

**Fischer v Pollack**

2015 NY Slip Op 32334(U)

March 23, 2015

Supreme Court, Westchester County

Docket Number: 52037/2013

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
ELISE FISCHER, DDS,

Plaintiff,

-against-

GLORIA E. POLLACK, SOUTH EAST CONSTRUCTION GROUP, INC., GRIGG & DAVIS ENGINEERS, P.C., STEVEN SECON ARCHITECT, P.C., THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, ANDREW SACKETT, ANDREW SACKETT CONTRACTING, DEBORAH TROY, DDS, P.C., and BOND E. DAVIS, III,

Defendants.

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GLORIA POLLACK,

Plaintiff,

-against-

ANDREW SACKETT, ANDREW SACKETT CONTRACTING, GARY EDERER, SOUTHEAST CONSTRUCTION CORP., BOND E. DAVIS, III, GRIGGS & DAVIS ENGINEERS P.C., DEBORAH TROY, DDS, P.C., and TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by defendant The Travelers Indemnity Company of Connecticut to compel plaintiff Elise Fischer, D.D.S., to provide discovery pursuant to CPLR 3124 or preclude her from adducing certain evidence at trial or otherwise pursuant to CPLR 3126:

- Order to Show Cause, Aff. in Support (Glazer), Exh. A-N
- Memorandum of Law in Support
- Southeast Aff. in Support (Bieder), Exh. A-B
- Secon Aff. in Support (Beitler)
- Pollack Aff. in Support (Hannum), Exh. A

**DECISION AND ORDER**

Index No. 52037/2013  
Motion Date Mar. 2, 2015  
Sequence No. 9

Index No. 52654/2013

Grigg & Davis Engs. and Davis Aff. in Support (Cheng)<sup>1</sup>  
Troy & Sackett Aff. in Support (McElearey)  
Aff. in Opposition (Robinson), Exh. 1-6 (NYSCEF Docs. 275-307)  
Substitution of Counsel (Grigg & Davis)

Upon the foregoing papers and proceedings held on March 2, 2015, the motion is determined as follows:

As most recently enumerated by the Decision and Order of this Court (Giacomo, J.) dated January 6, 2015, which, among other things, denied various parties' summary judgment motions, this action arises from a partial building collapse that occurred on June 4, 2012, at the premises known as 266 Purchase Street, Rye, New York. On that property was a three-story commercial office building owned by Gloria Pollack, plaintiff in the action commenced under Index Number 52654/2013. One of her tenants was Elise Fischer, DDS, plaintiff in the action commenced under Index Number 52037/2013. As alleged in plaintiffs' respective complaints, defendant Deborah Troy, DDS, P.C. (hereinafter "Troy"), another tenant of the subject premises, began with Pollack's permission interior renovation work based on architectural plans drawn up by defendant Steven Secon Architect P.C. (hereinafter "Secon"); in this work, the principal contractors were defendants Andrew Sackett (Troy's husband) and Andrew Sackett Contracting, (hereinafter collectively "Sackett") and Southeast Construction Group, Inc. (hereinafter "Southeast"). During renovation, a support column allegedly was deflected, and Sackett and Southeast hired defendant Bond E. Davis, III, and his firm, Griggs & Davis Engineers, P.C. (hereinafter "Davis" and "G&S," respectively), as structural engineers to examine the column. The building collapse then ensued, resulting in condemnation of the building by the City of Rye and evacuation of all building tenants.

By letter of July 25, 2012, defendant Travelers Casualty Insurance Company of America (hereinafter "Travelers") denied Fischer's insurance claim on grounds that the column defect that allegedly caused the collapse constituted a pre-existing condition under the relevant insurance policy. Fischer commenced her action on February 15, 2013, against Pollack, Southeast, G&D, Secon and Travelers, seeking damages for loss of business; Pollack commenced her action on February 28, 2013, against many of these same parties, seeking damages suffered in the collapse. By Decision and Order dated January 10, 2014, this Court (Giacomo, J.) granted Fischer's motion to join the two actions for discovery purposes and also for joint trial as to non-insurance coverage issues (*see* CPLR 602[a]). Pursuant thereto, the parties to both actions concluded a Preliminary Conference stipulation entered on February 11, 2014, and then proceeded to discovery.

