

CDR Creances S.A.S. v Cohen
2011 NY Slip Op 33636(U)
January 20, 2011
Supreme Court, New York County
Docket Number: 109565-03
Judge: James A. Yates
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: James A. Yates
Justice

PART 49

CDK CREANLESS S.A.S.

INDEX NO. 109565-03

- v -

MOTION DATE _____

MOTION SEQ. NO. 031

Maurice Green, et al.

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING
DECISION AND ORDER, DATED 1-20-11

Dated: 1-20-11

James A. Yates J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

----- X
 CDR CRÈANCES S.A.S., as Successor to :
 Societe de Banque Occidentale, : Index No. 109565-03
 :
 Plaintiff, : Motion Seq. 031 & 032
 :
 -against- :
 :
 MAURICE COHEN, SUMMERSON INTL. :
 ESTABLISHMENT, BLUE OCEAN FINANCE, :
 LTD. and IDERVAL HOLDING LTD., :
 :
 Defendants. :
 :

CDR CRÈANCES S.A.S., as Successor to :
 Societe de Banque Occidentale, : Index No. 600448-06
 :
 Plaintiff, : Motion Seq.039 & 040
 :
 -against- : Decision and Order
 :
 LEON COHEN, et al., :
 :
 Defendants. :
 :
 -----X

Hon. James A. Yates, J.S.C.

This decision consolidates and resolves Motion Seq. 031 and 032 under Index No. 109565-03, as well as Motion Seq. 039 and 040 under Index No. 600448-06.

This matter is before the Court on plaintiff's motion for sanctions and to dismiss and/or strike defendants' answers, filed on August 13, 2010. The decision deals with the serious issues of perjury, witness tampering and the creation of false witness statements taken under oath.

Invoking the Court's inherent power to sanction parties who engage in bad faith conduct that abuses the judicial process, plaintiff claims that defendants have repeatedly lied under oath

and obstructed discovery. Plaintiff contends that the evidence before the Court is indicative of a broad conspiracy and cover-up which transcends mere perjury and witness tampering. Thus, plaintiff claims that the alleged fraud is intrinsic to all prior proceedings. Plaintiffs' allegations of misconduct can be categorized into four categories: (1) allegations that the Cohens and other co-defendants hid critical evidence from them and the Court; (2) allegations that the Cohens and Allegria Aich manipulated certain witnesses to give false testimony under oath; (3) allegations that these same witnesses gave false testimony; and (4) allegations that critical evidence was forged and falsified.

Defendants maintain that any alleged false information is subject to impeachment and can be challenged at trial, that a prior Florida "fraud on the court" holding has no preclusive effect, that other factual matters are irrelevant to this case, and that there was no fraud on the court.

In this action, the Court is asked to decide whether the defendants Maurice Cohen, Leon Cohen, Sonia Cohen, Allegria Aich and Robert Maraboeuf have perpetuated a fraud on the Court sufficient to warrant a default or dismissal with prejudice. The Court held an evidentiary hearing on November 29 and 30, 2010 on the motion. The following are the Court's findings of fact and conclusions of law.

BACKGROUND

A. Statement of Facts

The facts of this case (*CDR Créances v Leon Cohen, et al.*, Index No. 600448-2006) and its companion case, *CDR Créances v Maurice Cohen, et al.*, Index No. 109565-2003, have been previously detailed in prior decisions. This action arises from loans made by the Societe de Banque Occidentale ("SBDO"), a French bank and CDR's predecessor in interest, to Euro-American Lodging Corporation ("EALC"), a Delaware corporation, its shareholders, S.N.C. Summersun et cie, and Summersun International Establishment, a Lichenstein trust (collectively, "Summersun") for the purpose of converting a multi-story building located at 135 West 52nd Street and operating it as the Flatotel, part of the "Flatotel " hotel franchise. The borrowing entities were allegedly controlled by Maurice Cohen and his son, Leon Cohen.

The parties entered into a May 1991 Loan Agreement under which SBDO provided an \$87 million loan to acquire and renovate

the property. The loan was collateralized by two recorded mortgages on the property. EALC also pledged additional collateral, including all leases and rents relating to the property and all of its personal property. The loan agreement included a forum selection clause that conferred exclusive jurisdiction over disputes in the Paris Commercial Court. SBDO received loan guaranties from EALC's shareholders. Leon Cohen managed the Flatotel in New York until its sale. In 2000, the defendants sold the Hotel and generated proceeds of \$33 million.

