APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEVIN CARROLL ANDERSON, Plaintiff,	:	14 Civ. 10249 (KPF)
v.	:	ORDER
ARTHUR B. GREENE, *et al.*, Defendants.	:	

KATHERINE POLK FAILLA, District Judge:

This matter is before the Court on Defendants' Motions to Dismiss. This lawsuit stems from Plaintiff Kevin Carroll Anderson's alleged long-term professional relationship with Defendants Arthur B. Greene, Arthur B. Greene & Company, P.C., and Marks, Paneth & Shron LLP. Defendants move to dismiss Plaintiffs' claims for breach of fiduciary duties based on constructive fraud and legal malpractice, on the grounds that they are barred by the applicable statutes of limitations, or in the alternative, that Plaintiff has failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). Although Plaintiff has attached numerous exhibits to his opposition and sur-reply briefing, these exhibits were not included in Plaintiff's Second or Third Amended Complaints. Further, Defendants have responded to Plaintiff's exhibits within their briefing, and they have appended further documents as exhibits to their motions.

"If, on a motion under Rule 12(b)(6) …, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56" and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

Given the focused nature of Defendants' statute of limitations defenses, resolution of those defenses may greatly affect evaluation of Plaintiff's claims. In the interest of efficiency and economy, the Court exercises its discretion to convert this motion to dismiss to a motion for summary judgment, only insofar as it pertains to Defendants' statute of limitations defenses, and to consider the evidence provided by the parties.

Because the Court chooses to convert the current motion to one for summary judgment, the federal rules require that the Court give the parties "reasonable opportunity to present all material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Both parties have filed extrinsic evidence in connection with their respective papers and relied on this extrinsic evidence in their arguments regarding the statute of limitations. However, the manner in which they have presented their evidence and argument leads the Court to believe that the parties have not had a "reasonable opportunity to present all pertinent material."

It is, therefore, ORDERED that, as to the limited issue of the applicable statutes of limitations, the Court converts the motion to dismiss into a motion for summary judgment. Plaintiff shall have **21 days** from the date of this Order to present all material pertinent to that issue, including any additional briefing not to exceed ten (10) pages. Defendants shall have **14 days** from the date of

Plaintiff's response to submit any additional materials, also including any additional briefing not to exceed ten (10) pages per Defendant.

Following resolution of this partial motion for summary judgment, the Court will evaluate all of Plaintiff's remaining claims in light of Defendants' motion to dismiss under Rule 12(b)(6).

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith; therefore, *in forma pauperis* status is denied for purposes of an appeal. *See Coppedge* v. *United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: May 12, 2016
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

A copy of this Order was mailed by Chambers to:

Kevin Carroll Anderson
c/o Marilyn Anderson
5905 Delaware Ave.
Gurnee, IL 60031

USDC SDNY
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KEVIN CARROLL ANDERSON,

Plaintiff,

v.

ARTHUR B. GREENE, *et al.*,

Defendants.

-- X

14 Civ. 10249 (KPF)

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiff Kevin Carroll Anderson brought suit against accountant Arthur B. Greene ("Greene"), and accounting firms Arthur B. Greene & Company, P.C. ("ABG Co.," and with Greene, the "Greene Defendants"), and Marks, Paneth & Shron LLP ("MPS," and collectively with the Greene Defendants, "Defendants"), alleging breach of fiduciary duty based on a theory of constructive fraud and legal malpractice. Defendants now move to dismiss Plaintiff's Third Amended Complaint on the grounds that (i) the statute of limitations for all claims expired prior to the filing of Plaintiff's lawsuit, and (ii) Plaintiff has not stated a claim upon which relief can be granted. The Court has exercised its discretion to convert the motions into motions for summary judgment insofar as they relate to Defendants' limitations-based arguments. And, for the reasons discussed below, Defendants' motions are granted in part and denied in part; all of Plaintiff's claims are dismissed, with the exception of his claims against

Greene and MPS for breach of fiduciary duty relating to his 2009 and 2010 tax returns.

BACKGROUND[1]

A. Factual Background

1. The Relationships Between and Among the Parties

Plaintiff alleges that Greene served, from 1990 until at least 2012, as his "lawyer, tax advisor, CPA, bookkeeper, financial planner, investment advisor, and overall business manager." (TAC ¶ 8). At the beginning of the relationship, Greene worked at ABG Co.; in 2009, Plaintiff states, ABG Co. merged with MPS, and Greene thereafter provided services from MPS. (*Id.* at ¶ 5). Initially, Greene worked only as Plaintiff's accountant; after about five

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[1] The majority of the facts contained in this Opinion are drawn from Plaintiff's Third Amended Complaint ("TAC," Dkt. #58). They are accepted as true for purposes of these motions. *See Faber* v. *Metro Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (when reviewing a complaint for failure to state a claim, the court will "assume all well-pleaded factual allegations to be true" (internal quotation marks omitted)). Additional factual material relevant to Defendants' statute of limitations-based defenses is drawn from the exhibits attached to the Declaration of Sari E. Kolatch in support of the Greene Defendants' motion to dismiss ("Kolatch Decl.," Dkt. #41); the Affidavit of Mark Levenfus submitted in conjunction with Defendant MPS's motion to dismiss ("Levenfus Aff.," Dkt. #47); the exhibits attached by Plaintiff to his opposition to Defendants' motion to dismiss (Dkt. #63-64); and the exhibits attached to the parties' supplemental briefing after the Court converted the motions, in part, into motions for summary judgment (Dkt. #86-87, 90-92).

For convenience, the Greene Defendants' motion to dismiss Plaintiff's Second Amended Complaint will be referred to as "Greene Br." (Dkt. #39-41), Plaintiff's response in opposition as "Pl. Greene Opp." (Dkt. #64), and the Greene Defendants' reply addressing Plaintiff's Third Amended Complaint as "Greene Reply" (Dkt. #69-70); Defendant MPS's motion to dismiss Plaintiff's Second Amended Complaint will be referred to as "MPS Br." (Dkt. #44-47), Plaintiff's response in opposition as "Pl. MPS Opp." (Dkt. #63), and MPS's reply addressing Plaintiff's Third Amended Complaint as "MPS Reply" (Dkt. #67). Plaintiff's sur-reply in response to both Defendants' motions to dismiss the Third Amended Complaint will be referred to as "Pl. Reply" (Dkt. #76).

Further, Plaintiff's additional briefing with regard to Defendants' motions for summary judgment will be referred to as "Pl. Supp. Br." (Dkt. #86). The Greene Defendants' additional briefing will be referred to as "Greene Supp. Br." (Dkt. #91), and Defendant MPS's additional briefing will be referred to as "MPS Supp. Br." (Dkt. #90).

years, in 1990, Greene approached Plaintiff with an offer to provide "full business management services." (*Id.* at ¶ 22). These services were detailed in a prospectus dated November 7, 1990, followed by a meeting on December 4, 1990, which Plaintiff transcribed and has termed a "verbal contract." (*Id.* at ¶¶ 22-23; TAC, Ex. 1A, 1B).[2]

Greene "represented to [Plaintiff] that he was a financial expert" who could manage and invest Plaintiff's money more aptly than Plaintiff, and thus, he would "maintain[] full custodial control and signature authority" on all of Plaintiff's accounts. (TAC ¶¶ 9-10). As Plaintiff enumerates, the written prospectus indicates that Greene would "be responsible for":

> planning the financial future of [Plaintiff], contract negotiations, receipt of all income, deposit[ing] all earnings, drawing checks to pay bills, maintaining records, all tax returns, wills, trusts, estate planning, insurance, supervision of investment program, determination of asset purchases, and all financial planning for an annual fee of 5% of yearly gross professional earnings.

(*Id.* at ¶ 24). Plaintiff claims that Greene "received all monies and mail" for him, and "recommended" that he (Greene) have durable and individual power of attorney. (*Id.* at ¶ 10). Further, Greene created a corporation for Plaintiff, Joe Coyote Inc. ("JCI"), and served as Secretary and Treasurer of that corporation. (*Id.* at ¶ 9).

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[2] The "verbal contract" comprises a transcript of a meeting between Plaintiff and Greene that was "recorded and subsequently transcribed" with Greene's consent; Plaintiff attaches the transcript as an exhibit to his Third Amended Complaint. (TAC ¶ 23, Ex. 1B).

Plaintiff asserts that, by virtue of Greene's role as his accountant, a fiduciary relationship existed; Greene also "rendered personal financial, investment, and tax advice," and managed Plaintiff's "assets and business," including his defined contribution pension fund. (TAC ¶ 12). Plaintiff claims Greene had "complete and total control" of Plaintiff's finances, along with "legal control" through his role as the "Secretary Treasurer of JCI and the trustee of the JCI pension/investment account"; Greene's "superior knowledge" and "position of trust and confidence" placed him in a fiduciary role." (*Id.* at ¶¶ 11, 13).

2. Plaintiff's 2010 Discovery of Financial Problems

Plaintiff alleges that in late 2010, he went to a bank to cash a certificate of deposit ("CD"), but discovered that it had been garnished due to a federal tax lien, "because his taxes had not been filed for 6-8 years." (TAC ¶ 15). Plaintiff claims not to have been aware of any tax liens, as Greene received all of Plaintiff's mail and failed to inform him of any issues. (*Id.*). Plaintiff requested to meet with Greene and his partner, Richard Guttenberg, who were then employees at MPS, but they became "uncooperative and evasive" and would not agree to meet. (*Id.* at ¶¶ 15-16).[3] According to Plaintiff, he "began to learn [that this failure to file Plaintiff's taxes over a period of years] was only a fraction of the financial wrong doings." (*Id.* at ¶ 19).