Pursuant to a briefing schedule, Travelers brings the instant CPLR 3124 motion by Order to Show Cause to compel Fischer to produce redacted copies of patient files, or in the alternative, pursuant to CPLR 3126 to preclude Fischer from adducing at trial or otherwise any information contained in those files in support of her claim. Travelers alleges that in its Combined Discovery Demands dated April 30, 2013, served with its answer to Fischer's amended complaint, Travelers sought from Fischer documents to explicate Fischer's insurance claims, including pecuniary loss, improvements and betterments to the office, business personal property and loss of business

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<sup>1</sup> After submission of papers, defendants G&D and Davis entered by NYSCEF their consent to change attorney, substituting as counsel Byrne & O'Neill, LLP.

income. Travelers avers that Fischer's response of March 12, 2014, consisted a copy of the Travelers insurance policy, Fischer's lease on the Pollack property, tax returns and seven pictures (NYSCEF Doc. 229). Travelers further avers that it served a Supplemental Notice of Discovery and Inspection dated April 8, 2014 (NYSCEF Doc. 230), in an attempt to further explicate Fischer's losses. These demands included but were not limited to her 2013 tax returns and NYS-45s for fiscal year 2012-2013, sample copy of her agreements with parties financially responsible for new patients, reports from software used to track patient visits, billings and collections from July 2011 to June 2013, copies of her business bank accounts for July 2011 to June 2013, and copies of her general ledger for tax years 2012 and 2013. By Compliance Conference Order dated April 29, 2014, Fischer was directed to respond by May 13, 2014. At the compliance conference of May 19, 2014, Travelers avers, it had not yet received such discovery from Fischer, but nevertheless proceeded with her deposition on Court instruction, which reserved on Travelers' right to receive such discovery and, if necessary, re-depose Fischer. Travelers further narrates that at Fischer's deposition of May 20, 2014, she testified that as a result of the collapse, the computer server that maintained her practice schedules became inoperable and was discarded. According to Travelers, Fischer indicated that the only way she could determine patient consult and treatment dates – and presumably, thus reconstruct the files for purposes of substantiating her losses – would be to review the physical patient charts. After this deposition, Travelers served on Fischer a post-deposition discovery demand on June 4, 2014, in which Travelers reiterated the demands to which Fischer had not yet responded as well certain additional matters, including the percentage of new patient consults that became paying patients, the total amount “billed to patients to determine trends and averages, and a list of all patients of [Fischer] who allegedly stopped using her services following the loss.” Thereafter, on July 7, 2014, Fischer made another document production: of these, Travelers asserts that Fischer produced “many of the outstanding documents,” but still failed to come forward with “sufficient” information to substantiate her claim of business income loss (Glazer Aff., at 4).

By Compliance Conference Order dated July 10, 2014, Fischer was ordered to appear on or before September 19, 2014, for a further deposition limited to her economic and personal property damage claims. In advance of such deposition, Travelers served on Fischer supplemental demands dated July 23, 2014, consisting of both document requests and interrogatories that Travelers denominates as “specifically tailored to get information only obtainable from [Fischer] patient charts - i.e., new patient starts by month; the number of patients who [were] treated and the length, type and cost of treatment per patient; and specific information as to the existing patients [Fischer] claims left the practice following the loss” (Glazer Aff., at 4). Travelers avers that Fischer declined to respond to such demand and that, at her deposition delayed until November 13, 2014, Fischer was unable to answer any of the interrogatory questions presented to her at the deposition, “or any specific questions about quantity of patients, timing of patient consults or appointments, or costs per patient, without reviewing the patient files” (*id.*, at 5). In response, Travelers served on Fischer yet another demand for these materials dated November 26, 2014, to which Travelers avers that Fischer declined to respond. Pursuant to a briefing schedule, Travelers now moves pursuant to CPLR 3124 to compel Fischer's response or, in the alternative, preclude her from offering at trial or otherwise evidence not disclosed pursuant to such demands.