This litigation arises out of the alleged breach of two Pledge Agreements issued in 1991 and now held by plaintiff CDR Creances. According to the Complaint, Maurice Cohen and his son, Leon Cohen, and their co-conspirators/co-defendants used nominees and shell companies formed in tax haven jurisdictions, including the British Virgin Islands, the Bahamas, Lichenstein, Panama and Switzerland, to transfer the loan proceeds and to conceal their assets to avoid repaying the loan.

B. Procedural History

The procedural history set forth in this decision is limited to those matters directly relating to this motion. This case is connected to other proceedings in France, New York and Florida.

In early 1992, SBDO stopped funding construction work on the hotel based on an alleged default. On August 25, 1992, SBDO declared EALC in default of the loan agreement, accelerated the loan, and demanded immediate payment of \$77, 501,809.59 in outstanding loan charges. No payments of interest or principal have ever been made by EALC under the loan agreement. Drawn out litigation between CDR and EALC began in the Paris Commercial Court on October 23, 1992, and culminated in a judgment, dated February 2, 2003, awarding CDR the principal sum of \$95,837,522 (inclusive of an offset in favor of EALC).

In May 2003, CDR commenced a foreclosure proceeding, and procured an order appointing Andrew L. Herz, Esq., as temporary receiver (the "Receiver"). The Receiver was authorized, without further order, to collect all revenues, make most reasonable and necessary ordinary repairs, and incur and pay operating expenses in the ordinary course of business. Macson Express S.A. ("Macson") continued to operate the property and collect the revenues, and then wired the funds to the temporary receiver.

In September 2003, CDR commenced an action in New York State Supreme Court to recognize the French judgment and to attach EALC's assets in New York. The state court granted summary

judgment to CDR, and in April 2005, entered a judgment in favor of CDR against EALC in the principal amount of \$95,838,152. The judgment referred the computation of unpaid interest to a referee. After the issuance of the referee's report, the Supreme Court entered a second judgment, dated October 11, 2005, for \$112,159,088.41 in interest, yielding a combined judgment of \$207,997,240.41. The interest judgment was modified on technical grounds by the Clerk of the Court on December 9, 2005, pursuant to the Supreme Court's decision dated December 8, 2005.

On May 27, 2005, CDR commenced a second action to foreclose its mortgages on the property in New York Supreme Court. The record does not reflect the fate of the 2003 foreclosure suit, but the receiver remained in place throughout, and another entity allegedly controlled by the Cohens, Macson, continued to manage the property. On October 11, 2005, the New York court granted summary judgment in favor of CDR, and dismissed all of the defenses to foreclosure raised by EALC and the other defendants. A judgment of foreclosure was entered on December 1, 2005, and a foreclosure sale was scheduled for January 4, 2006. The Appellate Division, First Department, however, stayed the foreclosure sale pending the outcome of appeals filed by EALC and Macson. The Appellate Division did not stay the collection of the New York Judgment. The Appellate Division has now been stayed from rendering a decision on the appeal of the foreclosure order by reason of CDR's filing on June 13, 2006 of an involuntary Chapter 7 petition.

The 2003 action (Index No. 109565-03) before Justice Tolub asserted six causes of action, sounding primarily in tort. On May 9, 2006, CDR filed another complaint in New York Supreme Court (Index No. 600448-06), asserting 38 causes of action based on fraud, breach of fiduciary duty, fraudulent conveyance, tortious interference with contract, unjust enrichment, conversion, alter ego liability and related claims against various Cohen defendants and Elias defendants arising from the alleged violation of Pledge Agreements between SBDO and two Cohen defendant companies denominated as S.N.C. Summersun et cie and Summersun International Establishment. This lawsuit names additional co-conspirators and contains causes of action for fraudulent conduct that has damaged CDR. There is also another sibling action which is not part of these motions (*CDR Creances S.A.S v First Hetels & Resorts*, Index No. 650084-09).

CDR alleges that each of the defendants was an active participant in a conspiracy to defraud it that was orchestrated by Maurice Cohen and his son, Leon Cohen, to divert and steal the assets of EALC and its corporate shareholders, which as with

EALC, were beneficially owned, controlled and dominated by the Cohens. The purpose of the alleged conspiracy was to defraud CDR of its right to recover proceeds from the 1991 loan, to conceal the fraud from CDR, and to conceal the location of the "fruits of stolen proceeds" which continues to this day. Thus, the Complaint alleged that in February 2000, after almost nine years of stripping EALC of its operating income, which was pledged as collateral for the loan, the Cohens, through their "alter ego" entities sold the New York Flatotel for \$33 million and pocketed the monies. It is further alleged that the proceeds were transferred to the Swiss bank account of Blue Ocean Finance ("Blue Ocean"), a Panamanian entity and another Cohen alter ego. Blue Ocean then transferred the proceeds to the account of Caribbean Business Fund at the same bank. This company is another Panamanian entity that is allegedly the alter ego of the Cohens. The Complaint further alleges that the fraud was accomplished by defendants and their nominees' use of forged and false filings, false record keeping and false statements. Defendants also abused and manipulated the corporate form of different jurisdictions, including Liechtenstein, Panama and the British Virgin Islands.

