in this action, from (1) taking any action to facilitate the transfer to any other financial institution of any investment management account held in the name of Walanpatrias or any entity or individual affiliated with Walanpatrias, including but not limited to the investment management account originally held under account number 739-96019 (the "Doraw Account") and the subsequent transfer designated BKR 229 FFC: 022-35030 and all successor accounts; and (2) transferring, collateralizing, assigning and/or disposing of any securities, cash and assets including funds received from the sale of any securities held in the Doraw Account or taking any acts that would diminish or jeopardize the value of the assets in the Doraw Account, other than for the purpose of purchasing securities to be held in the Doraw Account, during the pendency of this lawsuit.

In signing the Order to Show Cause, this Court issued a temporary restraining order (the "TRO") enjoining the defendants from "transferring, collateralizing, assigning, and/or disposing of any funds received from the sale of any securities, cash, and assets including funds received from the sale of any securities

held in the Doraw Account, or taking any acts that will diminish or jeopardize the value of the assets in the Doraw Account, other than for the purposes of purchasing securities to be held in the Doraw Account."

Counsel for plaintiff, LBI and LBIE subsequently entered into a Stipulation and Order dated May 21, 2004 (the "Stipulation") which provides, in relevant part, as follows:

2. LBI agrees, subject to the provisions of Paragraph 14 herein, that the injunction bars it from taking, or permitting to be taken through it, any action or issuing instructions to any other entity, including but not limited to Depository Trust & Clearing Corporation and/or Depository Trust Company, and/or Cede & Co., their respective affiliates, successors, and assigns (hereinafter collectively, "DTCC"), that would have the effect of disbursing, removing, transferring, conveying, assigning, pledging, hypothecating, selling, concealing, and/or secreting (hereinafter collectively, "Transfers" or "Transferred") any assets, securities, funds and/or property that may be held on account for or on behalf of the Judgment-Debtor to any entity whatsoever, including but not limited to the Judgment-Debtor itself. LBI represents that it has the ability to prohibit Transfers out of the DTCC accounts containing securities referable to the Judgment Debtor's accounts at LBI and LBIE, and LBI acknowledges it is obligated under this paragraph to exercise that ability...

* * *

14. Nothing set forth herein shall prohibit the trading of the assets within the aforementioned accounts provided that: (a) any U.S. securities sold are sold for immediate reinvestment in U.S. securities of reasonably equivalent value at the time of the sale; and (b) none of the sale proceeds or newly-purchased

U.S. securities are Transferred out of the accounts in which the assets are currently maintained.

By Decision/Order under motion sequence number 001 dated February 7, 2005, this Court granted plaintiff's motion for a preliminary injunction to the extent of continuing the TRO pending this Court's determination of Walanpatrias's then-pending motion to dismiss the Second Amended Complaint. That motion was decided by Decision/Order under motion sequence number 003 dated March 2, 2006, in which this Court dismissed all but the first cause of action for fraudulent conveyance, and scheduled further oral argument on that portion of defendant's motion seeking to vacate the TRO (as well as oral argument on an Order to Show Cause by plaintiff for separate injunctive relief, which was subsequently denied and is not at issue herein).

By Decision/Order dated March 13, 2006 issued in accordance with the decision dictated on the record on said date, this Court denied defendant's motion seeking to vacate the TRO pending the resolution of this action or further Order of this Court.¹

¹ Both decisions were unanimously affirmed by the Appellate Division, First Department (34 AD3d 231 [2006]).

Plaintiff now moves by Order to Show Cause under motion sequence number 008 signed on October 7, 2008, for an order pursuant to Judiciary Law § 753(A)(3) and 22 NYCRR § 130-1.1, (1) finding that the conduct of Walanpatrias was in violation of this Court's April 27, 2004 and May 21, 2004 Orders, and was calculated to, or actually did, defeat, impair, impede or prejudice the rights or remedies of plaintiff, warranting Walanpatrias to be held in civil contempt and (2) entering an order:

(i) directing Walanpatrias to pay the cash value of the assets improperly transferred from U.S. securities into non-U.S. securities, at the value of the U.S. securities at the time of transfer, into an account under the direct control of this Court, or to post a bond with this Court in that amount;

(ii) ordering Walanpatrias to refund the money paid to Pier Furno, the manager of the Doraw Account, or his company, FCCP Management, from the frozen account to the same account under the direct control of this Court, or to post a bond with the Court in that amount;

(iii) ordering Pier Furno to be removed as Walanpatrias's investment advisor immediately, prohibiting Pier Furno from having any control over the assets pending the outcome of this action and prohibiting Walanpatrias from compensating Pier Furno in the future;

(iv) directing that Pier Furno's deposition be immediately reopened so that he can be questioned as to his management of this account and receipt of payments from the frozen Doraw Account and that all of AMP's costs associated with such deposition, including attorneys' fees, be borne by Walanpatrias;

(v) directing a representative of Walanpatrias to be produced immediately in the United States for a deposition as to the alleged improper transfers of assets from U.S. securities to non-U.S. securities and improper withdrawals from the Doraw Account and that all of AMP's costs associated with such deposition be borne, including attorneys' fees, by Walanpatrias;

(vi) directing Walanpatrias to produce all of its monthly statements for the Doraw Account and other communications with LBI, LBIE and Pier Furno;

(vii) allowing AMP to question LBI about its communications with Walanpatrias on the subject of the transfer of assets from U.S. securities to non-U.S. securities and its maintenance of the account and compliance with this Court's orders, and requiring LBI to produce all records regarding its efforts to comply with this Court's orders and all communications with Walanpatrias, LBIE or Pier Furno regarding the Doraw Account; and

(viii) awarding any and all such further relief as this Court deems just and appropriate, including costs and attorneys'

fees for investigating the violations of this Court's orders and bringing this motion as sanctions for Walanpatrias's frivolous conduct.