In support of its motion, Travelers submits documentation of the foregoing procedural posture and asserts that Fischer's pecuniary loss claim depends on proving (1) the number of patients lost due to the accident, (2) the patients who left her practice following the loss, and the amounts they paid Fischer prior to leaving, and (3) the per-patient charge and payment dates. The only way to determine these variables, Travelers asserts, is to examine the patient charts with medical information and other confidential information (e.g. Social Security Numbers) redacted. Travelers further avers that Fischer has the charts and that Fischer concedes that the only way to ascertain the amount of Fischer's business loss is to perform this analysis using the patient charts to extract the date of first contact, contracts showing amounts each patient agreed to pay Fischer, amounts actually paid and dates of treatment of each patient (Travelers' Mem of Law, at 3).

Pollack, South East, Secon, Troy, Sackett, G&D and Davis each submit papers in support of Travelers' application and substantially adopt Travelers' arguments in relation thereto.<sup>2</sup>

Plaintiff Fischer opposes the motion. The gravamen of Fischer's argument is that she has provided extensive documentary discovery including but not limited to corporate tax returns for tax years 2010 through 2013, inclusive; business banking statements, business checks, credit card statements, loan documents for Fischer's office renovations, federal and state payroll records, invoices for moving and storage, emergency office rental costs, invoices for new professional equipment and inventory, and more. More than this, Fischer asserts, would be unduly burdensome and calculated to harass her. Fischer asserts that Travelers' demands for redacted patient charts were received not on November 26, 2014, but on January 5, 2015, and on that basis must be disallowed as "fraudulent" (Robinson & Millman Aff., at 5). Fischer further asserts that she lacked opportunity to create a privilege log or seek a protective order against such demand. Fischer also opposes with a certain degree of particularity the discoverability of certain of these materials. Fischer addresses three of the demands, denominated as 4, 5 and 6, as follows:

Demand #4: "Full and complete copies of patient charts (redacted to show only patient initials) of all patients Dr. Fischer claims left her practice after the June 4, 2012 building collapse."

Demand #5: "Full and complete copies of patient charts (redacted to show only patient initials) of all charts Dr. Fischer reviewed to ascertain the fee structure of the office and how it changed."

Demand #6: "Full and complete copies of patient charts (redacted to show only the patient initials) of all charts Dr. Fischer reviewed to ascertain the number of new patients that started with Dr. Fischer, and the amounts each paid to Dr. Fischer."

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<sup>2</sup> Fischer argues that these parties' papers in support of Travelers' motion, which papers they submitted after Travelers' brought this motion, are untimely under the Briefing Schedule. Fischer asserts that the Briefing Schedule's two-week period for answering papers applies only to papers "in opposition" to the motion, and that therefore Fischer's opposition papers had no time to respond to these additional papers. Thus, Fischer asserts that such supporting papers should have no bearing on disposition of this motion. This Court declines Fischer's invitation in this regard, especially in light of the Court's extensive oral argument on this motion in which Fischer had a full opportunity to address matters raised in those papers.

As to Demand #4, Fischer asserts that the deposition testimony reflects that she determined which patients left her practice after the building collapse not only by reviewing charts but also by telephone calls, and thus Travelers' demand "is not designed to ascertain any actual additional information not disclosed by the information previously provided and about which plaintiff was admittedly question on this topic" (Robinson & Millman Aff., at 6). Fischer also asserts that this demand is "lacking in clarity" (*id.*, at 7). That said, Fischer's discovery response dated January 29, 2015, states that "A search for these documents is underway. To the extent they exist, same will be provided in redacted format with patient charts pertinent to calculate and prove [Fischer's] lost income resulting from all patients that left the practice" (Robinson & Millman Aff, Exh. 6, at 2).