Maurice Cohen and his son, each with residences in Miami Beach, Florida, also have been charged with conspiring to defraud the United States Government and filing false tax returns. In essence, the criminal case charged the defendants with failing to report, or pay taxes upon, the same proceeds which CDR seeks to recover. Both defendants were ordered detained in Florida pending a trial in the Southern District of Florida (see *United States v Cohen, et al.*, Case No. 10-60159-CR-ZLOCH [SD Fla 2010]). They were recently found guilty of a federal felony under 18 USC 371 of conspiracy to defraud the Internal Revenue Service and additional felony counts on October 6, 2010.

Discovery disputes, involving allegations that defendants failed to follow the court's orders to produce documents and schedule depositions, have been continually before the court. After this matter was reassigned from Justice Tolub to this Court, Allegría Aich appeared for her deposition on March 9 and 10, 2010; and the Cohens appeared for depositions beginning on April 12, 2010. Maurice Cohen's deposition ended on April 14, 2010 because Maurice and Leon Cohen were arrested at their hotel on April 15, 2010 on tax evasion charges. Robert Maraboeuf was permitted to appear for his deposition in Paris on June 7 and 8, 2010 and his deposition was video-taped. Patricia Petitin and Joelle Habib appeared for their depositions on April 22 and 23, 2010, and asserted their Fifth Amendment right against self-incrimination.

By Order to Show Cause submitted May 3, 2010 and issued May 14, 2010, defendants moved for a stay of these actions in light of the Florida criminal case against the Cohens. The Court issued a conditional stay of discovery, i.e. depositions, of the criminal defendants. That order was conditioned upon the defendants signing a confidentiality release in order for plaintiffs to have access to bank records of the deposit and transfer of the EALC proceeds. The Order was for a blanket release, thereby eliminating any plausible claim of "act of production" immunity since neither knowledge or control of the accounts could be inferred from the release. Subsequently, while successfully avoiding deposition, the defendants nonetheless refused access to the bank accounts in question.

C. The Motion for Default.

On August 13, 2010, plaintiffs' counsel submitted a motion for default alleging that defendants have defaulted on their discovery obligations and have committed fraud on the court. The motion called into question the veracity of affidavits and deposition testimony in the case. The motion alleges that Maurice Cohen and Leon Cohen and certain co-defendants induced other individuals to make false statements and suborned perjury in this matter by directing co-defendants to testify falsely under oath as part of the action's discovery process. Additionally, the motion alleges that the Cohens forged and falsified documents produced. Because the motion raised questions of suborning perjury, witness tampering, coercing witness testimony, and fraud on the court, an evidentiary hearing was set to determine the validity of plaintiffs' claims (*See Melcher v Apollo Med. Fund Mgmt. LLC*, 52 AD3d 244 [1st Dept 2008]).

A *Melcher* hearing was held before this Court from November 29, 2010 through November 30, 2010. Both sides were permitted to present witnesses. Joelle Habib, Maurice Cohen's personal secretary for 23 years, and Patricia Habib Petetin Benharbon, her sister, testified at the hearing. Both witnesses had been named defendants in the New York lawsuit because of their designation as officers and directors in certain corporate defendants. Ms. Habib was approximately 17 years old when she began working for Mauricio Cohen and has little formal education. Benharbon was employed as a sales associate at a perfume store in Paris, France owned by Maurice Cohen and managed by his wife. She was fired by the Cohens in 1997. In addition to these fact witnesses, a script prepared by Maurice Cohen and used to coach witnesses at their depositions, transcripts of testimony of Habib Levy, an affidavit from George Pavia, Esq., the attorney who represented the buyers of the New York Flatotel, deposition

testimony, bank records and other documents were submitted to the Court.

On December 17, 2010, plaintiffs filed with the Court their post-hearing memorandum of law in support of their motion to strike defendants' pleadings; on January 5, 2011, defendants filed their reply and on January 13, 2011, plaintiffs filed their sur-reply papers.