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[3] While the TAC contains certain allegations concerning Guttenberg, the Court notes that he is not named as a defendant in this action.

3. The 2011 Termination of Plaintiff's Business Relationship with Defendants

Plaintiff states that, at some point, he received an email indicating that MPS would drop him as a client effective December 31, 2011. (TAC ¶ 25). As he alleges, this termination occurred "without completion of paid for work including six (6) years of [ ] personal taxes and 10-12 years of JCI returns and required reports." (*Id.*). Further, Greene "resigned as trustee" of the JCI Pension Plan on May 18, 2012. (*Id.* at ¶ 26).

4. Plaintiff's Breach of Fiduciary Duty Allegations Against Defendants

Plaintiff asserts that Defendants breached their fiduciary duty of care through constructive fraud by "showing an outrageous, reckless, abusive, and egregious disregard," specifically by:

- (i) "routinely mismanaging" Plaintiff's finances;
- (ii) failing to prepare, send to Plaintiff, or file Plaintiff's tax returns on time or at all;
- (iii) "failing to invest funds carefully, prudently, and promptly";
- (iv) "not changing or recommending a new investment strategy where warranted by a change in circumstances";
- (v) not retaining Plaintiff's personal documents, absent Plaintiff's permission to destroy or discard them;
- (vi) dismissing Plaintiff's "many requests"; and
- (vii) "diverting and draining [Plaintiff's] investments and pension account leaving him essentially homeless and almost completely bankrupt."

(TAC ¶ 18). Plaintiff claims that these breaches harmed both his personal life and his professional standing, and, "most painfully," rendered him financially unable to provide for his mother before she died. (*Id.*). Plaintiff also states that the conduct at issue "[was] either done by Mr. Greene, or he directed someone within ABG&Co or MPS to do so." (*Id.* at ¶ 20).

Plaintiff does not address the violations listed in the preceding paragraph claim-by-claim; rather, he presents a laundry list of factual allegations that the Court will address in the order they are presented, omitting those allegations that amount to mere legal conclusions.

a. Failure to File Taxes

First, Plaintiff alleges that Greene failed to file or send Plaintiff's personal taxes in 1994 and from 2004 to 2011, resulting in liens, levies, garnishment of wages and bank accounts, and a tax bill of approximately $100,000. (TAC ¶¶ 28-29). Additionally, Plaintiff claims that Greene failed to file corporate taxes and required forms for JCI for a period of 10 to 12 years. (*Id.* at ¶ 29). Plaintiff states that, in the fall of 2010, Guttenberg informed him that Greene was transferring Plaintiff's money into Greene's personal account to avoid Government seizure, but Guttenberg did not inform Plaintiff of any liens or levies at that time. (*Id.* at ¶ 30).[4]

Plaintiff states that, after hiring an independent attorney in July 2011, that attorney was informed by Greene that Plaintiff "had slipped through the cracks," which Plaintiff interprets to mean "the returns had never been completed or filed." (TAC ¶ 33). Greene later stated to Plaintiff that the tax

[4] Plaintiff does not address the disconnect in his pleadings between his conceded awareness that his money was being transferred to avoid Government seizure and his professed ignorance of any liens and levies that might have precipitated those transfers.

forms had indeed been prepared and mailed to Plaintiff, but Plaintiff had not filed them. (*Id.*). Plaintiff contends that Greene received "numerous warnings and notices spanning several years," alerting him to Plaintiff's tax delinquencies. (*Id.*). And while acknowledging Greene's claim that he never signed tax forms, Plaintiff states that Greene had power of attorney and had previously signed IRS extension forms and JCI corporate returns. (*Id.*).

Further, Plaintiff alleges that in June 2011, Guttenberg dated a 2005 tax return with the date "10/10/06," even though the actual date was June 21, 2011. (TAC ¶ 34). Guttenberg assured Plaintiff that this was acceptable, but as Plaintiff asserts, this "created a situation that made it appear that [Plaintiff and his then-wife] were simply refiling their returns," when it was instead an attempt to cover Greene's prior failures to file. (*Id.*).

Next, Plaintiff asserts that Greene purports to have all previous tax forms and pertinent records saved to his computer; however, following Plaintiff's request for these documents in November 2010, it took six to nine months for Greene to send the tax forms to Plaintiff. (TAC ¶ 35). Further, in the course of preparing delinquent tax forms for 2009 and 2010, Plaintiff sought records from Greene and MPS in order to answer certain questions, but they "denied access to the records requested." (*Id.* at ¶ 36).

Separately, Plaintiff alleges that while he was attempting to resolve these tax issues, other MPS employees — also not named as defendants — endeavored to transfer Plaintiff's Chase Bank account to a retail branch without Plaintiff's consent. (TAC ¶ 38). While Plaintiff expressed opposition, the address on this account was ultimately changed. (*Id.*). Finally, Plaintiff claims “a discrepancy between Social Security reported earnings ($3,500,000) as reported by Mr. Greene and earnings on [Plaintiff’s] union statements ($7,100,000 including foreign earnings).” (*Id.* at ¶ 39).

b. Failure to Keep or Transmit Complete Records

As but another proffer of misconduct, Plaintiff alleges that Greene breached his fiduciary duty “by not disclosing all relevant facts relating to matters regarding [Plaintiff’s] finances.” (TAC ¶ 41). As he states, rather than providing all bank, financial, and investment statements to Plaintiff, Greene provided “monthly summary statements,” not including “separate itemized invoices for services rendered for [Plaintiff] or JCI”; Plaintiff did not separately receive backup documentation (such as bank statements) at his home address. (*Id.* at ¶¶ 42, 45). Plaintiff claims that the summary statements “contained unexplained large transactions and failed to provide [a] full, detailed, and accurate account of all monies.” (*Id.* at ¶ 43). Plaintiff further states that these statements did not conform to Generally Accepted Accounting Principles (“GAAP”). (*Id.* at ¶ 52).

More specifically, Plaintiff claims that (i) he received a Smith Barney financial statement in the late 1980s listing an offshore account that did not appear on his monthly summary statement;[5] (ii) even after more than 30

[5] Plaintiff does not attempt to reconcile his allegation that he received only summary statements with his receipt of at least one Smith Barney statement. Additionally, inasmuch as Plaintiff alleges that Greene performed only tax-related services prior to 1990 (*see* TAC ¶ 8), the basis of Green’s liability in this regard is unclear.

requests, Greene failed to provide additional statements and documentation from 1990 through 2014; (iii) MPS supplied certain Chase Bank statements in 2011, but omitted months during which, Plaintiff claims, Greene was transferring Plaintiff's money to avoid IRS garnishment; (iv) MPS ultimately sent six or seven boxes of records on April 18, 2012, but these were incomplete and missing hundreds of check records; (v) in August 2012, Plaintiff received an incomplete QuickBooks disk of accounting records; and (vi) in April 2013, MPS's counsel mailed Plaintiff "a completely blank JCI corporate kit." (TAC ¶¶ 44, 46-50).

c. Mismanagement of Pension Fund Assets

Plaintiff next alleges that Greene breached his fiduciary duty by "taking substantial control over JCI and by mismanaging [Plaintiff's] money" that had been entrusted to Greene. (TAC ¶ 55). Plaintiff claims Greene was "a self-appointed trustee" to the JCI Pension Plan, and "had a joint Chase Bank account." (*Id.* at ¶¶ 56-57).

Plaintiff further contends that Greene advised him, early in their relationship, that Plaintiff could invest "up to $30,000" into the JCI Pension Plan annually, which could mature to approximately $1,000,000 by the time of his retirement, "if contributions were made every year." (TAC ¶ 64).[6] After 18

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[6] Notably, Plaintiff does not allege that Defendants stated that they would deposit this amount annually irrespective of Plaintiff's income; rather, in the transcript provided by Plaintiff, Plaintiff asks "[t]hat pension thing … that was the thing you were telling me about … twenty thousand dollars and every nine years." In response, Greene states:

> [I]f you just open a savings account in a regular savings bank and you put thirty thousand dollars there, in nine years the thirty thousand should double … in another nine years it'll be worth a hundred and twenty

years, however, the account contained only $350,000. (*Id.*). Plaintiff notes that 18 years of contributions, at $30,000 per year, should yield a value of $540,000. (*Id.*).

As Plaintiff further alleges, there is "evidence of withdrawals from the pension" by Greene, including a $34,930 deposit and subsequent withdrawal on May 4, 2012, two weeks before Greene "remov[ed] himself as trustee." (TAC ¶ 58). Further, Plaintiff claims, the summary statements discussed above did not include pension and investment records, and the pension fund was liquidated in 2012 without Plaintiff's knowledge or consent. (*Id.* at ¶ 59). Plaintiff discovered these facts in February 2015. (*Id.* at ¶¶ 58-59).[7]

Next, Plaintiff claims that Greene opened an IRA account at a Citibank in Sonoma, California, without Plaintiff's knowledge; curiously, Plaintiff states that the account was opened in 1985, prior to the parties' services agreement. (TAC ¶ 62). Plaintiff also indicates that the account statements were being sent to an address where Plaintiff had not lived for approximately 10 years, and that Greene should have updated this mailing address. (*Id.*). Plaintiff further states

> thousand, and in another nine years it'll be worth two hundred and forty thousand … *assuming that the interest rate stays the same.*

(TAC, Ex. 1B (emphasis added)).