As to Demand #5, Fischer asserts that this demand is facially defective on grounds that it lacks specificity as to time span applicable to the demanded records, and also is objectionable on grounds that the demand lacks "clarity and completeness." For its part, Fischer's discovery response dated January 29, 2015, additionally objected on grounds that she already "exchanged her fee structure agreements previously as well as the amounts by which said fee structure has changed" (Robinson & Millman Aff, Exh. 6, at 3).

As to Demand #6, Fischer likewise asserts that this demand is facially defective on grounds of excess generality as to time. Fischer also asserts that this demand seeks patient records for information already received by Travelers, ostensibly in a different form. Fischer's January 29, 2015, discovery and inspection response objected to this demand on grounds of relevance, asserting that business banking records and tax returns from 2010 to 2013, showing deposits and debited transactions, sufficed to satisfy Travelers' demand for this information.

It is axiomatic that parties are entitled to liberal discovery of "all matters material and necessary in the prosecution" of their action (CPLR 3101[a]), and the determination of what is "material and necessary" is within the sound discretion of the trial court (*see e.g. Andon v 302-304 Mott Assocs.*, 94 NY2d 740 [2000]). The phrase "material and necessary" is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Clepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The foregoing standards vest in the trial court broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant duties arising in the individual case (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Where the court determines that relevant discovery has been withheld, the usual proper remedy is a CPLR 3124 order to compel such disclosure. The CPLR 3126 remedy of striking papers or precluding evidentiary materials as penalty for a discovery violation is a drastic one requiring the movant to show that the withholding of discovery was willful and contumacious (*see Greene v Mullen*, 20 AD3d 996 [2d Dept 2010]; *Maiorino v City of N.Y.*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). This showing, in turn, requires a showing of a substantial pattern of noncompliance over time coupled with a lack of excuse (*see e.g. Estaba v Quow*, 101 AD3d 940 [2d Dept 2012]; *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812 [2d Dept 2012]).

While Fischer's papers exhort this Court to conclude that Travelers' repeated discovery demands and other incidents of Travelers' papers evince a lack of good faith specifically with intent to harass Fischer and use discovery demands as a bludgeon against her, this Court begins by according all parties the presumptions of regularity and good faith. Based on review of the extensive record in discovery, this Court has little doubt that all parties have acted in a manner justifying these routine presumptions. Fischer has tendered to Travelers and the other defendants substantial discovery under the difficult circumstance that her business location was functionally destroyed. Travelers, for its part, has been clear from the near inception of discovery that it seeks reasonable proof of Fischer's businesses losses and, even lacking what Travelers deemed to be adequate measure of such proof, nevertheless proceeded to depositions in a posture that Travelers deemed disadvantageous. This Court further takes cognizance that Travelers' instant motion does not seek a remedy overbroad to the foregoing circumstances: Travelers does not allege "willful or contumacious" conduct that might undergird a CPLR 3126 motion to dismiss Fischer's complaint. This Court also notes that Fischer's response of January 29, 2015, appears to concede that Fischer would comply with Demand #4, albeit with the proviso that Fischer would provide only such patients chart as (Fischer deems) "pertinent to calculate and prove [Fischer's] lost income resulting from all patients that left the practice" as a result of the building collapse.

This Court also takes this prefatory opportunity to clarify that the main issue presented is not privilege within the meaning of CPLR 4504 but relevance within the meaning of CPLR 3101(a). In this regard, Travelers pains to establish that the patient files demanded are subject to redaction of medical information and other protected materials and thus are not exempt from disclosure under physician-patient privilege. On the strength of Travelers' cited cases (*see e.g. Seamon v Wyckoff Heights Med. Ctr., Inc.*, 25 AD3d 596 [2d Dept 2006]; *Rubin v Alamo Rent-A-Car*, 190 AD2d 661 [2d Dept 1993]; *Henry v Lewis*, 102 AD2d 430 [1st Dept 1984]), this Court agrees that to the extent the materials are relevant, physician-patient privilege does not weigh against their disclosure based on the facts presented. Indeed, as a further indication of Fischer's good faith herein, Fischer does not substantially argue to the contrary.