DISCUSSION

After considering the witnesses' testimony and the other relevant evidence, the Court concludes, on the basis of clear and convincing evidence, that the sanction of striking defendants' answers and granting a default judgment is appropriate.

A. Standard of Review

In order to meet the demanding standard for proof of fraud upon the court, there must be "clear and convincing evidence that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by . . . unfairly hampering the presentation of the opposing party's claim or defense." (*Passlogix, Inc. v 2FA Tech, LLC*, 708 F Supp 2d 378 [SD NY 2010] quoting *McMunn v Memorial Sloan-Kettering Cancer Ctr.*, 191 F Supp 440, 445 [SD NY 2002] quoting *Aoude v Mobil Oil Corp.*, 892 F2d 1115, 1118 [1st Cir 1989]; *Rybner v Cannon Design, Inc.*, 1996 WL 470668, at *4, 1996 US Dist LEXIS 12068 [SD NY 1996] [sanctioning plaintiff where "defendants have proven by clear and convincing evidence that [he] acted intentionally, wilfully and in bad faith" [emphasis supplied]). Befitting the seriousness of the remedy, the First Department has held that "[d]eceipt warranting the striking of the answer" must be "conclusively demonstrated" (*Melcher*, 52 AD3d at 245). The claim requires: (1) an intentional fraud; (2) which is directed at the court itself; and (3) that, in fact, deceives the court.

B. Relevant Law

Our judicial system relies on litigants to tell the truth and participate in discovery in good faith. See *United States v Turns*, 198 F3d 584, 587-88 (6th Cir 2000) ("Our system of justice relies, in large part, on the theory that when a person takes the witness stand and swears to tell the truth, that he or she will in fact do so."); *United States v Leon-Reyes*, 177 F3d 816, 823 (9th Cir 1999) ("our [criminal] justice system relies on

witnesses telling the truth"); *Solar Turbines, Inc. v United States*, 14 ClCt 551, 553 (1988) ("our system of justice generally relies upon the basic honesty of most individuals, harsh sanctions for perjury, and a panoply of rights concerning discovery and cross-examination"). Accordingly, when a party lies to the court and his adversary intentionally, repeatedly, and about issues that are critical to the truth-finding process, "it can fairly be said that he has forfeited his right to have his claim decided on the merits. This is the essence of a fraud upon the court (*McMunn v Memorial Sloan-Kettering Cancer Ctr.*, 191 F Supp 440, 445 [SD NY 2002])."

Actions for fraud upon the court are rare. When considering this motion to strike the pleadings because of an alleged fraud on the court, this Court is mindful of the strong policy favoring resolution of cases on the merits and that dismissal is a drastic sanction which should be imposed sparingly. However, it is also mindful of the need to maintain the court's integrity and the administration of justice.

The United States Supreme Court has stated that "false testimony in a formal proceeding is intolerable. We must neither reward nor condone such a flagrant 'affront' to the truth-seeking function of the adversary proceedings" (*ABF Freight Sys., Inc. v NLRB*, 510 US 317, 323 [1994]). The Supreme Court has described fraud on the court as "a wrong against the institutions set up to protect and safeguard the public" (*Hazel-Atlas Glass Co. v Hartford-Empire*, 322 US 238, 246 [1944]). While viewed as a wrong perpetrated on the judicial system rather than on an individual litigant, the doctrine of fraud upon the court has led to the dismissal of a perjuring plaintiff's claims.

The "clean hands" doctrine's scope is broader than, but may encompass fraud on the court. It is a "self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief" (*Precision Instrument Mfg. Co. v Auto. Mach. Co.*, 324 US 806, 814-815 [1945]). This doctrine has been used to dismiss claims or defenses of litigants who have used underhanded means to advance their claims. The clean hands doctrine closes the court room doors to a litigant where a "violation [] of conscience as in some measure affects the equitable relations between the parties in respect of something brought before the court for adjudication" (*Keystone Driller Co. v Gen. Excavator Co.*, 290 US 240, 245 [1933] accord *Precision Instrument*, 324 US at 814-815)).

The issues in this motion are narrow and the Court does not

reach a final determination as to the merits of CDR's claims. As well, the Court agrees that perjury by a witness, standing alone, is not enough to constitute fraud upon the court. In this case, however, an accusation of perjury, though not sufficient to prove fraud upon the court, is a necessary element for meeting the additional rigors of proving fraud upon the court. As the First Circuit stated in *Aoude v Mobil Oil Corp.* (892 F2d 1115, 1118 [1989]): "Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms." Thus, the fraud on the court rule is to be characterized by flexibility and an ability to meet new factual scenarios.