Defendant Walanpatrias opposed the Order to Show Cause and cross-moved for an order (1) pursuant to CPLR 6312(b), requiring plaintiff to provide an appropriate undertaking in an amount to be fixed by the Court (which defendant requested be not less than \$30 million) to pay Walanpatrias for all damages and costs it may incur as a result of the April 2004 TRO and the May 2004 Stipulation in the event that it is finally determined that plaintiff was not entitled to preliminary relief in this proceeding; (2) pursuant to CPLR 6314, modifying the April 2004 TRO so as to permit Walanpatrias to request from the London bankruptcy administrator for LBIE that Walanpatrias's property, which is presently being held by LBIE as custodian, be transferred as soon as possible to a successor custodian to be selected by Walanpatrias, and to permit Walanpatrias to change the custodian for these assets at any time upon giving five business days notice to plaintiff; and (3) pursuant to CPLR 3214, modifying the May 2004 Stipulation to permit the custodian of Walanpatrias's assets to invest such assets in any investments it considers prudent.

There is no dispute that in or about January 2008, a significant portion of the assets at issue were invested in the AMBIX Fund, an Irish mutual fund traded on the Irish Stock Exchange. Defendant refutes any suggestion that such an investment constituted a violation of this Court's orders because the Fund is invested almost exclusively in U.S. securities and because LBIE remains the custodian of record of the account which holds the shares of AMBIX. Defendant further argues that plaintiff cannot establish that it was damaged as a result of the transfer at issue.²

Plaintiff, on the other hand, contends that this Court's Order was clearly violated because LBIE, on behalf of Walanpatrias, sold U.S. securities and failed to immediately reinvest the proceeds into U.S. securities as specifically required by paragraph 14 of the May 21, 2004 Stipulation and Order. Plaintiff further contends that the custodian is no longer LBIE but rather AMBIX, and that the obvious purpose of the transfer of the funds was to remove the assets from Walanpatrias's creditors and to place the funds outside of this Court's control, contrary to the intent of the TRO and Stipulation and Order.

² Defendant contends that the transfer to AMBIX constituted a sound investment.

There is also no dispute that defendant Walanpatrias paid Pier Furno a 'management' fee out of the Doraw Account. Defendant argues that the payment to Furno was a contractual obligation under the terms of a contract entered into years before the entry of the preliminary injunction, and was required in order to facilitate the trading of securities. Plaintiff, however, contends that the payment violated the TRO and the Stipulation and Order since those Orders made no provision for the payment of such fees.

This Court issued an Interim Order dated February 25, 2009 resolving several of the issues, and finding, *inter alia*, that the "transfer of the funds to AMBIX constituted a clear violation by LBIE of this Court's Order, since AMBIX is an Irish mutual fund." Defendant, however, argued that there was no basis to find Walanpatrias in contempt because LBIE had absolute authority and discretion to make any investment on behalf of Walanpatrias.

This Court found that there were "questions of fact as to what extent defendant Walanpatrias authorized, directed and/or ratified the transfer to the Irish mutual fund" and directed the parties to appear for a hearing on dates set in April of 2009.

This Court also determined that those portions of plaintiff's motion "seeking to hold Walanpatrias in contempt, to

direct Walanpatrias to pay the cash value of the assets transferred into an account under the direct control of this Court, to refund the money paid to Furno or his company and to remove Furno as Walanpatrias's advisor [would be] held in abeyance pending the hearing. Likewise, that portion of defendant's cross-motion seeking to modify the TRO and Stipulation and Order to permit the transfer of the Doraw Account to a successor custodian [were] held in abeyance pending the hearing or further so-ordered Stipulation of the parties."

That portion of the cross-motion seeking an order requiring plaintiff to post an undertaking was denied, as this Court found that defendant had failed to establish a change in circumstances warranting said relief.³

Due to problems scheduling the pre-hearing depositions of Mr. Furno and Gislhaine Whyte, one of the directors of Walanpatrias, the hearing was adjourned to May 14 and 15, 2009. On May 14, this Court specifically declined to sign an Order to Show Cause presented by plaintiff for an order "finding that additional conduct of Walanpatrias and/or its counsel since October 7, 2008 warrants defendant to be held in civil contempt

³ As noted, *supra*, the preliminary injunction, which was never subject to an undertaking, was upheld on appeal.

and entering into an order pursuant to CPLR 3126 for Walanpatrias' failure to produce Mrs. Gislhaine Whyte for a deposition in the United States prior to the hearing on AMP's contempt motion."