7 Plaintiff indicates that he sought, but had difficulties obtaining, pension records from the Kaufman Katz Financial Group at Morgan Stanley. (TAC ¶¶ 59-61). As Plaintiff states, employees of Kaufman Katz informed him that he "had to disengage Mr. Greene as trustee of JCI in order to withdraw money even though [Plaintiff] himself was also a trustee." (*Id.* at ¶ 61). The Court does not construe this as an allegation against Greene, as Plaintiff does not state that Greene was aware of or had any part in this issue, or that the Kaufman Katz group was a part of ABG Co. or MPS.

that, as of 2012, the IRA contained only $4,000, whereas Greene "should have been contributing funds to [it] annually." (*Id.*).

Finally, Plaintiff alleges that Greene was responsible for overseeing Plaintiff's pension investment program, through which 45 CDs were purchased and sold. (TAC ¶ 63). Plaintiff claims that, per statements received from Kaufman Katz, the total amount used to purchase the CDs was $2,706,000, and the total sale price was $2,670,469; Plaintiff compares this to a $3,500 CD, which he purchased in 1985 and which doubled in value before he discovered, in 2010, that it had been garnished. (*Id.*).

d. Failure to Disclose Disbursement of Checks

Plaintiff also alleges that Greene breached his fiduciary duty as an accountant by "not disclosing relevant facts regarding the payments and disbursements of checks." (TAC ¶ 66). Plaintiff states that between 2000 and 2004, Greene "wrote and disbursed 20 to 30 checks per month when 9 to 12 checks would have covered expenses." (*Id.* at ¶ 67). Further, Plaintiff states that (i) multiple checks were disbursed to unidentified recipients; (ii) certain checks written by Greene to Plaintiff's mother were never received; and (iii) there are "multiple reimbursed expenses" made by Greene, followed by disbursements to Plaintiff's account. (*Id.* at ¶ 70). Plaintiff claims that there is "at least $177,018 unaccounted for from undisclosed checks and disbursements." (*Id.* at ¶ 71).

e. Overcharges of Fees

Plaintiff alleges defalcation of his assets. In particular, he contends that, when the business relationship commenced, Greene gave him a set of largely blank documents to sign, which Plaintiff understood to be "Individual and Durable Powers of Attorney, Corporate Resolution papers and a Chase Bank signature card filled out in Mr. Greene's handwriting and giving Mr. Greene exclusive power on any and all Chase accounts." (TAC ¶ 77). Plaintiff claims that, in spite of requesting the fully executed documents at that time and since, he has never received them — he has only the "essentially blank signature forms." (*Id.*).

More importantly, Plaintiff alleges that Greene breached his obligations "by secretly profiting from the fiduciary relationship," including by paying himself "un-agreed on expenses of approximately $5,000 per year, in addition to overcharging the agreed upon 5% of gross professional earnings" annually. (TAC ¶¶ 72-73). Indeed, Plaintiff claims, "it appears" Greene "fraudulently paid himself approximately $75,000 a year to oversee JCI disguised as business expenses for JCI for over 20 years." (*Id.* at ¶ 74). In all, Greene "overpaid himself at least $90,476 in fees plus $105,000 in un-agreed to expenses and approximately $75,000 a year in fraudulently charged business expenses." (*Id.* at ¶ 78).

Plaintiff states that he has sought copies of checks to "investigate" his suspicions of overpayment, but the checks he received from Chase Bank and JP Morgan Chase were unreadable. (TAC ¶ 75). Moreover, he claims, he was "disenabled by MPS from receiving past statements online" due to a password issue in fall 2011, which "impeded progress toward filing this action." (*Id.* at ¶ 76).

f. Mismanagement of Personal Investments

Plaintiff next alleges that Greene breached his fiduciary duty as an accountant "by failing to invest [Plaintiff's] monies when [Plaintiff] reasonably believed they were being invested." (TAC ¶ 79). Plaintiff states that Greene represented that he would manage all investments in consultation with Plaintiff, but failed to consult Plaintiff and used brokers other than the individual suggested by Plaintiff. (*Id.* at ¶ 80).

g. Earnings and Payment Irregularities

Plaintiff claims Greene breached his fiduciary duty by "not acting solely for the benefit of [Plaintiff], to whom he owed the duty." (TAC ¶ 85). Specifically, Plaintiff alleges that Greene did not deposit the full value of Plaintiff's earnings into his bank accounts, noting specifically payments from "Sunset Boulevard" in 1994 and "Nothing Sacred ABC television series" in 1998. (*Id.* at ¶¶ 87-88).

Further, Plaintiff states that, in 2009, he was paid U.S. dollars for acting work overseas when he was supposed to be paid in British pounds; when part of his paycheck was effectively withheld, presumably by virtue of the exchange rate, Defendants were "unresponsive and ineffective" in helping him obtain the remainder of this money. (TAC ¶ 89). Plaintiff indicates that he learned only in 2012 that he had been paid in U.S. dollars. (*Id.*).[8]

h. Unapproved Money Transfers and Loan Repayments

Next, Plaintiff alleges that Greene's failure to "disclos[e] all relevant facts regarding money transfers and loan repayments" constituted a breach of his fiduciary duty as Plaintiff's accountant. (TAC ¶ 91). Plaintiff cites examples of "unexplained loan repayments made by Mr. Greene to Mr. Greene," in addition to "unexplained balance drops or missing funds from earnings in bank accounts." (*Id.* at ¶¶ 94-95). In all, Plaintiff alleges, these "loan repayments and money transfers" total at least $1,838,187." (*Id.* at ¶ 96).

i. Undisclosed ATM Withdrawals

Plaintiff also claims that Greene breached his fiduciary duty as Plaintiff's accountant by "not disclosing all relevant facts regarding ATM withdrawals." (TAC ¶ 97). Plaintiff refers to "excessive ATM Cash withdrawals" totaling at least $82,023, "not executed by [Plaintiff] or [Plaintiff's ex-wife]," noting that the withdrawal locations were not included on the summary statements. (*Id.* at ¶¶ 98-99).

j. Unapproved Wire Transfers and Credit Card Transactions

Plaintiff next alleges that Greene's "unauthorized wire transfers and credit card transactions" breached his fiduciary duty as Plaintiff's accountant.

[8] Plaintiff's contention on this point is unclear: he indicates that he only learned of the currency error in summer 2012 (TAC ¶ 89), leaving it unclear at what point he alleges Defendants were "unresponsive and ineffective" in attempting to obtain the outstanding payment (*id.*), unless this allegation relates solely to conduct post-dating the conclusion of Defendants' business relationship with Plaintiff.

(TAC ¶ 100). In particular, Plaintiff states that MPS employees requested, from September 2009 to May 2010, that Plaintiff wire funds from his Royal Bank of Scotland account to his Chase account for "payroll," when in fact, JCI had been dissolved as of April 2009, unbeknownst to Plaintiff. (*Id.* at ¶ 101). In addition, he claims, credit card transactions "were made out to [Plaintiff's ex-wife]" over the course of 10 years beginning in 1996, but she "verified the moneys were never received." (*Id.* at ¶ 102). Further, Plaintiff listed a number of "unexplained credit card transactions including advanced credit card payments," totaling at least $263,284 in "undisclosed money transfers and credit card bills." (*Id.* at ¶¶ 103-04).

k. Mismanagement of Treasury Bills

Plaintiff further claims that Greene's failure to "exercis[e] due care in the management" of Plaintiff's assets constituted a breach of his fiduciary duty. (TAC ¶ 105). As Plaintiff explains, Greene opened a Bank of New York Treasury Bill account in January 1991, "without agreed upon consultation or [Plaintiff's] verbal or written consent," and then proceeded to short-sell Treasury Bills, "rampantly cash[ing] [them out] before they matured with no explanation or reason." (*Id.* at ¶ 106).

Plaintiff alleges that "[i]n 1997 the JP Morgan Chase Securities account held $1,000,000 in [Treasury Bills] but by 2003 only $40,000 remained." (TAC ¶ 107). As he asserts, "[t]here is no record of what happened to the monies after the short sale[s]," and there are "$1,000,000 in Treasury bills unaccounted for and with undisclosed disbursement." (*Id.* at ¶¶ 107-08).