C. Facts

The Court finds that the Cohens and their fellow co-defendants repeatedly committed fraud on the court and on plaintiffs. In evaluating the allegations against the Cohens, Allegría Aich and Robert Mr. Maraboeuf, the Court considers the following factors: (1) whether the misconduct was the product of intentional bad faith; (2) whether and to what extent the misconduct prejudiced the other party; (3) whether there is a pattern of misbehavior, rather than an isolated instance; (4) whether and when the misconduct was corrected; and (5) whether further misconduct is likely to continue in the future (See *McMunn v Memorial Sloan-Kettering Cancer Ctr.*, 191 F Supp at 446 citing *Skywark v Isaacson*, 1999 WL 1489038, at *15 [collecting cases] [plaintiff lied about three matters of extreme importance to his claim for damages and that pattern of misconduct continued throughout the case's pre-trial discovery phase]).

As the allegations can be organized into categories, each of them is examined with these factors in mind.

1. Perjury and Witness Tampering

Joelle Habib's and Patricia Habib's testimony was the most damaging to defendants' case and the Court credits their testimony. An explicit "script", submitted affidavits, transcripts and other documents in which fraudulent representations were made also are important.

Perjury is "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory" (*U.S. v Dunnigan*, 507 US 87, 94 [1993]).

The Cohens have presented affirmative defenses in which they claim that they neither owned nor controlled the entities through

which they conducted their real estate development business. Accordingly, plaintiffs sought to discover evidence of the Cohens' ownership interests. The issue of control is critical to a determination of whether the Cohens fraudulently transferred and concealed millions of dollars properly due CDR.

Nonetheless, the Cohens and fellow co-conspirators have been motivated by a purposeful desire to evade the discovery process and to gain a tactical advantage over plaintiffs.

The sisters were asked by the Cohens to present themselves as representatives or agents of entities that the Cohens deny controlling. Specifically, Joelle Habib learned she would be deposed after the Appellate Division, First Department, reversed a default judgment ruling against her. Subsequently, she met with Maurice Cohen, Leon Cohen, Patricia Benharbon, Robert Maraboeuf, and Allegria Aich on June 15, 2009 in Paris to prepare for their upcoming depositions. This date was a month before the Cohens' scheduled depositions through March 2010.

Subsequent meetings were held in October 2009 and March 2010. They were asked not to disclose the Cohens' relationships to the various entities and the transactions leading to the transfer of \$33 million into the Swiss bank account of Blue Ocean Finance on February 15, 2000. At that meeting, Leon Cohen gave Joelle Habib a "script" to follow at her deposition and also distributed a "script" to her sister, Allegria Aich and Robert Maraboeuf with their names on (see exhibits 4 and 5). The scripts contained two columns of answers; one set to give to their attorneys in preparation for their depositions and the other set of answers to give at the depositions. All the answers were false. Each person was told to destroy their respective scripts. However, Joelle Habib retained her copy and turned it over to the United States Government in April 2010 after the Cohens were arrested in New York. The script also provided that almost all the co-defendants were to deny or distort their relationships with each other.

Joelle Habib and Patricia Benharbon were instructed to testify that they did not know Maurice or Leonard Cohen. If asked about the location of Maurice Cohen's office, Joelle Habib, his personal secretary for over 20 years, was ordered to testify that she did not remember whether her office was next to Maurice Cohen. In their depositions, the Cohens denied an ownership interest in Blue Ocean Finance, Whitebury and other entities used to transfer funds.

Some of the most egregious acts of perjury concerned the

fabrication of fictitious characters so that the defendants could testify they were behind the corporate entities involved in the alleged transfer of collateral. Joelle Habib was asked to testify that it was Francois Lavallo who had hired her "knowing of course that's absolutely completely false because I don't know Mr. Francois Lavallo, he doesn't exist."

"Jim Cox" was another fictional person behind Blue Ocean Finance who Allegria Aich supposedly introduced to Joelle Habib, as the representative of Winder, another entity controlled by the Cohens. Joelle Habib was directed to deny knowledge of the Winder bank accounts. Physical descriptions of and background information on Jim Cox and Francois Lavallo were provided. Even though, Maurice Cohen controlled International Wilder, all the co-defendants were to testify that a fictitious Francois Lavallo controlled that company.