The hearing on the Order to Show Cause for contempt was continued on June 12, 2009 and plaintiff subsequently moved by Notice of Motion under motion sequence number 011 dated June 25, 2009, for an order sanctioning Walanpatrias and its counsel, pursuant to 22 NYCRR § 130-1.1, for frivolous conduct concerning: (1) misrepresentations to AMP and the Court regarding Walanpatrias's investments in the Doraw Account, and the existence and availability of account information, which proved to be demonstrably false; (2) the presentation of fabricated justifications for Walanpatrias's repeated refusal to produce Mrs. Whyte for her court-ordered deposition in the United States, which Mrs. Whyte's own sworn testimony demonstrates were pretextual; (3) obstructionist conduct with respect to discovery from Mr. Furno; and (4) blatant violations of this Court's July 11, 2006 Order Governing the Exchange of Confidential Information (the "Confidentiality Order") by using AMP's confidential information in multiple other jurisdictions, and presenting frivolous arguments in defense of such violations.

The hearing continued on July 7, 2009 at the conclusion of which this Court permitted defendant to submit papers in support of its application to terminate plaintiff's contempt proceedings at the close of plaintiff's evidence. Defendant's main argument was that plaintiff's potential remedies herein were not impaired by the investment in the AMBIX Fund, nor did it in any way prejudice any remedies that AMP had with respect to the assets that were held in the Doraw account.

The parties submitted additional papers on this application and AMP's cross-application alleging that based on the factual admissions contained in the documents provided and the testimony adduced up to that point, plaintiff had proven its case and thus there was no reason to go forward any further. Oral argument was heard on those applications and other motions on September 11, 2009, at which time this Court, *inter alia*, precluded defendant's proposed expert, Professor James S. Rogers, from testifying. The only other possible witness defendant considered producing was Paul-Marie Jacques, another director of Walanpatrias.

The sanctions motion (mot. seq. no. 011) was deemed fully briefed at that time and was marked submitted after a conference call on September 21, 2009.

Defendant never produced Mr. Jacques to testify, but did submit in mid-October 2009 two additional affidavits and a memorandum of law in support of its submission of additional evidence opposing plaintiff's contempt proceeding. AMP then submitted a memorandum of law in opposition to Walanpatrias's submission, and the contempt Order to Show Cause (mot. seq. no. 008) was finally marked submitted on October 30, 2009.

This Court also received a great deal of correspondence from counsel for both sides in the Spring of 2010 regarding whether this Court should stay its decision as to plaintiff's motions for contempt and sanctions pending the resolution of AMP's appeal of related litigation in Florida. On April 28, 2010, this Court held a session to discuss whether or not such a stay would be appropriate. This Court has determined that the resolution of the ongoing litigation in Florida does not demand a stay nor will its resolution have an affect upon the outcome of the motions presently being decided by this Court. As such, it is appropriate that this Court decide the contempt and sanctions motions at this time.

Discussion

1 - Civil Contempt

This Court has the power to punish "a neglect or violation of duty, or other misconduct, by which a right or remedy of a

party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced." Judiciary Law §753(A).

To sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that party had knowledge, and that as a result of the violation a right of a party to the litigation was prejudiced.

Incorporated Vil. of Plandome Manor v. Ioannou, 54 AD3d 365, 366 (2nd Dep't 2008); see also, *McCain v Dinkins*, 84 NY2d 216 (1994).

"'The party seeking to hold another in civil contempt bears the burden of proof' to establish the offense by clear and convincing evidence." *Levin v Tiber Holding Corp.*, 277 F3d 243, 250 (2d Cir. 2002) (citing *Beverina v West*, 257 AD2d 957 [3rd Dep't 1999]).

"In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate a 'reasonable certainty' that a violation occurred." *Levin v. Tiber Holding Corp.*, *supra* at 250. "In order to sustain a finding of civil contempt, it is not necessary that the

disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party." *Doors v. Greenberg*, 151 AD2d 550, 551 (2nd Dep't 1989); see also, *Gucci v Gucci*, 213 AD2d 356 (1st Dep't 1995).

It is undisputed that Walanpatrias had actual knowledge of the TRO and Stipulation. Plaintiff argues that the TRO and the Stipulation were violated by LBIE's actions and that Walanpatrias ratified those violations, resulting in prejudice to the rights and remedies of plaintiff in this action.

The only New York case cited by plaintiff in which a party was found to be in civil contempt for ratifying another party's violation of an injunction is a case in which union officials were found to have ratified the union members' decision to implement a walkout in violation of a court ordered injunction. *New York Times Co. v. Newspaper and Mail Deliverers' Union*, 740 FSupp 240, 243 (S.D.N.Y. 1990). The Court in *New York Times* never mentions the application of the "ratification" theory outside of the labor context, and in fact, there is no such precedent to do so in the State of New York.

The relationship between Walanpatrias and LBIE is inherently different from that found between a union leader and that union's membership. A union leader has clear authority regarding union members and the call for a strike. In the present context, LBIE was operating under a discretionary mandate in the management of the Doraw Account. It was apparently rare that Walanpatrias would participate at all in the investment decision-making process. Given the lack of applicable precedent and the differing circumstances, it would be inappropriate to apply a ratification theory to the present contempt motion.

Nonetheless, the plaintiff seeks to have this Court find the defendants in contempt for (a) the investment in the AMBIX fund, (b) the failure to immediately reinvest the proceeds of the sales of U.S. securities in new U.S. securities of equivalent value and (c) the payment of management fees out of the Doraw Account.

(a) The Investment in the AMBIX fund

The primary issues for this Court to consider here are whether or not Walanpatrias authorized LBIE's violation of this Court's Order, and if so, whether that violation was calculated to or did result in prejudice to the rights and remedies of plaintiff.