Rather, the issues are whether the demanded materials are relevant to show Fischer's business income loss, and whether their disclosure would be unduly burdensome under CPLR 3103(a). In that connection, Travelers asserted in its papers and amplified at oral argument that a proper business income calculation is a complex undertaking, requiring not only snapshots of patients gained and lost in the years before and after the loss, but also a trend line to project long-term impacts of these business changes. For this reason, Travelers asserts, it is helpful but not sufficient that Fischer tendered her business tax records and banking statements for the years 2010 through 2013: these materials show the amount of income coming in and changes in that income, but not the number of patients Fischer lost and the corresponding loss of business income arising from that loss. Travelers further clarified at oral argument that this latter calculation also requires a more granular calculation than are possible from the documents that Fischer tendered, because it requires calculation of each lost patient's stage of treatment and how much each such patient already had paid pursuant to the applicable treatment contract at the time of loss.

As to these points, Fischer strenuously disagrees that Travelers' review of the patient files is necessary to determine the business loss. Fischer asserted at oral argument that Travelers can

determine the number of lost patients by tracing the business account checks and tax returns, and that therefore the remaining materials are not material within the meaning of CPLR 3101(a). Even if the same are discoverable, Fischer's position is that it'd be unduly burdensome within the meaning of CPLR 3103 to disclose more than the approximately 25 files for patients who left the practice ostensibly as a proximate result of the collapse (*i.e.* Demand #4). Fischer also asserts that this Court should be bound by the holding in *40 Rector Holdings LLC v Travelers Indem. Co.* (40 AD3d 482 [1st Dept 2007]), which Fischer characterizes as directly on point.

In *40 Rector Holdings*, which arose out of collapse of a building façade after the September 11 attacks, Travelers successfully argued that it should not be required to disclose to insurance claimants five classes of documents that included Travelers' calculation of file estimates. While Fischer asserts that the "file estimates" whose disclosure *40 Rector Holdings* quashed are directly analogous to the patient files underlying Fischer's estimates of patient losses, the First Department instead clarified that these "file estimates" were internal calculations of file reserves that Travelers would maintain for insurance claims potentially subject to payment. Because the First Department concluded that these internal reserves were not relevant to determining the cause of the façade collapse disputed in that litigation, the First Department held that documents concerning these internal reserves were not discoverable under CPLR 3101(a) (*see 40 Rector Holdings*, 40 AD3d at 483). As Fischer's patient files potentially documenting the extent of business loss are factually distinguishable from internal reserve files at issue in *40 Rector Holdings*, this Court must reject Fischer's argument that such case is binding or even persuasive authority for the instant motion.

Fischer's remaining blanket argument against disclosure is that Travelers can reconstruct calculations of Fischer's business loss based on tax and banking records previously disclosed, and therefore the financial records in the patient files are not "necessary" to Travelers' defense of this action within the meaning of CPLR 3101(a). Fischer's argument lacks merit. This Court agrees with Travelers that Travelers needn't proceed without patient financial files showing business loss merely because Fischer's expert so far opted to do so. Neither can this Court conclude that the tax and banking records that Fischer heretofore disclosed satisfy Travelers' legitimate demand for financial records establishing Fischer's business loss. While Fischer's already-disclosed tax and banking records can show what moneys Fischer actually received for professional services rendered, Travelers asserts – and Fischer offers this Court no sufficient basis to dispute – that those documents cannot explicate the moneys that Fischer lost for professional services *not* rendered as a proximate result of the collapse. Travelers further asserts – and Fischer again offers this Court no sufficient basis to dispute – that by its nature Fischer's business loss must be projected based on a variety of economic indicators (*e.g.* business trend lines, total patient payments actually made pursuant to contract relative to contracted amounts, patients lost after the collapse, their respective phases of treatment and payment at the time of loss, patients newly contracted after the collapse, and their contracted amounts). Accordingly, even assuming that Fischer's previously disclosed tax and banking records establish every payment that Fischer actually received, Fischer is incorrect that Travelers necessarily can reconstruct from those documents Fischer's business loss as pleaded in Fischer's complaint and bill of particulars. Given Fischer's deposition testimony that she could not sufficiently explicate the foregoing economic indicators sufficient to testify about them without recourse to the records at issue on this motion, this Court must reject Fischer's argument that the documents sought are unnecessary to Travelers' defense within the meaning of CPLR 3101.