The Court is convinced that Jim Cox and Francois Lavallo were conscious fabrications, created by the Cohens to meet the exigencies of the situation and to obstruct the Court's truth-finding process.

Additionally, Patricia Benharbon also was instructed by the Cohens to deny any relationship to them or to Sonia and Lea Cohen. Maurice Cohen specifically instructed her to testify that her only intermediary was Robert Maraboeuf and that she became secretary of EALC at his request. They were also asked to testify that Maraboeuf was the decision-maker, not Maurice Cohen.

Evidence was shown that the Cohens paid their co-defendants' legal fees and coordinated their litigation defense. The co-defendants were warned by the Cohens that if they did not follow their directives, each defendant would become responsible for paying their respective legal fees or a monetary sanction which could be in the millions of dollars. As well, Maurice Cohen telephoned Ms. Habib and ordered her to tell Brian Waller, Esq., her new attorney based in New York, that she was the one who had given monies to Allegria Aich to pay John Gleason's (Mr. Cohen's and their previous attorney) legal fees. She followed his instructions.

Each co-defendant was asked to and did testify under oath that they paid their own legal fees, which payments were made and coordinated through Allegria Aich. Ms. Habib and Benharbon were asked by Allegria Aich to sign a bank signature card in order to pay legal fees after the Cohens hired the law firm of Simon & Partners to represent them. This firm's bank records reveal that payments received were from a Panamanian entity, Merriwell

Corporation and a Canadian entity, Farlton Enterprises. These two entities are linked to the ownership of the Cohens' apartment in Paris, France.

The evidence before the Court shows that the Cohens' co-defendants followed the perjurious scripts and repeated the Cohens' false directives in their depositions. Ms. Aich testified, for example, that "Mr. Lavalle told Joelle Habib that the operation could not be sold without the ownership of the building" and she further testified that she provided some information to Mr. Cox when he came back to Paris from London. She also declined to give any address or other evidence that these two persons who allegedly engaged in a multi-million dollar transaction ever existed. The Cohens and Aich deliberately and willfully attempted to withhold evidence directly responsive to deposition questions, and urged Robert Maraboeuf and the Habib sisters to commit perjury at their deposition. The Court further finds that Allegria Aich and Robert Maraboeuf lied at their depositions when they denied a relationship with the Cohens, and that they did so intentionally. Testimony concerning Maurice and Leon Cohen's control over certain entities is especially essential to the resolution of this matter. Nonetheless, the Cohens denied, under oath, that they were connected to the Flatotel hotel chain.

Shortly after the Cohens' recent arrest, Joelle Habib and Patricia Petetin informed the government of the fraudulent scheme.

Based on the evidence at the hearing, the Court concludes that the false testimony at the depositions was given with the willful intent of providing false evidence, rather than as a result of confusion or faulty memory. Any false information or testimony given under oath is a serious type of perjury because of the degree of faith the Court places in the truth of those representations. A resort to the suppression of evidence indicates not a seeking of justice before this Court, but an effort to stifle the truth.

2. Falsification of Documents and Affidavits

The issue concerning the Cohens' fraud goes beyond the subordination of perjury and witness tampering because they also forged and falsified documents that provided additional support for their defense.

Moving to the court's examination of the substance of the evidentiary documents relied upon for support by plaintiffs, it

is apparent that the court must determine whether they are susceptible to a truthful interpretation. They are not.

Although Ms. Harbarbon stopped using the name Patricia Petetin when she remarried on March 21, 1996 and that her employment with the Cohens terminated in 1997, documents used to further the sale of EALC stock that closed in February 2000 contained a forged "Patricia Petetin" signature. During the meetings, Leon Cohen showed her these documents and instructed her to "make sure that [Patricia] don't say that it was not my signature, to say that I'm not sure . . . to leave the confusion remaining." She was also prompted to accuse Albert Israel, an associate of the Cohens, of forging her signature.

The Cohens have falsified and forged documents that were turned over to plaintiffs' counsel, including the Whitebury Shareholder Affidavit and a number of promissory notes related to Whitebury. They fabricated corporate records and affidavits and then tried to prevent the fabrications from being discovered. Therefore, there is no doubt that the Cohens have altered or concealed evidence that bears directly upon plaintiff's claims. Accordingly, there is no doubt that they have irrevocably tainted these proceedings.

3. Court Orders

Defendants have engaged in a persistent pattern of delay and defiance of its discovery orders. On February 28, 2006, the New York Supreme Court entered a preliminary conference order in the 2003 action that directed the parties who had not yet appeared to answer or otherwise appear by March 15, 2006. The Court also directed that all discovery demands be served on or before April 15, 2006.