Walanpatrias claims that no such authorization of the investments in AMBIX took place. Mrs. Whyte testified that Mr. Furno did not inform her before transferring the funds to AMBIX and that in the case of a new investment, Mr. Furno "doesn't normally let us know ahead of time." (June 12, 2009 Hearing, 90:25-91:3). Mrs. Whyte further testified that once she became aware of the investment in AMBIX she contacted Mr. Furno, and was assured that the investment was approved by an LBIE compliance officer and complied with this Court's Order (June 12, 2009 Hearing, 94:2-25).

While AMP does point to inconsistencies in the testimony of both Mr. Furno and Mrs. Whyte as to when discussions between them regarding the AMBIX transaction took place and the substance of those conversations, there is no testimony or evidence presented that would purport to affirmatively show that Walanpatrias authorized or directed these investments. The plaintiff argues that because no objection was raised by the defendant while the three transactions took place between December 2007 and May 2008, there is an implication of authorization.

However, that is not sufficient to satisfy the clear and convincing standard necessary to sustain a finding of contempt.

Thus, this Court finds that the plaintiff has failed to meet its burden as to Walanpatrias's role in the AMBIX investment by LBIE, and, accordingly, it is not necessary for the Court to reach the additional elements of this alleged violation.

(b) Failure to immediately reinvest in U.S. securities

There is no dispute that there were delays in the time that passed between the sale of U.S. securities by LBIE and their subsequent reinvestment. The Stipulation provided that "[n]othing set forth [t]herein shall prohibit the trading of the assets ... provided that: [a]ny U.S. securities sold are sold for immediate reinvestment in U.S. securities of reasonably equivalent value at the time of the sale." Accordingly, LBIE's failure to immediately reinvest in U.S. securities after sales of U.S. securities was a technical violation of the Stipulation.

Once again, since LBIE managed the Doraw Account, it is not immediately clear what role Walanpatrias played in this violation. Furthermore, "[a] defense to civil contempt is that the alleged contemnor was 'reasonably diligent and energetic in attempting to accomplish what was ordered,' (citation omitted) but was unable to comply with the order, (citation omitted)." *In re Flushing Hosp. and Medical Center*, 395 B.R. 229, 241 (Bkrtcy

EDNY 2008). This Court must determine whether (1) Walanpatrias authorized the failure to immediately reinvest; (2) whether Walanpatrias was reasonably diligent in attempting to comply with this Court's Order, and (3) whether the alleged authorization resulted in prejudice to the rights and remedies of plaintiff.

Plaintiff argues that Walanpatrias had knowledge of the failures to reinvest and that Walanpatrias's failure to correct the violations or to order Mr. Furno to comply with the Stipulation constitutes approval of the subsequent violations. Plaintiff points to Mr. Furno's deposition testimony as to discussions he had with Walanpatrias regarding his failure to reinvest as evidence of Walanpatrias's knowledge (May 5, 2009 Furno Dep., 387:1-6). Furthermore, plaintiff argues that since Mrs. Whyte carefully reviewed the account statements which reflected the failure to reinvest, she must have known of this failure on Mr. Furno's part (June 12, 2009 Hearing 8:8-10, 24-26, 9:15-22). Mrs. Whyte also testified at her deposition taken in June 2009 that she understood that the requirement to reinvest "immediately" did not allow for a several month delay before reinvesting (June 12, 2009 Hearing 78:15-22). Thus, plaintiff argues, Walanpatrias knew that this failure was a violation of the Stipulation.

While plaintiff put forth a great deal of evidence showing that a violation of this Court's order did, in fact, take place, the mere occurrence of a violation is not sufficient for a finding of contempt. The evidence must show that the alleged contemnor authorized or directed the violation in question. While there is evidence that Walanpatrias knew of the difficulties LBIE and/or Mr. Furno was encountering in adhering to the restrictions imposed by the Stipulation, such evidence falls short of proving clearly and convincingly that Walanpatrias authorized or directed the failure to immediately reinvest in U.S. securities.⁴ Thus, as to the failure to reinvest in a timely manner, the plaintiff has failed to meet the necessary evidentiary burden to warrant a finding of contempt against Walanpatrias.

Accordingly, this Court denies that portion of plaintiff's Order to Show Cause seeking an order directing Walanpatrias to pay the cash value of the assets transferred from U.S. securities to non-U.S. Securities, at the value of the U.S. securities at the time of the transfers into an account under the direct

⁴ Walanpatrias also submitted evidence during the hearing to show the difficulties involved in timely reinvesting in a prudent and responsible manner.

control of the Court, or to post a bond with the Court in that amount.

(c) Payment of management fees out of the Doraw Account

There is no dispute that management fees were paid to LBIE using assets from the Doraw Account. Plaintiff claims that the payment of these fees to LBIE was a clear violation of the TRO's prohibition on transferring any of the assets in the Doraw Account held on behalf of Walanpatrias. Plaintiff further argues that Walanpatrias was aware that removing any funds from the Doraw Account for the payment of bills was a violation of the TRO, regardless of their contractual arrangement with LBIE. Plaintiff also notes that LBIE charged both a one percent management fee for Mr. Furno's advice and another one percent transaction fee for each trade. Plaintiff argues that these fees were not necessary for the purchase or sale of securities and were therefore not permitted under the TRO.