1. Mismanagement of JCI Corporate Accounts

Next, Plaintiff alleges that Greene breached his fiduciary duty "by mismanaging [Plaintiff's] money and corporation that he entrusted" to Defendants. (TAC ¶ 109). Plaintiff states that Greene filed for incorporation of JCI on May 17, 1990, prior to the parties' agreement, and he failed to inform Plaintiff when the State of New York dissolved JCI in 2009 for non-payment of taxes. (*Id.* at ¶¶ 110-11). As Plaintiff claims, even when he asked Guttenberg about JCI taxes in 2010, he "was not notified that JCI was dissolved in 2009." (*Id.* at ¶ 112).[9]

Plaintiff makes a number of other assertions in connection with his mismanagement allegations, the import of which are less clear to the Court. For instance, he claims that (i) in February 1995, Greene "through JCI advanced an undisclosed payment of $34495," which was "changed to Mr. Anderson loan repayment" (TAC ¶ 114); (ii) Greene "used a different FEIN [Federal Employer Identification Number] for JCI from 1997 onward" (*id.* at ¶ 115); and (iii) JCI "was not registered with NY state department of revenue as of August 2012" (*id.* at ¶ 116). Separately, Plaintiff claims that Greene disbursed a $10,000 check issued to "K. Anderson" on October 10, 2002, listed as "shareholder loans" on the summary statement; Plaintiff was not aware of

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[9] Plaintiff further states that the "JCI pension statements" provided by Kaufman Katz for 1999-2011 were incomplete. (TAC ¶ 113). Again, given that Kaufman Katz and its employees are not named as Defendants or alleged to be under control of Defendants, the Court does not attribute these claims to the named Defendants.

any loans and "was informed he was the sole shareholder for JCI." (*Id.* at ¶ 117).

m. Forgeries (Including Forged and Fraudulent Checks)

Finally, Plaintiff alleges that Greene "disburs[ed] forged and fraudulent checks," thereby violating his fiduciary duty. (TAC ¶ 119). As Plaintiff claims, Greene "paid utilities" for Plaintiff's rented home "when utilities were included in the rental lease" for that property. (*Id.* at ¶ 123). Plaintiff states that "[i]t is unknown whether checks were cashed by the landlord or whether they were added to the summary statement for utilities paid at an unknown property or were simply fabricated." (*Id.*). Plaintiff concludes that approximately $9,600 to $19,200 in utility payments are not accounted for, "with undisclosed disbursement." (*Id.* at ¶ 124).

Plaintiff also asserts several acts attributable to Guttenberg; while Guttenberg is not named as a Defendant, the Court includes these allegations on the assumption that they could support liability for ABG Co. or MPS, or that they were directed by Greene and support liability against him. First, Plaintiff claims that his former landlady informed him that one endorsed rent check contained a signature and handwriting different from hers, which Plaintiff alleges "resemble Mr. Guttenberg's handwriting." (TAC ¶ 120). Second, Plaintiff claims Guttenberg forged his signature on "an IRS corporate tax document," signing as JCI's President when that role belonged to Plaintiff. (*Id.* at ¶ 121). Last, Plaintiff alleges that Guttenberg notarized his divorce papers with an expired notary stamp, "crossing out [the] expired date and adding [the] current date." (*Id.* at ¶ 122).

5. Plaintiff's Legal Malpractice Allegations Against Defendants

Plaintiff alleges that Greene acted as his attorney, and not merely his accountant, by (i) advising him on trusts and estate planning, including advice on how to "protect[] his assets through different legal entities"; (ii) counseling him, as his tax attorney, on "all aspects of his taxes and providing tax planning strategies";[10] (iii) providing legal advice, as an immigration attorney, during Plaintiff's "effort to obtain a green card for his then wife"; (iv) advising him, as a divorce attorney, regarding his separation, divorce, and post-nuptial agreement; and (v) drafting and negotiating Plaintiff's contracts. (TAC ¶¶ 125-28, 131-34). As further substantiation for his claim of an attorney-client relationship, Plaintiff notes that Greene used "Attorney at Law" letterhead in communications with Plaintiff and with attorneys on Plaintiff's behalf, and he also had power of attorney to control Plaintiff's finances. (*Id.* at ¶¶ 129, 146).

Plaintiff claims that Greene failed to represent him adequately *as his attorney*, including by (i) preparing but failing to file Plaintiff's tax returns; (ii) controlling his finances, and "purport[ing] to invest them suitably and prudently," but then losing Plaintiff's money; (iii) assuming responsibility for

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10 With regard to his tax returns, discussed at length above, Plaintiff again indicates that Greene "represented to [Plaintiff], in a letter sent to [Plaintiff] at the outset of their relationship, that he would be 'responsible for all tax returns, federal, state, local as well as gift, estate, or any others' and that he would 'assume responsibility in connection with … taxes.'" (TAC ¶ 145). Plaintiff claims Greene "had authority to simply sign and file the tax returns on behalf of [Plaintiff] and, in fact, [Greene] signed and filed requests for extensions to file tax returns on behalf of [Plaintiff]." (*Id.*). The Court has not identified any factual allegations pertaining to tax-planning strategies.

paying "nearly all [Plaintiff's] bills," but then "allow[ing] creditors to attach liens to [Plaintiff's] property" when the bills were not paid; and (iv) creating (and becoming an officer of) JCI, but failing to keep it in good standing and ensure its tax returns were properly filed. (TAC ¶¶ 136-38, 140-41). Plaintiff alleges that Greene charged, for his accounting and legal work, 5% of Plaintiff's gross income, in addition to "un-agreed to costs and expenses." (*Id.* at ¶ 139).

Further, Plaintiff asserts that Greene never communicated the scope or fees of his representation or memorialized the parties' services agreement. (TAC ¶ 130). Finally, Plaintiff claims Greene never discussed any potential conflict of interest inherent in Greene's dual role as officer of JCI and advisor to Plaintiff. (*Id.* at ¶¶ 140-43).

B. Procedural Background

On December 31, 2014, Plaintiff, proceeding *pro se*, filed his Complaint against Greene individually. (Dkt. #1). Three weeks later, on January 21, 2015, Plaintiff filed an Amended Complaint against Greene, ABG Co., and MPS. (Dkt. #3). On May 1, 2015, Defendant MPS requested a conference on its anticipated motion to dismiss (Dkt. #10), and on May 8, 2015, the Greene Defendants requested the same (Dkt. #14). On May 28, 2015, the Court held a conference, following which Plaintiff was granted leave to file his Second Amended Complaint ("SAC") on or before June 19, 2015. (Dkt. #23).

On June 9, 2015, Plaintiff requested a stay of the proceedings to permit him to hire an expert to assist with a "forensic financial analysis" in order to amend his complaint with "certainty" (Dkt. #24), which request Defendants opposed (Dkt. #25). The Court denied Plaintiff's request on June 15, 2015, explaining that Plaintiff was required, at the pleading stage, only "to demonstrate that he has legally viable claims that will entitle him to collect evidence in discovery in an effort to *prove* his claims." (Dkt. #26 (emphasis in original)). On June 29, 2015, Plaintiff filed his SAC (Dkt. #30), which, on July 13, 2015, each Defendant indicated it would move to dismiss (Dkt. #33, 34).

On September 11, 2015, Defendants filed their respective motions to dismiss the SAC. (Dkt. #39, 42). On September 15, 2015, Plaintiff requested and was granted an additional month — until November 12, 2015 — to file his response in opposition. (Dkt. #51, 53). Then, on October 5, 2015, Plaintiff sought leave to amend and file a Third Amended Complaint ("TAC") asserting constructive fraud claims (Dkt. #55), which request Defendants opposed on the grounds of futility and perceived dilatory tactics (Dkt. #56). Citing the solicitude afforded *pro se* parties, the Court granted Plaintiff's request to file the TAC, but gave each Defendant an additional ten pages in which to respond to Plaintiff's added claims; the Court also permitted Plaintiff to file a sur-reply. (Dkt. #57). On November 13, 2015, Plaintiff filed his response in opposition to Defendants' motions (Dkt. #60-64), and Defendants filed reply papers on December 3, 2015 (Dkt. #67-70).

On December 8, 2015, nine days before Plaintiff's sur-reply was to be filed, the Court received a letter from Ethan Brecher, prospective counsel to Plaintiff, seeking a 45-day extension for Plaintiff's sur-reply, along with leave to file a Fourth Amended Complaint, "if the facts and law so warrant[ed]." (Dkt. #72). Struck by the timing of this request, in light of a prior order announcing no further extensions (Dkt. #57), the Court denied the request (Dkt. #74). On December 17, 2015, still proceeding *pro se*, Plaintiff filed his sur-reply. (Dkt. #76).

Upon reviewing the full briefing, the Court could not help but notice the volume of exhibits that were attached to Plaintiff's oppositions but had not been included in any prior iteration of Plaintiff's Complaint; it further noted that Defendants had similarly appended various documents to their motion papers (particularly in support of their limitations arguments) and had referenced Plaintiff's exhibits in reply. (Dkt. #82). Accordingly, the Court exercised its discretion under Federal Rule of Civil Procedure 12(d) to convert Defendants' Rule 12(b)(6) motions into Rule 56 motions for summary judgment insofar as they pertained to Defendants' statute of limitations defenses; any remaining claims would be assessed under Rule 12(b)(6). (*Id.*).

In order to satisfy itself that Rule 12(d)'s notice requirement was fulfilled, the Court granted Plaintiff 21 days and an additional 10 pages to present pertinent material, followed by 14 days and 10 pages for each Defendant to provide additional argument. (Dkt. #82). The Court then granted Plaintiff, now counseled by Brecher, a one-week extension, and Plaintiff filed his supplemental briefing on June 9, 2016. (Dkt. #85-87). Defendant MPS filed its papers on June 23, 2016, and the Greene Defendants, following a one-week extension, filed their papers on June 30, 2016, concluding briefing on all motions. (Dkt. #88-92).

DISCUSSION

A. Applicable Law

1. Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in [the plaintiff's] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber*, 648 F.3d at 104 (internal quotation marks omitted). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). "While Twombly does not require heightened fact pleading of specifics, it does require enough facts to 'nudge [a plaintiff's] claims across the line from conceivable to plausible.'" *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 570). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Moreover, "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Id.* at 663.

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint." *Chambers* v. *Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (quoting *Int'l Audiotext Network, Inc.* v. *Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam)); *see generally Goel* v. *Bunge, Ltd.*, 820 F.3d 554, 558-60 (2d Cir. 2016).