Fischer next argues that Travelers' demands are overbroad as to time scope and should be rejected on that basis. This Court having determined that the class of documents sought is material to Travelers' defense, this Court declines Fischer's invitation to quash the demand on that basis—especially given that, as narrated above, Travelers has been both consistent and patient in seeking these documents nearly from the inception of this litigation. To whatever extent that Travelers' demand may be overbroad, any such overbreadth is curable by remedial judicial order. Travelers previously having demanded and Fischer having tendered tax and banking records for the years 2010 forward, this Court concludes that patient files for the years 2010 forward are material and necessary to the discovery purposes for which Travelers demands them.

Neither can Fischer prevail on her argument that such disclosure would be so unduly burdensome within the meaning of CPLR 3103 that Travelers' demands should be quashed on that basis. In the final analysis, Fischer placed her economic loss in controversy by bringing suit, and Fischer failed to establish why the approximately 25 files that she agreed to produce in response to Demand #4 would not be unduly burdensome to provide while the additional files responsive to Demands #5 and #6 would cross the line. Fischer having failed to provide this Court a reasonable basis to determine what disclosures would be unduly burdensome to her, based on the facts and circumstances presented, this Court declines Fischer's invitation *sua sponte* to enter a protective order against any part of Travelers' discovery demands.

Nothing herein, however, should be construed necessarily to invite additional discovery beyond the materials specifically designated herein. Fischer is correct that she has provided voluminous discovery, and this Court is fully aware that this Decision will result in still further disclosure under circumstances that may be difficult for a small business owner who already has claimed substantial disruption arising from the building collapse and now this litigation seeking compensation for it. On the other hand, this Court has a non-delegable duty to enforce the discovery rights of parties pursuant to CPLR article 31. Accordingly, if after the disclosure required hereunder, a party shows that still further discovery is necessary, and that such necessity could not previously have been determined reasonably, then this Court is prepared to consider and order additional discovery to that extent. Otherwise, the parties should be preparing to certify this action for trial. On the basis of the foregoing, it is hereby

ORDERED that Travelers' motion to compel discovery is granted to the extent that plaintiff Fischer shall comply with Demand #4, and Demands #5 and #6 for years 2010 to the present, as denominated herein, within 30 days after defendant Travelers shall serve this Decision and Order on plaintiff in accordance herewith; and it is further

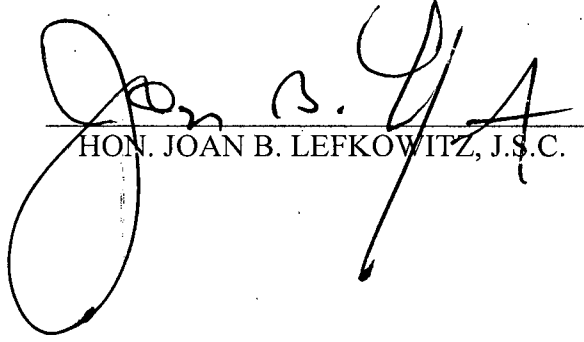
ORDERED that all relief not granted herein is denied; and it is further

ORDERED that defendant Travelers shall cause this Decision and Order, with Notice of Entry thereof, to be served on all parties within seven days hereof; and it is further

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, at 9:30am on Friday, May 15, 2015.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
March 23, 2015



HON. JOAN B. LEFKOWITZ, J.S.C.

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