Walanpatrias argues that the payment of these management fees was necessary in order for the purchase and sale of securities to have occurred at all because they were compensation for the management of the account. Had Walanpatrias failed to pay these fees, defendant propounds, there would have been no

purchases or sales of securities whatsoever. Walanpatrias argues that since the management fees were paid as compensation for researching, executing and monitoring trades, they fall under the TRO's exception for disposing of funds "for the purposes of purchasing securities to be held in the Doraw Account[.]"

While the TRO does not explicitly carve out an exception for the payment of management fees, this Court determines that it was not a violation of the TRO for the assets within the Doraw Account to be used to pay these fees. The language in the TRO could reasonably be interpreted not to be limited only to the moneys used directly for the purchase or sale of the securities themselves, but to include those fees necessary for the execution of those purchases and sales. This Court, in issuing the TRO, did not intend that the Doraw Account no longer be managed or that the ongoing management of the Doraw Account be unpaid.

Thus, Walanpatrias cannot be found in contempt for making those payments, and those portions of plaintiff's Order to Show Cause seeking an order directing Walanpatrias to refund the money paid to Mr. Furno or FCCP Management or to post a bond in that amount; removing Mr. Furno as Walanpatrias's investment advisor; prohibiting him from having any control over the assets pending

the outcome of this action and prohibiting Walanpatrias from compensating him in the future are denied.

2 - Walanpatrias's Cross-Motion

The only portion of the cross-motion remaining to be decided after the Interim Order is that portion seeking to modify the TRO so as to permit Walanpatrias to request from the London bankruptcy administrator for LBIE that Walanpatrias's property, which is presently being held by LBIE as custodian, be transferred to a successor custodian. This relief is granted given the fact that LBIE has been placed in Administration in London, thereby freezing the account and preventing any of that money from being invested or traded.

If and when Walanpatrias receives permission from the London bankruptcy administrator to transfer the funds presently being held by LBIE as custodian, and prior to any transfer, Walanpatrias is directed to give AMP ten business days notice of the identity of the successor custodian so that AMP will have the opportunity to bring any objections it may have regarding the new custodian to this Court.

3- Sanctions (mot. seq. no. 011)

This Court may, in its discretion,

award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct.

22 N.Y.C.R.R. 130-1.1(a).

Conduct is considered frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

22 N.Y.C.R.R. 130-1.1(c).

(a) Misrepresentations to AMP and the Court regarding Investments in the Doraw Account and the Availability of Account Statements

Plaintiff claims that Walanpatrias's counsel repeatedly falsely represented to this Court that the AMBIX Fund was invested only in U.S. securities. Plaintiff evidences this conduct with four statements made by Walanpatrias's counsel, by letter and in open court.

(1) On September 8, 2008, Walanpatrias's counsel represented to this Court that their "understanding of this investment, this is, I guess, a closed end fund that trades in U.S. securities. So in my understanding - I don't have the prospectus with me - is that it trades entirely in U.S. securities..." (September 8, 2008 Hearing, 8:22-26).

(2) On October 2, 2008 Walanpatrias's counsel stated in a letter to AMP's counsel that their "client has been informed that the investment refers to a Lehman fund that is invested in U.S. securities."

(3) Then, in a letter from Walanpatrias's counsel to this Court dated October 3, 2008, Walanpatrias stated that "[w]hen the Foundation inquired about the AMBIX Investment, it was assured

that the portfolio was a Lehman fund invested solely in U.S. securities and the AMBIX Investment had been approved by LBIE's compliance officer." Walanpatrias's counsel further noted that "[a]n investment in a Lehman Brothers fund that invests solely in U.S. securities does not violate the intent of the [Stipulation Order.]"

(4) Lastly, on October 7, 2008, counsel for Walanpatrias represented to this Court that the "first time that AMBIX showed up is the January 2008 statement, and when that happened our clients immediately questioned the investment advisor because they were interested, they wanted to know whether the LBIE was sub was a subfund of the fund they've been all along. It's been approved by the LBIE officer and every fund in that subfund is U.S. securities these are all liquidable to them." (October 7, 2008 Hearing, 7:24 - 8:7).

Plaintiff argues that Walanpatrias's counsel's aforementioned assertions are belied by the AMBIX Fund's prospectus, the sworn affidavit and testimony of Mrs. Whyte as well as the testimony of Mr. Furno. The AMBIX Fund's prospectus, which was produced by Walanpatrias to plaintiff prior to all of these statements, states that the fund invests "in common stocks

which are listed or traded on Markets in Europe, North America, South America, Asia and Australia." Plaintiff argues that Walanpatrias's September 8, 2008 statements as to the makeup of the AMBIX Fund were, thus, knowingly false.

While counsel for Walanpatrias did qualify their statement and noted that they did not have the prospectus with them at the hearing, they do not argue that they were unaware of the prospectus' contents; nor is it likely that any such argument would be persuasive given the pivotal importance of the makeup of the AMBIX Fund. Their possession of the prospectus is strong evidence of Walanpatrias's counsel's knowledge of the investments making up the AMBIX Fund and, as such, the various statements made by defendant's counsel were false statements of material facts.

Plaintiff also refers to Mrs. Whyte's affidavit dated November 5, 2008, annexed to defendants' Notice of Cross-Motion, in which she states that immediately after receiving the January 2008 Doraw Account statement, she was told by Mr. Furno that the AMBIX Fund "was invested in US securities with only one very minor exception." Mrs. Whyte also testified to that same effect before this Court on June 12, 2009.

Accordingly, plaintiff argues that Walanpatrias's counsel's representations as to their client's knowledge in their October 2 and October 3, 2008 letters, as well as their October 7, 2008 statement in Court are untrue.