Further, "courts must construe *pro se* pleadings broadly, and interpret them to raise the strongest arguments that they suggest." *Cruz* v. *Gomez*, 202 F.3d 593, 597 (2d Cir. 2000) (internal quotation marks omitted) (citing *Graham* v. *Henderson*, 89 F.3d 75, 79 (2d Cir. 1996)); *accord McPherson* v. *Coombe*, 174 F.3d 276, 280 (2d Cir. 1999). "That said, the liberal pleading standard accorded to *pro se* litigants is not without limits, and all normal rules of pleading are not absolutely suspended." *Hill* v. *City of New York*, No. 13 Civ. 8901 (KPF), 2015 WL 246359, at *2 (S.D.N.Y. Jan. 20, 2015) (internal quotation marks omitted).

2. Conversion of a Rule 12(b)(6) Motion Into a Rule 56 Motion

Rule 12(d) of the Federal Rules of Civil Procedure provides that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). A district court may thus convert a motion to dismiss into a motion for summary judgment when the motion presents matters outside the pleadings, provided that the court gives "sufficient notice to an opposing party and an opportunity for that party to respond." *Groden* v. *Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995).

"[C]are should, of course, be taken by the district court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law." *Ramsey* v. *Coughlin*, 94 F.3d 71, 73-74 (2d Cir. 1996) (quoting 6 MOORE'S FEDERAL PRACTICE ¶ 56.12, at 56-165 (2d ed. 1995)). Where a court elects to consider materials outside the pleadings with regard to specific claims, the court may limit its conversion of the motion to those claims for which outside materials will be considered. *See Alex* v. *Gen. Elec. Co.*, No. 12 Civ. 1021 (GTS) (CFH), 2014 WL 2510561, at *4 (N.D.N.Y. June 4, 2014) (stating that a court may "*partially* convert a motion to dismiss to a motion for summary judgment" (emphasis in original)); *Levy* v. *Aaron Faber, Inc.*, 148 F.R.D. 114, 117 (S.D.N.Y. 1993) (partially converting a motion to dismiss to one for summary judgment, on the limited issue of the statute of limitations).

In conjunction with their motion to dismiss, the Greene Defendants submitted, as an exhibit, Plaintiff's disciplinary complaint about Greene to the New York State Supreme Court's Departmental Disciplinary Committee (*see* Dkt. #41, Ex. B), along with Greene's response (*id.*, Ex. C). And, in opposition to Defendants' motions to dismiss, Plaintiff submitted a wealth of exhibits purportedly substantiating his claims, including twenty exhibits in opposition to the Greene Defendants' motion and nine exhibits in opposition to MPS's motion. (*See* Dkt. #63-64). These included, *inter alia*, past correspondence — both letters and emails — with Defendants, Greene's response to Plaintiff's Departmental Disciplinary Committee complaint, a timeline created by Plaintiff of his communications with Defendants, account transcripts from the Internal Revenue Service, a divorce agreement drafted by Greene and post-nuptial agreement drafted by Greene and notarized by Guttenberg, and communications between Plaintiff and Don Fontana, an attorney hired by Plaintiff in 2012 to evaluate his IRS records. (Dkt. #63-64).

"Where both parties submit extrinsic evidence in support of their positions, a district court may fairly convert a motion to dismiss into one for summary judgment under Fed. R. Civ. P. 56." *Garcha* v. *City of Beacon*, 351 F. Supp. 2d 213, 216 (S.D.N.Y. 2005); *see also Carruthers* v. *Flaum*, 388 F. Supp. 2d 360, 378-79 (S.D.N.Y. 2005) (converting a motion to dismiss to one for summary judgment where both sides submitted documents outside the pleadings).

The Court stated in an Order dated May 12, 2016, that

> [g]iven the focused nature of Defendants' statute of limitations defenses, resolution of those defenses may greatly affect evaluation of Plaintiff's claims. In the interest of efficiency and economy, the Court exercises its discretion to convert this motion to dismiss to a motion for summary judgment, only insofar as it pertains to Defendants' statute of limitations defenses, and to consider the evidence provided by the parties.

(Dkt. #82). Because both sides received notice and an opportunity to respond to the additional factual matter appended to the briefing — and Plaintiff even retained the assistance of counsel at this stage — the Court exercises its discretion to convert those portions of Defendants' motions to dismiss addressing statute of limitations arguments into motions for summary judgment.

3. Motions for Summary Judgment Under Federal Rule of Civil Procedure 56

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986); *accord Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also* *Jeffreys* v. *City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing

Anderson). The movant may discharge its burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322; *see also Selevan* v. *N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (finding summary judgment appropriate where the non-moving party failed to "come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim" (internal quotation marks omitted)).

If the moving party meets this burden, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial" using affidavits or otherwise, and cannot rely on the "mere allegations or denials" contained in the pleadings. *Anderson*, 477 U.S. at 248; *see also Wright* v. *Goord*, 554 F.3d 255, 266 (2d Cir. 2009). In other words, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," *Knight* v. *U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986).

"When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc.* v. *CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir.

2003). However, in considering "what may reasonably be inferred" from witness testimony, the court should not accord the non-moving party the benefit of "unreasonable inferences, or inferences at war with undisputed facts." *Berk* v. *St. Vincent's Hosp. & Med. Ctr.*, 380 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (citing *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1318 (2d Cir. 1990)). And because Plaintiff was counseled at the time of his additional briefing on limitations issues, the Court need not construe his arguments in that regard as broadly as in the Rule 12(b)(6) context.

B. Analysis

Plaintiff brings two claims against all Defendants: (i) breach of fiduciary duty based on constructive fraud and (ii) legal malpractice. With respect to the former, Plaintiff claims that "there existed a foregoing relationship of dependence and influence whereby each of the defendants had a fiduciary duty to act with utmost good faith, honesty, and loyalty toward [Plaintiff] and to not favor their own interests at the expense of the interests of [Plaintiff]." (TAC ¶ 148). Plaintiff claims Defendants breached this duty by "not disclosing relevant facts and making material misrepresentations and omissions, by not rendering accounts or by not keeping accurate records of the persons involved, of the dates and amounts of monies received, and of payments made, ... by failing to disclose material facts regarding the status of [JCI]," and by "mismanaging [Plaintiff's] finances and corporation." (*Id.* at ¶ 149).

As for his legal malpractice claim, Plaintiff alleges that "through a foregoing attorney/client relationship between [Plaintiff] and the defendants, there existed a foregoing relationship of dependence and influence whereby each of the defendants owed competent and skillful representation … and to not favor their own interests at the expense" of Plaintiff's interests. (TAC ¶ 152). Plaintiff claims Defendants committed legal malpractice by "an abuse of [Plaintiff's] trust account, commingling trust account funds with the defendants' personal funds," and "other things." (*Id.* at ¶ 153).

For the reasons articulated below, all of Plaintiff's claims are time-barred, with the exception of his claims relating to Defendants' failure to file his 2009 and 2010 tax returns.

1. Plaintiff's Amended Complaint Against MPS and ABG Co. Relates Back to the Initial Complaint Against Arthur B. Greene

A preliminary issue concerns the timing of Plaintiff's claims, and, more specifically, whether the claims brought against the corporate defendants in the Amended Complaint "relate back" to the date of the initial Complaint. For an amended complaint to relate back to an initial complaint under Federal Rule of Civil Procedure 15(c)(1)(C), it must satisfy four criteria: (i) any new claim "must have arisen out of conduct set out in the original pleading"; (ii) any newly named defendant "must have received such notice that it will not be prejudiced in maintaining its defense"; (iii) any newly named defendant must have known that "but for a mistake of identity, the original action would have been brought against it"; and (iv) "the second and third criteria [must be] fulfilled within 120 days of the filing of the original complaint, and … the original complaint [must have been] filed within the limitations period."

Barrow v. *Wethersfield Police Dept.*, 66 F.3d 466, 468-69 (2d Cir. 1995) (citing *Aslanidis* v. *U.S. Lines, Inc.*, 7 F.3d 1067, 1075-76 (2d Cir. 1993)).

Here, the first prong is not seriously in dispute, and the fourth prong is at the heart of the remainder of this Opinion. However, Plaintiff faces a difficult burden at the third prong, as his initial Complaint evidences awareness of MPS's identity even as it fails to name it as a defendant. (*See* Dkt. #1 at ¶¶ 5(b), 6). Complicating the analysis further is Plaintiff's admission that, when filing his Complaint on December 31, 2014, he "realized that he did not have an address for [MPS]" and thus "could only fill in Arthur Greene's address which he knew from memory and was also partially printed on the General Complaint form." (Pl. MPS Opp. 5). Plaintiff indicates that "[w]hen turning in the handwritten complaint packet at [this District's] Pro Se office, he was assured that filing the complaint stops the statute of limitations and that he could add defendants within 21 days of the filing." (*Id.*). Plaintiff then states that, as he did not have a proper address for MPS, he "reasonably erred on the side of caution and waited until he obtained [MPS's] complete information rather than hand in an incomplete form without the proper address of one of the defendants." (*Id.* at 6).