By the March 2008 preliminary conference, defendants were in default of their obligation to produce documents and to appear for depositions. Plaintiff had already submitted a motion to compel discovery. Justice Tolub set a schedule for discovery. On August 7, 2008, Justice Tolub issued an order declaring that "no further discovery delays would be tolerated. Defendants have repeatedly chosen to ignore those orders (the evidence of which is abundant in plaintiff's submissions. . .) Defendants' long-standing patterns of default, lateness and abject failure to comply with the Court orders amounts to willful and contumacious conduct which not only warrants, but necessitates the striking of defendants' collective answer and an award of default judgment." Subsequently, that court issued a default judgment based on discovery violations.

Shortly thereafter, the defendants sought to vacate the default judgment. On May 21, 2009, the First Department reversed that order. On May 28, 2009, Justice Tolub ordered the depositions of the Cohens to be held in July 2009. It was only in Spring 2010 that depositions took place. Depositions were delayed in part by affidavits claiming various spurious reasons why witnesses could not come to New York, including illness and child care problems, all of which turned out to be false.

Additionally, the Court's order on April 8, 2010, put Mr. Maraboef on notice that deposition questions were to be answered "truthfully, fairly and fully, respond to any relevant questions put to him and failure to do so . . . may result in a default judgment or other sanction." However, it is clear from the deposition testimony that Maraboef and other deponents offered denials or evasive responses to plaintiff's questions. If questions were answered, more often than not, the answers were also too vague to provide any useful information to plaintiff.

D. Preclusive Effect of Other Court Holdings

Aside from the federal criminal trial in Florida in which Maurice and Leon Cohen were found guilty of conspiring to defraud the United States government and federal tax evasion, plaintiffs also introduced a hearing transcript in a closely-related Florida civil proceeding brought by CDR against the Cohens where Judge Manno-Schurr, after a similar evidentiary hearing, granted CDR's motion to strike the pleadings in that case, and to enter a default judgment against those defendants, finding that Maurice, Leon and Sonia Cohen had perpetuated a fraud on the Florida court and this court. Defendants contend that the Florida order was non-final and therefore has no preclusive effect here.

The issue then is the effect that the findings of misconduct in that case has on the related litigation here. One approach has been to apply *res judicata* or collateral estoppel principles. In *Synanon Church v United States* (579 F Supp 967 (DDC 1984)), the church brought an action against the United States Government to establish its tax-exempt status. A prior case involved the issue of whether the church was a non-profit corporation under the District of Columbia's zoning laws. That case had been dismissed because the judge had found that the church engaged in a "wilful, deliberate and purposeful scheme . . . to destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing upon Synanon's . . . non-profit status (*id.* at 972). The second court found that the issues in the case against the United States were "substantially identical," concluded that plaintiff "had a full and fair

opportunity to litigate " the issue in the prior action and therefore held that the church was collaterally estopped from seeking a different conclusion (*id.* at 973 citing *Blonder-Tongue Lab v Univ. of Ill. Found.*, 402 US 313, 333 [1971] [other citations omitted]).

In *Aoude v Mobil Oil Corp.*, *supra*, the Court of Appeals dealt with plaintiff's argument that his second action - unlike a prior action - was not predicated upon false evidence and therefore should not have been dismissed. Aoude argued that an additional cause of action was included in his second suit. The Court rejected that argument and stated:

"Appellant remonstrates that whatever disposition may be made of his original suit, his second suit was filed without any reference to the bogus agreement [filed in the first action] and should not have been dismissed. The assertion will not wash.

A malefactor caught red-handed, cannot simply walk away from a case, pay a new docket fee and begin afresh. History is not so glibly to be erased. Once a litigant chooses to practice fraud, that misconduct infects his [second] cause of action, in whatever guises it may subsequently appear. Thus to the extent that the two complaints paralleled each other, the second suit was, for the reasons already stated, appropriately jettisoned."

(*Id.* at 1121).

In considering the preclusive effect of a conviction, only those "issues which were essential to the verdict must be regarded as having been determined by the judgment" (*Emich Motors Corp. v General Motors Corp.*, 340 US 558, 569 [1951]).

The Court finds that the criminal action in Florida was based on the same allegations of this case, namely, the Cohens' utilization of a web of alter-ego entities to hide the millions they received from the sale of their New York hotel. However, the Court finds that evidence of a default judgment in Florida based upon fraud on the court is by itself insufficient to prove plaintiffs' allegations of fraud on the court in this case. Nonetheless, the Court has considered the Florida evidence as part of the alleged pattern of misconduct.