Walanpatrias's counsel argues that nowhere in its October 2, 2008 letter did it state that the AMBIX Fund was invested "solely" in U.S. securities. Counsel further argues that an LBIE compliance officer did approve the AMBIX investment and that their statements in the October 3, 2008 letter and on October 7, 2008 were based upon those assurances. That argument, however, does not excuse their statements on October 3, 2008 or October 7, 2008 regarding what Walanpatrias was told about the AMBIX investment.

Walanpatrias's counsel also points out that Mr. Furno stated in his March 25, 2009 deposition that when he first spoke with Mrs. Whyte about the AMBIX Fund, he did not discuss its investments in non-U.S. securities with her. (March 25, 2009 Furno Dep., 173:3 - 174:16). However, while there are some inconsistencies between the testimony of Mr. Furno and Mrs. Whyte, both of them have made clear statements on the record that Mr. Furno never told Mrs. Whyte that AMBIX was invested solely in

U.S. securities. There is no evidence refuting this testimony, and as such, the October 3, 2008 letter and the statements made before this Court on September 8 and October 7, 2008 contain representations of material fact which the Court finds were false when made, warranting sanctions.

As to the account statements for September through December 2008, counsel for Walanpatrias represented in a letter to this Court dated January 12, 2009, a letter to plaintiff's counsel dated January 23, 2009 and at conferences before this Court held on January 16, and February 17, 2009 that Walanpatrias did not have these statements. It appears, however, that Mrs. Whyte did receive informal copies of statements obtained from Lehman Live and other sources prior to defendant producing them to AMP.

Defendant represents that its counsel diligently pursued the Linklater's firm which was acting as solicitors for the administrator of LBIE in London, to obtain unofficial statements for the Doraw Account, but were not able to obtain them until February 24, 2009 when Walanpatrias received from AMBIX Capital an informal statement generated by Barclays Wealth purporting to set forth the holdings in the Doraw Account as of February 23, 2009. Counsel for defendant sent these documents to AMP's

counsel on or about March 4, 2009, more than two weeks prior to Mr. Furno's March 25, 2009 deposition.

It appears that Mr. Furno had some of these informal statements generated from other sources prior to that date.

However, it does not appear to this Court that the somewhat delayed production of these statements, due in part to the LBIE crisis and the difficulty in obtaining even informal statements, warrants the granting of costs or the imposition of sanctions.

(b) Walanpatrias's Production of Mrs. Whyte

At a conference held on February 17, 2009, this Court directed a representative of Walanpatrias to be produced for a deposition in the United States within two weeks after the deposition of Mr. Furno in London.

It was always assumed by this Court that the representative to be deposed would be Mrs. Whyte, who had already submitted an affidavit in opposition to the motion for contempt and had much more involvement with Mr. Furno and the issues being raised in these hearings than either of the other two directors of Walanpatrias - Paul-Marie Jacques and Mario Simmen. Moreover,

plaintiff wanted her to testify on its case due to discrepancies between her affidavit and the testimony of Mr. Furno.

By letter dated March 18, 2009, defense counsel for the first time notified this Court that Mrs. Whyte "does not fly", and proposed to produce her instead for a deposition in London, to which she could travel by automobile and train, on March 26, 2009, the day after Mr. Furno's deposition.

When problems relating to the production of documents prior to the depositions interfered with that plan, a conference call was held on March 24, 2009, during which counsel for defendant said that he had "convinced" Mrs. Whyte to travel to New York to appear for her deposition and for the hearing.⁵

At a further conference held on April 13, 2009, counsel for Walanpatrias indicated that Mrs. Whyte had expressed concerns about service of process on her if she came to the United States and raised the possibility of this Court's issuing an order protecting her from being served with process while she travelled to New York.

⁵ Plaintiff argues that this representation was false, noting that Mrs. Whyte testified at her June 8, 2009 deposition that she had only decided to come to the United States for the hearing as of June 4, 2009 (June 8, 2009 Whyte Dep., 27:5-9).

While this Court was working on the form of such a protective Order, defendant's counsel sent a letter to this Court dated May 4, 2009 relating to a phony red-alert that had been sent to the Panamanian office of Interpol by a law firm representing AMP in Panama in an attempted prosecution of Mrs. Whyte in Panama. AMP disputed the information contained in the letters and further noted that the case had nothing to do with the proceedings in this action.

After having extensive discussions with counsel and receiving several drafts from them of proposed orders, this Court issued a four-page "protective" Order on May 7, 2009 to facilitate Mrs. Whyte's appearance for her scheduled deposition in New York on Monday, May 11, 2009 prior to the commencement of the hearing on May 14.

Notwithstanding the issuance of this Order, defendant's counsel then sent a letter to plaintiff's counsel on May 8, 2009 stating that Mrs. Whyte "remains very uncomfortable about traveling to the United States" and offering to provide her for a deposition on Tuesday, May 12 and as a witness for the court proceedings on May 14 and 15 by video-link from Monaco.

On Monday, May 11, 2009, plaintiff's counsel provided an affidavit from AMP's Panamanian counsel, confirming that the allegations contained in the article from one year earlier, which gave defendant's counsel such concern, had been determined to be false by Panamanian authorities, and that there could be no Interpol-related problems for Mrs. Whyte. Nonetheless, due to the time constraints, Mrs. Whyte could not be produced for the hearing on May 14.