Such statements suggest that Plaintiff did not merely suffer "a mistake of identity" as to MPS, but rather deliberately opted not to name MPS as a defendant. The Supreme Court has held, however, that the relevant inquiry under Rule 15(c)(1)(C)(ii) is "what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant." *Krupski* v. *Costa Crociere S.p.A.*, 560 U.S. 538, 553-54 (2010). Here, Plaintiff's initial Complaint asserted, in its "fraud" section, that from "2009 to May 2010 Anita Asmah and Richard Guttenberg (both employees at MPS) requested the Plaintiff to wire monies totaling approximately $30,000 from his Royal Bank of Scotland British account for 'payroll,' yet JCI was dissolved [on] April 29, 2009." (Dkt. #1 at ¶ 5(b)). Later, Plaintiff alleges that Greene "partook of racketeering as defined by the Racketeer Influenced and Corruption Organizations Act (RICO) … us[ing] his business and employees to engage in a pattern of racketeering, committing two or more of the racketeering offenses, specifically embezzlement and fraud as listed in #4 and #5 above." (*Id.* at ¶ 6). Accordingly, the Court finds that, under the Supreme Court's formulation, Defendants ABG Co. and MPS, as Greene's "business[es]," could reasonably expect that Plaintiff intended to assert a racketeering claim — by definition requiring more than one participant — against them.

While this analysis is an exceptionally close call for the Court, in light of Plaintiff's prompt amendment following his initial Complaint, its decision "is consistent with the purpose of relation back: to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski*, 560 U.S. at 550.

Moreover, Plaintiff also meets the criteria for relation back under New York law. Under Federal Rule of Civil Procedure 15(c)(1)(A), an amended pleading relates back when relation back is permitted by "the law that provides the applicable statute of limitations." Under New York law, the doctrine "permits a plaintiff to amend a complaint and add new defendants even though, at the time of the amendment, the statute of limitations has expired." *Beck* v. *Consol. Rail Corp.*, 394 F. Supp. 2d 632, 639-40 (S.D.N.Y. 2005) (citing N.Y. C.P.L.R. § 203). The party seeking to invoke relation back under New York law must establish three elements: that "[i] both claims arose out of the same conduct, transaction or occurrence; [ii] the new party is 'united in interest' with the original party such that [it] can be charged with notice of the original action and will not be prejudiced in maintaining a defense on the merits; and [iii] the new party should have known that, but for a mistake as to the proper party, the action would have been brought against [it] as well." *Id.* (citing *Blakeslee* v. *Royal Ins. Co. of Am.*, No. 93 Civ. 1633 (MBM), 1998 WL 209623, at *4 (S.D.N.Y. Apr. 29, 1998)).

Again, the claims asserted against all Defendants arise out of the same conduct, transactions, and occurrences as those originally pleaded. And with regard to the second factor, under C.P.L.R. § 203, parties are "united in interest" where "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." *L&L Plumbing & Heating* v. *DePalo*, 677 N.Y.S.2d 153, 154 (2d Dep't 1998) (citing *Prudential Ins. Co.* v. *Stone*, 270 N.Y. 154, 159 (1936)). Thus, "interests will be united[] only where one is vicariously liable for the acts of the other. Underlying the doctrine of vicarious liability … is the notion of control.

The person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences." *Walker* v. *Agro*, No. 96 Civ. 5414 (JG), 2000 WL 744536, at *4 (E.D.N.Y. May 19, 2000) (internal quotation marks and citation omitted).

Here, Defendants do not dispute that Greene worked as an accountant, first at ABG Co., and, beginning in 2009, at MPS. While Defendants dispute the characterization of Greene's move to MPS as a "merger," MPS Managing Partner Mark Levenfus stated in his affidavit in support of MPS's motion to dismiss that in 2009, Greene and Guttenberg, "the principal partners in the accounting firm [ABG Co.], joined [MPS] as contract partners. In connection with Greene and Guttenberg joining [MPS] as partners, [MPS] also acquired some, but not all, of the assets of ABG Co." (Levenfus Aff. ¶ 3). Levenfus also stated that "ABG Co. remained responsible for its own liabilities after Greene and Guttenberg joined [MPS]. For example, ABG Co. maintained its own errors and omissions insurance, and proceeded to wind down its business in an orderly fashion, including satisfaction of its obligations and liabilities." (*Id.* at ¶ 4). Further, Levenfus explained, "the word 'merge' was not used in its technical or legal sense to indicate that the firms had merged, but, instead, in its common usage by laym[e]n to advise the clients that Greene and Guttenberg were now practicing as partners in [MPS]." (*Id.* at ¶ 6).

In light of these statements, the Court deems the parties plausibly "united in interest," as Greene was first a partner at ABG Co. and later became a partner at MPS. *See* N.Y. P'ship Law § 24 ("Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."). Absent indication that such provision does not apply, Greene is "united in interest" with MPS and ABG Co. in that "judgment against one will similarly affect the other." *See L&L Plumbing*, 677 N.Y.S.2d at 154.

With respect to the third factor, while worded similarly to the federal test for relation back, courts in New York "typically deem dispositive the presence or absence of bad faith on the part of the party seeking the amendment." *Walker*, 2000 WL 744536, at *4; *see also Buran* v. *Coupal*, 87 N.Y.2d 173, 181 (1995) (finding the third prong would not be met where "plaintiff omitted a defendant in order to obtain a tactical advantage in the litigation [by] … intentionally decid[ing] not to assert a claim against a party known to be potentially liable"); *Blakeslee*, 1998 WL 209623, at *6 ("[U]nder this third prong of the test, courts should focus on whether the party invoking the relation back doctrine acted intentionally or in bad faith in not including all the appropriate parties in the original pleading."). Here, there is no evidence or indication that Plaintiff sought a "tactical advantage" by failing to name MPS or ABG Co. during the three-week span between his initial and amended Complaints. Plaintiff explains the delay as mere confusion about Defendant MPS's address and a misunderstanding, ostensibly engendered by the District's Pro Se Office, regarding the tolling of the statute of limitations. And since Defendants do not contend that Plaintiff sought any advantage by filing an initial Complaint without naming MPS or ABG Co., the Court will not find such a motive.

Accordingly, Plaintiff meets the test under New York law for relation back of his Amended Complaint as against MPS and ABG Co. To be sure, Plaintiff's arguments for relation back are by no means unimpeachable; however, the Court finds that the order of events satisfies Rule 15 and the underlying "preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits," rather than on technicalities. *Krupski*, 560 U.S. at 550.

2. Plaintiff's Claims for Breach of Fiduciary Duty Based on Constructive Fraud Are Time-Barred, with the Exception of Plaintiff's Claims Pertaining to His 2009 and 2010 Tax Returns

Under New York law, "the applicable statute of limitations for breach of fiduciary duty claims depends on the substantive remedy sought. Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies." *Kaufman* v. *Cohen*, 760 N.Y.S.2d 157, 164 (1st Dep't 2003). However, if a plaintiff seeks money damages, "courts have viewed such actions as alleging 'injury to property,' to which a three-year statute of limitations applies." *Id.*; *see also Carlingford Ctr. Point Assocs.* v. *MR Realty Assocs., L.P.*, 772 N.Y.S.2d 273, 274 (1st Dep't 2004) ("A breach of fiduciary duty claim is governed by either a three-year or six-year limitation period, depending on the nature of the relief sought. The shorter time period applies where monetary relief is sought, the longer where the relief sought is equitable in nature." (internal citations omitted)).

a. Plaintiff's Claims Are Not Governed by the Six-Year Limitations Period for Constructive Fraud Actions

In his TAC and sur-reply papers, Plaintiff contends that his fiduciary duty claims sound in constructive fraud, and thus, they are subject to a six-year statute of limitations. (Pl. Reply 1-6). *See Balta* v. *Ayco Co.*, 626 F. Supp. 2d 347, 356 (W.D.N.Y. 2009) ("[C]laims for breach of fiduciary duty that sound in fraud are subject to a six-year statute of limitations, even when the relief sought is money damages."). Defendants rejoin that Plaintiff's assertion of constructive fraud cannot save his claims, and they remain subject to the three-year statute of limitations governing fiduciary duty claims seeking money damages. (Greene Reply 3-10; MPS Reply 7-12). The Court finds Defendants' arguments to be supported by the law: Plaintiff's late assertion of constructive fraud cannot render his claims timely.

Even "[a]ssuming that fraud has been pled adequately, whether a plaintiff may take advantage of the longer limitations period turns on whether the fraud claim is 'essential' to the breach of fiduciary duty claim, or whether the fraud claim is 'incidental' to the fiduciary duty claim." *Matana* v. *Merkin*, 957 F. Supp. 2d 473, 492 (S.D.N.Y. 2013). "Where the alleged fraud is merely 'the means of accomplishing the breach and add[s] nothing to the causes of action ...,' the statute of limitations applicable to fraud claims will not control." *Powers Mercantile Corp.* v. *Feinberg*, 490 N.Y.S.2d 190, 193 (1st Dep't 1985) (quoting *Iandoli* v. *Asiatic Petroleum Corp.*, 395 N.Y.S.2d 15, 15 (1st Dep't 1977)); *cf. Garber* v. *Ravitch*, 588 N.Y.S.2d 163, 164 (1st Dep't 1992) ("Where an allegation of fraud is not essential to the cause of action pleaded, [and] its only purpose [is] to avoid an anticipated defense of the Statute of Limitations," the shorter limitations period of a replevin action applied).[11]

In other words, "[a] fraud action is not incidental only when: [i] the fraud occurred separately from and subsequent to the injury forming the basis of the alternate claim; and [ii] the injuries caused by the fraud are distinct from the injuries caused by the alternate claim." *Corcoran* v. *N.Y. Power Auth.*, 202 F.3d 530, 545 (2d Cir. 1999). Where a plaintiff's "allegations of breach of fiduciary duty are substantially identical to its allegations of fraud," "the injuries alleged in the two claims are not distinct." *Matana*, 957 F. Supp. 2d at 492. In that case, the statute of limitations applicable to the breach of fiduciary duty claim will control. *Id.* at 492-93.