E. The Question of an Appropriate Sanction

Having found that defendants committed a fraud on the Court, the Court now considers whether defendants' actions require the ultimate sanction of dismissing the case with prejudice.

The Court's authority to sanction defendants for their discovery abuse flows from its inherent power to "manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases," including "fashion[ing] an appropriate sanction for conduct which abuses the judicial process" (*Chambers v NASCO, Inc.*, 501 US 32, 43 [1991]) (internal citations omitted)). Further, the Appellate Division, First Department, has held that, "[c]ontributing to 'undisputed untruthfulness' on the record justifies imposition of sanctions under CPLR 3126" (*317 W. 87 Assocs. v Dannenberg*, 159 AD2d 245 [1st Dept 1990] [case involving submission of false document to court and false testimony in depositions as to reliability] citing *Smith v Malarczyk*, 118 AD2d 934, 935).

In *Herrera v The Clipper Group L.P.* (No. 97-560, 1998 WL 229499, US DIST LEXIS 6454 [SD NY 1998]), the Court found that plaintiff had acted in bad faith by "deliberately subvert[ing] the discovery rules of this court by secretly misappropriating thousands of pages of documents;" by lying about this practice; and by disclosing defendants' confidential information. Judge Scheindlin found that this misconduct was "motivated by a desire to evade the discovery process in order to gain a tactical advantage in the litigation."

Similarly, this Court finds that striking defendants' pleadings and dismissing the action is the appropriate sanction for the Cohens' bad faith and deliberate intent to deceive the Court. Because discovery is certainly within the range of this Court's authority and at the "hands-on" supervision of the Court, defendants' misconduct adversely impacts the judicial system. Through lies under oath, delays and through concealment by deliberate actions, defendant attempted to hide from the Court, plaintiff and ultimately, the fact-finders, evidence that clearly concerned the heart of this case. Defendants' cover-up attempts also militate toward dismissal. As well, their actions prejudiced plaintiff by impeding its ability to obtain true discovery and forcing CDR to spend enormous amounts of money and time to prove their case. It is also clear that the Cohens' actions are not an isolated case of misconduct. More importantly, the Cohens have not attempted to correct their misconduct. Equally important is this Court's belief that the Cohens' deception on the Court will continue if this action is allowed to go forward, therefore

nullifying the integrity of this proceeding.

"The object of a trial is to do justice, and whenever it is made to appear that one of the parties to the litigation has by fraud, connivance, conspiracy or any other dishonest act prevented his adversary from having a fair trial, then the court [should] never hesitate[] to use that power which it possesses to rectify that wrong" (Nugent v Metropolitan S.R. Co., 48 App Div 105 [1st Dept 1899]; see also Melcher v Apollo Med. Fund Mgt. LLC, 52 AD3d 244, 245 [1st Dept 2008]; Koschack v Gates Constr. Corp., 225 AD2d315 [1st Dept 1996] ["The paramount concern of this court is the preservvation of the integrity of the judicial process."]).

A lesser sanction would not repair the harm done by defendants' willful misconduct which pervades every aspect of this case (See Chira v Lockheed Aircraft Corp., 634 FSupp 664, 665 [2d Cir 1980]). A jury inference would not sufficiently remove the taint from this case. The Court considered whether a large money sanction would be an adequate sanction. However, such an award would likely be uncollectible. The Cohens have already exhibited manipulative financial behavior. Therefore, a monetary sanction representing the additional costs, fees, and expenses incurred by plaintiff due to the Cohens' deceit would not sufficiently punish them.

Accordingly it is hereby

ORDERED that plaintiff's motion to dismiss and/or strike the pleadings because of defendants' misconduct, pursuant to motion sequence 039 and motion sequence 040 (under Index No. 600448-06) is granted; and it is further

ORDERED that defendants' cross-motion in motion sequence 039 and 040 to compel plaintiff to respond to defendants' document requests and interrogatories and in opposition to plaintiff's motion to dismiss is denied; and it is further

ORDERED that plaintiff's motion to strike the pleadings and to enter a default judgment pursuant to motion sequence 031 and motion sequence 032 (under Index No. 109565-03) is granted and defendants' cross-motion in opposition is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter a default judgment against the defendants and in favor of

plaintiff.

This constitutes the Decision and Order of the Court.

Dated: January 20, 2011

JAN 20 2011

ENTER:

James A. Yates, J. S. C.

James A. Yates