At the beginning of the hearing on May 14, 2009, this Court directed counsel for Walanpatrias to produce Mrs. Whyte in person for the continued hearing then scheduled for Friday, June 12, 2009, and for a deposition earlier in that week.

After everyone worked so hard to accommodate Mrs. Whyte, defendant's counsel, Charles C. Kline of White & Case, then writes to plaintiff's counsel on May 27, 2009 stating that the defendant had decided to produce Paul-Marie Jacques as its representative at the hearing instead of Mrs. Whyte, it now appearing to defendant's counsel "that Mr. Jacques [who is a banker] is the appropriate party to address the factual issues as they have been shaped by your presentation thus far."

The Court then held a conference with counsel on the record on June 3, 2009 in which this Court directed in no uncertain terms, that Mrs. Whyte, not Mr. Jacques, appear in person for the hearing the following week.

Mrs. Whyte finally appeared for her deposition in New York on June 8 and 9, and testified before this Court on June 12, 2009.

Plaintiff claims that the numerous excuses for not producing Mrs. Whyte over the course of several months were fabrications designed to deprive plaintiff of the opportunity to question Mrs. Whyte, and to delay and prolong the litigation. Plaintiff specifically refers to Mrs. Whyte's June 8, 2009 deposition transcript which provides in relevant part at page 92:4-22 as follows:

Q: Did you ever express concern to anyone that you might be arrested if you came to the United States?

Mrs. Whyte: I don't know. I don't know what can be done to me.

Q: Do you have concern you might be arrested when you're in Europe?

Mrs. Whyte: No. And I understand the rules of Europe.

Q: You said you expressed concerns about ten days ago about the fact that - that you might be served with legal papers here in the United States. Is that the first time you recall that issue coming up, about ten days ago?

Mrs. Whyte: Yes.

Plaintiff also refers to the following testimony from Mrs. Whyte's deposition (June 8, 2009 Whyte Dep., 17:16-23):

Q: Did Mr. Jacques discuss any other - did you discuss with Mr. Jacques any reasons why you didn't want to come to the United States for your deposition other than your fear of flying?

Mrs. Whyte: No, there was no other reason.

It appears that the concerns raised by defendant's counsel were not, in fact, Mrs. Whyte's concerns, but rather counsel's fabrications.

Walanpatrias argues, on the other hand, that they attempted to substitute Mr. Jacques for Mrs. Whyte because Mr. Jacques, by virtue of being a banker and more intimately familiar with the investments of the AMBIX Fund, would be better qualified to answer questions as to the "improper transfers of assets" and "improper withdrawals from the Doraw Account" than Mrs. Whyte. Under CPLR 3106(d), a party whose director is sought for a deposition may substitute some other person if it wishes so long as it notifies the other party of the substitution no later than ten days prior to the scheduled deposition.

However, under the specific circumstances and history of this case, this Court finds that Walanpatrias's timing in attempting to substitute Mr. Jacques at the eleventh hour, after so many requests for and discussions regarding the production of Mrs. Whyte for a deposition and at the hearing, supports plaintiff's position that this conduct was "undertaken primarily to delay or prolong the litigation," thus warranting the imposition of appropriate sanctions.

(c) Walanpatrias's Conduct Relating to Court-Ordered Discovery from Pier Furno

Plaintiff also seeks sanctions against Walanpatrias for its conduct relating to the court-ordered discovery from Mr. Furno, by failing to disclose a document prepared by Mr. Furno in preparation for his deposition that was provided to counsel for Walanpatrias, failing to produce all the responsive documents to the Court-ordered discovery and for engaging in allegedly obstructionist behavior relating to Mr. Furno's document production and deposition.

Plaintiff claims that counsel for Walanpatrias failed to disclose a document to AMP that Mr. Furno had created in preparation for his deposition. Plaintiff argues that Mr. Furno

repeatedly failed to mention this document when questioned about his preparation for the deposition while counsel for Walanpatrias remained silent, knowingly allowing the witness to perjure himself.

Walanpatrias argues that this issue was laid to rest at Mr. Furno's deposition when the Court-appointed Examiner overseeing the deposition in London ruled that Mr. Furno could not be questioned about the undisclosed document. Furthermore, Walanpatrias argues that they requested that this document be prepared by Mr. Furno months earlier, and not in connection with this deposition. Walanpatrias also claims that it only received the document two days before the deposition and that they did not review or discuss the document with Mr. Furno prior to his deposition.

Although the Court believes that Walanpatrias should have disclosed this document to Plaintiff prior to Mr. Furno's deposition, this issue was resolved by the Examiner at the time of the deposition and no sanctions are warranted.

Plaintiff also seeks sanctions against Walanpatrias for engaging in obstructionist conduct in regard to Mr. Furno's

document production. During Mr. Furno's March 25, 2009 deposition, he testified as to the existence of fact sheets with information relating to the AMBIX Fund's management fees as well as monthly information received from the AMBIX Fund's administrator (the "Discovery Materials"), all of which had not been produced to AMP.

Plaintiff contacted Mr. Furno on March 31, 2009 notifying him that he had not complied with his Court-ordered discovery requirements and listed a series of discovery requests. In a reply dated March 31, 2009, Walanpatrias represented that Mr. Furno had already made a complete production of all documents required under the Discovery Order. The Discovery Materials were ultimately produced, but only after AMP sought intervention by this Court. Plaintiff claims that Walanpatrias obstructed the production of these documents with the purpose of delaying or prolonging the resolution of the litigation and, therefore, sanctions are warranted.