Plaintiff's constructive fraud claims are a thinly-disguised effort to circumvent the limitations period for his fiduciary duty claims, as revealed by the evolution of his pleadings in this case. As in *De Carlo*, upon the filing of Defendants' motions to dismiss, Plaintiff sought leave to file his Third Amended Complaint; the only change from its predecessor was the repeated inclusion of the phrase "based on constructive fraud" following the phrase "breach of

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11 *See generally De Carlo* v. *Ratner*, 204 F. Supp. 2d 630 (S.D.N.Y. 2002):

> Upon learning that [the defendant] planned to oppose this action on statute of limitations grounds, [plaintiff] amended his complaint to include a fraud claim.... [Plaintiff] argues that his fraud claim is governed by the six year statute of limitations ... and that it therefore is not time-barred. We reject [plaintiff's] argument for several reasons. First, he simply has not pleaded a cause of action in fraud distinct from his malpractice claim. In applying the Statute of Limitations we look for the reality, and the essence of the action and not its mere name.

Id. at 637 (internal quotation marks and alteration omitted).

fiduciary duty." (*Compare* SAC § III.B, ¶ 1, p. 36 ("FIRST CAUSE OF ACTION – COUNT I: Breach of Fiduciary Duty"); *with* TAC § III.B, ¶ 1, p. 37 ("FIRST CAUSE OF ACTION – COUNT I: Breach of Fiduciary Duty based on Constructive Fraud")). Other than this incantation, Plaintiff did not amend the relevant factual allegations in any way. Significantly, however, Plaintiff's claims in this case sound in fiduciary duty — as discussed above, he alleges that Defendants "routinely mismanage[d]" his finances; failed to prepare, send, or file his taxes; "fail[ed] to invest funds carefully, prudently, and promptly"; failed to recommend "a new investment strategy where warranted by a change in circumstances"; failed to retain Plaintiff's documents; dismissed Plaintiff's "many requests"; and "divert[ed] and drain[ed] [Plaintiff's] investment and pension account leaving him essentially homeless and almost completely bankrupt." (TAC ¶ 18).

Plaintiff recites a host of facts regarding these claims, but even assuming that such allegations amount to properly pleaded constructive fraud, they constitute only "the means of accomplishing the breach[es]" of fiduciary duty that are at the heart of his Complaint. *Iandoli*, 395 N.Y.S.2d at 15. Because Plaintiff fails to plead constructive fraud that occurred separately from and subsequent to the injuries at the base of his complaints, he does not receive the benefit of the six-year statute of limitations.

b. Plaintiff's Claims Are Not Governed by the Six-Year Statute of Limitations for an Accounting

Additionally, Plaintiff contends that his claims are subject to the six-year statute of limitations governing actions for equitable relief, as Plaintiff has requested an accounting in the TAC. (Pl. Greene Opp. 20; Pl. Reply 6-7). An accounting is an "equitable remedy … designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession." *Roslyn Union Free Sch. Dist.* v. *Barkan*, 16 N.Y.3d 643, 643-44 (2011). Under New York law, to bring a claim for an accounting, a plaintiff must allege "[i] relations of a mutual and confidential nature; [ii] money or property entrusted to the defendant imposing upon him a burden of accounting; [iii] that there is no adequate legal remedy; and [iv] in some cases, a demand for an accounting and a refusal." *Ellington Credit Fund, Ltd.* v. *Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 207 (S.D.N.Y. 2011) (quoting *IMG Fragrance Brands, LLC* v. *Houbigant, Inc.*, 679 F. Supp. 2d 395, 411 (S.D.N.Y. 2009)).

Plaintiff's argument does not suffice to give him the benefit of the longer limitations period. Even if Plaintiff has properly pleaded the first two prongs, he falls short in demonstrating the inadequacy of a legal remedy. *See CSI Inv. Partners II, L.P.* v. *Cendant Corp.*, 507 F. Supp. 2d 384, 425 (S.D.N.Y. 2007) ("An accounting claim is not proper where money damages are recoverable under alternative causes of action for the same injury"), *aff'd*, 328 F. App'x 56 (2d Cir. 2009) (summary order).

More pointedly, "[w]here there are concurrent remedies at law and in equity, the plaintiff cannot enlarge the limitations period for the claim seeking damages relief by also seeking equitable relief," and "the request for equitable relief in the form of … an accounting does not enlarge the limitations period for the claim for money damages." *ABS Entm't, Inc.* v. *CBS Corp.*, No. 15 Civ. 6801 (JGK), 2016 WL 676464, at *3 (S.D.N.Y. Feb. 18, 2016) (internal citations, quotation marks, and alterations omitted); *see also Klein* v. *Bower*, 421 F.2d 338, 344 (2d Cir. 1970) ("New York courts have long held that a prayer for equitable relief will not bring an action under the longer limitations period for equity actions when full relief can be granted at law. The prayer for an accounting … [is] not enough to bring the action within the longer equity period." (internal citations omitted)).

Still further, "an accounting is unnecessary when an underlying legal action exists, and is properly dismissed when the legal action is time-barred." *Pons* v. *People's Republic of China*, 666 F. Supp. 2d 406, 415 (S.D.N.Y. 2009); *see also Arrow Commc'ns Labs.* v. *Pico Prods. Inc.*, 632 N.Y.S.2d 903, 905 (4th Dep't 1995) ("Where a party seeks an accounting, but the primary demand is for monetary damages, the accounting is merely a method to determine the amount of monetary damages. The action therefore sounds in law and not in equity." (internal quotation marks and alterations omitted)).

Here, Plaintiff seeks substantial money damages, including compensatory damages of $3,900,000, statutory treble damages, lost wages in the amount of $1,200,000, lost pension funds in the amount of $300,000 plus interest, legal fees in the amount of $100,000, and unspecified punitive damages. (TAC § V ¶¶ 1, 3-5, 7-8). Throughout the TAC, however, Plaintiff reiterates his request for an accounting. (*See, e.g., id.* at ¶¶ 65 ("The true nature of missing monies from the pension fund is not known until accountings of the pension fund have been made."), 71 ("The true nature and sum of the undisclosed checks and disbursements made by Mr. Greene is not known until accountings of the checks and disbursements have been made."), 78 ("The true nature and sum of overpayments [of fees] made by Mr. Greene is not known until accountings of the overpayments have been made."), 84 ("The true nature and sum of all investments made by Mr. Greene is not known until accountings of the investments have been made."), 90 ("The true nature and sum of missing and unaccounted for funds is not known until an accounting of [Plaintiff's] earnings has been made."), 96 ("The true nature and sum of the loan repayments and money transfers are unknown until an accounting has been made."), 99 ("The true sum and nature of the undisclosed ATM withdrawals remain unknown until an accounting of the withdrawals has been made."), 104 ("The true sum and nature of the [unexplained money] transfers and [credit card] bills is unknown until an accounting of them has been made."), 108 ("Until an accounting is made, the true nature and sum of the missing monies from the T-bills is unknown."), 118 ("The true nature of JCI as created and used as a corporation to benefit [Plaintiff] is not known until an accounting of the corporation has been made."), 124 ("Until an accounting is made, the true nature and sum of the undisclosed disbursements and forged checks is unknown.")). Moreover, in his Prayer for Relief, Plaintiff requests "[a]n equitable accounting of missing monies and investments, and undisclosed disbursements." (*Id.* at § V ¶ 9).

Plaintiff now contends that "whenever there is a fiduciary relationship between the parties, as is the situation here, there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law." (Pl. Supp. Br. 6 (citing *Koppel* v. *Wien, Lane & Malkin*, 509 N.Y.S.2d 327, 330 (1st Dep't 1986)). Without conceding the point, the Court observes that Plaintiff has not brought a claim for an accounting; rather, as in the cases cited above, Plaintiff has brought a claim for money damages and asserted a request for an accounting as a method of determining those damages. As such, a concurrent remedy at law exists, as damages would be recoverable under Plaintiff's claims. Accordingly, the shorter statute of limitations governs. *See ABS Entm't, Inc.*, 2016 WL 676464, at *3; *Klein*, 421 F.2d at 344.