Walanpatrias argues that the discovery request that Plaintiff made in its March 31, 2009 letter to Mr. Furno was a unilateral attempt to expand the required production. When the Discovery Materials were produced, they were accompanied by a

letter from Walanpatrias explaining that Mr. Furno did not believe that the Discovery Materials fell within the descriptions provided in the Discovery Order. Walanpatrias explained that if those documents had been asked for by name earlier, they would have been produced more quickly.

While it appears that the Discovery Documents should have been initially produced by Mr. Furno, the failure to do so is supported by a reasonable argument and does not appear to have been undertaken primarily for the purpose of delaying or prolonging the resolution of the litigation. As such, no sanctions are warranted as to Mr. Furno's discovery production.

Plaintiff further complains that over the course of Mr. Furno's deposition, counsel for Walanpatrias engaged in obstructionist conduct by instructing him not to respond to certain questions. Plaintiff claims that when Mr. Furno's testimony on May 5, 2009 elicited additional information that was not offered in his March 25, 2009 deposition, Walanpatrias objected to follow up questioning, deeming it to be "repetitive." Plaintiff contends that Walanpatrias mischaracterized those lines

of questioning as repetitive in order to hide the inconsistencies in Mr. Furno's story.

Walanpatrias argues that Plaintiff's counsel repeatedly asked questions to which Mr. Furno had already given answers. Given that the deposition was a three day, sixteen hour affair, with breaks in between, Walanpatrias argues that it was entirely reasonable that they should object to unnecessary questions regarding information that had already been given. While Plaintiff has raised some concerns about Walanpatrias's objections, those objections were grounded in valid legal arguments. The instances cited by Plaintiff are not sufficiently compelling to warrant sanctions against counsel for Walanpatrias for obstructionist conduct.

(d) Violation of the Confidentiality Order

On July 11, 2006, this Court issued an Order Governing the Exchange of Confidential Information (the "Confidentiality Order") which, *inter alia*, restricted the use of certain information produced or disclosed over the course of this litigation which was designated as "Confidential". However, this Order also provided that "the usage, dissemination, and disclosure restrictions and obligations set forth herein shall not apply to any information which: (i) was public knowledge when

produced by the Producing Party or has become public knowledge other than as a result of disclosure in violation of this Order."

Plaintiff claims that Walanpatrias violated the Confidentiality Order when it submitted a confidential agreement between AMP and the Internal Revenue Service (the "IRS Agreement") to a court in Liechtenstein on January 22, 2009 by attaching it as an exhibit to its papers. The IRS Agreement was produced by AMP pursuant to the Confidentiality Order and was duly designated as "Confidential." According to plaintiff, Walanpatrias also referenced the IRS Agreement in a February 19, 2009 submission to a court in Monaco. Plaintiff claims that these actions were in direct violation of the Confidentiality Order, warranting sanctions against counsel for Walanpatrias.

Walanpatrias argues that the IRS Agreement had become public knowledge by the time it was used in the Liechtenstein and Monaco actions, and thus falls under the exception carved out in the Confidentiality Order. In an affidavit sworn to on July 31, 2009, Kade Coutain, a non-attorney employee of Chadbourne & Park, LLP, attaches the IRS Agreement and states that Kade Coutain "was able to view the Affirmation of David G. Keyko, dated August 25, 2008 (the "Keyko Affirmation") and the exhibits attached to that affirmation, which was maintained in the public records of the

Court as of March 5, 2009." It appears that the Keyko Affirmation with the IRS Agreement attached as an exhibit was filed with the New York County Clerk's Office on December 3, 2008, thus, according to defendant, making it a public document.

Despite this filing of the IRS Agreement, plaintiff argues that Walanpatrias clearly considered the materials to be "Confidential" because Walanpatrias sought to obtain AMP's permission to use the IRS Agreement in the Monaco proceedings, permission which was never granted. Furthermore, plaintiff argues that Walanpatrias had a duty to seek relief from the Confidentiality Order either from AMP or the Court if there were questions as to the continuing confidentiality of the Agreement.

Walanpatrias argues that its use of the IRS Agreement falls squarely within the exception carved out in the Confidentiality Order for materials which have "become public knowledge other than as a result of disclosure in violation of this Order."

This Court agrees with Walanpatrias that it is not necessary that Walanpatrias prove that it knew the IRS Agreement was part of the public domain when it produced it in the Monaco and Liechtenstein proceedings. The simple fact that the IRS Agreement was filed by AMP with the County Clerk's Office of New York made

it public knowledge, and as such, the restrictions set forth in the Confidentiality Order no longer applied. Therefore, sanctions are not warranted as to this issue.

Accordingly, this Court finds that "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees" is the appropriate award for that conduct determined by this Court in this decision to be sanctionable.

Plaintiff's counsel shall submit to defendant's counsel and to this Court its request for reasonable attorneys' fees and expenses incurred which are specifically referable to defendant's sanctionable conduct, with back up documentation, within 45 days of the date of this Order.

Defendant's counsel shall have 45 days to respond to plaintiff's submission, and plaintiff shall have 20 days to reply.

FILED

FEB 15 2011

NEW YORK
This constitutes the decision of the County Clerk's Office Court.

Date: February 14, 2011



Barbara R. Kapnick
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**