Because Plaintiff primarily seeks money damages, and discovery as to the measure of those damages will be available to him should he move forward on those claims, he "can obtain all the information [he] seek[s] in [his] existing claims at law," and "no useful purpose would be served by treating [his] equitable accounting claim as an additional, and duplicative, action at law." *Leveraged Leasing Admin. Corp.* v. *PacifiCorp Capital, Inc.*, 87 F.3d 44, 49 (2d Cir. 1996). Thus, assuming Plaintiff can demonstrate a fiduciary relationship warranting an accounting, this nevertheless does not suffice to bring his claims under the six-year limitations period. Rather, they remain subject to the three-year statute of limitations governing his requests for damages.[12]

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12 Along the same lines, the TAC seeks "a constructive trust [to] be imposed on all property owned, in whole or in part, by Defendants which was acquired, in whole or in part, by Defendants with the funds misappropriated from the Plaintiff[']s accounts."

c. Plaintiff's Claims Are Time-Barred Absent a Basis for Tolling

Having determined that a three-year statute of limitations applies to Plaintiff's claims for breach of fiduciary duty, *see Kaufman*, 760 N.Y.S.2d at 164, the Court must now determine when each claim accrued. "A claim for breach of fiduciary duty generally accrues at the time of breach." *Barnett* v. *Countrywide Bank, FSB*, 60 F. Supp. 3d 379, 391 (E.D.N.Y. 2014) (citing *Malmsteen* v. *Berdon, LLP*, 369 F. App'x 248, 249-50 (2d Cir. 2010) (summary order)). Here, unless any of the alleged breaches of fiduciary duty accrued on the very day MPS terminated its services — which Plaintiff does not suggest — Plaintiff's claims are not timely absent some reason to toll the statute of limitations. Indeed, many of Plaintiff's claims accrued years before the end of the relationship.

With regard to Plaintiff's tax-related claims, the latest alleged failure by Defendants occurred in 2011. Even giving Plaintiff the benefit of a renewed statute of limitations for each year in which Defendants did not file his taxes, Plaintiff's claim in 2011 for failure to file his personal taxes would have accrued on April 18, 2011, or on October 17, 2011, if Defendants had sought an extension from the Internal Revenue Service.[13] Further, assuming Plaintiff has

(TAC § 5.A ¶ 2). While a constructive trust claim "is governed by the six-year statute of limitations provided by CPLR 213(1)," *Kaufman*, 760 N.Y.S.2d at 171, the shorter statute of limitations governs when legal remedies will "afford[] plaintiff[] full and complete relief," *Gold Sun Shipping Ltd.* v. *Ionian Transp. Inc.*, 666 N.Y.S.2d 677, 678 (2d Dep't 1997).

[13] The Court takes judicial notice of the Internal Revenue Service's 2011 Tax Calendar, published to the public at https://www.irs.com/articles/2011-tax-calendar, and the

standing to assert claims on behalf of the corporate entity JCI — an assumption that Defendants persuasively refute (*see* Greene Br. 22, 24-25; Greene Reply 5 n.6) — Plaintiff's claim for failure to file JCI's corporate taxes would have accrued at the deadline for fourth-quarter filings on December 15, 2011, more than two weeks prior to the termination of MPS's services. (*Id.*).[14]

With respect to the asserted "incomplete records and omission of data," Plaintiff alleges that Greene "breached his fiduciary duty by not disclosing all relevant facts relating to matters regarding [Plaintiff's] finances." (TAC ¶ 41). Plaintiff ties this to his receipt of monthly summary statements, indicating that these statements "contained unexplained large transactions and failed to provide full, detailed, and accurate account of all monies" (*id.* at ¶43), and that they failed to conform to GAAP standards (*id.* at ¶ 52). Further, Plaintiff asserts that "[a]fter over 30 requests to provide the [corresponding] records," Greene continued to refuse to do so. (*Id.* at ¶ 46). Plainly, both Defendants' failures to provide complete and adequate accounting records and Greene's alleged refusal to turn over supporting documentation accrued when those breaches first occurred, well before the termination of MPS's services on December 31, 2011. Accordingly, those claims are not timely absent an independent reason to toll the statute of limitations.

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fact that the IRS will grant an individual taxpayer a filing extension until October of the same year.

14 Again here, the Court takes judicial notice of the fourth quarter filing deadline for corporations, pursuant to the Internal Revenue Service's 2011 Tax Calendar. *See* https://www.irs.com/articles/2011-tax-calendar.

Similarly, Plaintiff claims Greene mismanaged his pension fund, stating that Greene, "as [Plaintiff's] accountant, breached his fiduciary duty by taking substantial control over JCI and by mismanaging [Plaintiff's] money that he entrusted to [ ] Greene." (TAC ¶ 55). Along the same lines, Plaintiff contends that Greene mismanaged Plaintiff's investments "by failing to invest [Plaintiff's] monies when [Plaintiff] reasonably believed they were being invested." (*Id.* at ¶ 79). Given that all of this alleged mismanagement necessarily began prior to MPS's resignation as Plaintiff's accountants, the statute of limitation for these claims also expired prior to the filing of Plaintiff's Complaint.

With regard to Plaintiff's claim that Greene "breached his fiduciary duty by not disclosing relevant facts regarding the payments and disbursement of checks," Plaintiff contends that "[b]eginning 2000 through 2004," Greene "excessively wrote and disbursed 20 to 30 checks per months when 9 to 12 checks would have covered expenses." (TAC ¶¶ 66-67). Plaintiff also references checks with "unidentified recipients" in 1991 and 1995, and purportedly problematic "reimbursed expenses" in 2003. (*Id.* at ¶¶ 68, 70). As all of these events took place well over three years prior to Plaintiff's filing, claims premised upon them are not timely.

Further, Plaintiff contends that Greene "breached his fiduciary duty by secretly profiting from the fiduciary relationship," and specifically, Defendant "paid himself for un-agreed upon expenses of approximately $5,000 per year in addition to overcharging the agreed upon 5% of gross professional earnings commission fee from late 1990 through 2011." (TAC ¶ 73). Given that this breach accrued in 1990, when Greene allegedly began paying himself in excess of the fee to which Plaintiff agreed, this claim is not timely under the three-year statute of limitations.[15]

A review of Plaintiff's other claims reveals similar timeliness issues. Plaintiff's claims regarding "unexplained loan repayments" and "unexplained balance drops" recite a list of examples, the latest of which occurred in November 2004, more than ten years prior to Plaintiff's initial Complaint. (*See* TAC ¶¶ 93-95). Likewise, Plaintiff's claims regarding "undisclosed ATM withdrawals" only allege withdrawals made as late as 2003. (*Id.* at ¶ 98). And, Plaintiff's allegations pertaining to "unapproved wire transfers and credit card transactions" relate, in the latest instance, to transactions that occurred in May 2010. (*Id.* at ¶¶ 101-03). Accordingly, the statute of limitations has expired on all of these claims.

With regard to Plaintiff's claims of mismanagement of Treasury Bills, Plaintiff alleges that Greene "breached his fiduciary duty by not exercising due care in the management of [Plaintiff's] assets," including by "rampantly

[15] An argument could be made that each year of alleged overpayment began anew the three-year limitations period for this claim, such that Plaintiff's contention regarding the outsized 2011 commission fee might be viable. However, in the exhibits submitted with his Opposition to the Greene Defendants, Plaintiff details (i) his earnings that year, (ii) 5% of that figure, (iii) the actual amount of Greene's fee, and (iv) the amount by which he believes Greene over- or underpaid himself. (*See* Pl. Greene Opp., Ex. 8). For 2010, for instance, Plaintiff indicates that he earned $85,895.69, 5% of which would be $4,294.50; Greene paid himself $3,407, constituting an underpayment of $887.50. (*Id.*). For 2011, however, Plaintiff states that he earned $8,317.03, but no charged fee is listed, and Plaintiff instead states, "NOTE: THEY HAVE DROPPED ME AS CLIENT. NOT DOING 2011 TAXES." (*Id.*). Accordingly, even if these payments were considered severable, Plaintiff has not alleged facts suggesting any 2011 fee, much less one paid on December 31, 2011, and he has in fact produced documents suggesting that no such fee was paid in that year.

cash[ing] out T-bills before they matured with no explanation or reason." (TAC ¶¶ 105-06). However, the latest Treasury Bill transaction alleged by Plaintiff occurred between August and November of 2005 (*id.* at ¶ 107), rendering these claims untimely as well.

Plaintiff further alleges mismanagement of JCI's corporate accounts, stating that Greene failed to "exercise due care in the management of [Plaintiff's] corporation," including by failing to notify Plaintiff of the corporation's dissolution by New York State in 2009. (TAC ¶¶ 109, 112). Separately, Plaintiff references an "undisclosed payment" through JCI in February 1995, an unexplained "disbursed check" in October 2002, and Greene's "use[] [of] a different [Federal Employer Identification Number] for JCI from 1997 onward." (*Id.* at ¶¶ 114-15). As none of these allegations relate to actions within three years prior to Plaintiff's Complaint, they are not timely.

Finally, Plaintiff alleges that Greene "breached his fiduciary duties by disbursing forged and fraudulent checks," but again he fails to allege any acts occurring within the three-year period prior to filing his Complaint. (TAC ¶ 119). Plaintiff states that "[on] May 21, 2014, at ~9:00 a.m., Peggy Anderson, landlady for loft at 39 Spring Street, New York City, New York, 10012 stated that the signature on Check 7126 was not her signature.... The false signatures resemble Mr. Guttenberg's handwriting." (*Id.* at ¶ 120). While this claim is not untimely on its face, Plaintiff submitted an affidavit from Peggy Anderson in conjunction with his opposition, affirming that she was his "landlady from January to June of 1999 and September 2003 to June of 2004," meaning that any check to her would have been written no later than 2004. (Pl. Reply 14). Apart from this, Plaintiff references Guttenberg "forg[ing]" Plaintiff's signature "on an IRS corporate tax document in 2009," and notarizing a divorce document with an expired notary stamp. (*Id.* at ¶¶ 121-22). As the rent check claim occurred outside the three-year window, and the divorce-related documents submitted by Plaintiff are dated 2003 (*see* Pl. Greene Opp., Ex. 12), these claims are untimely as well. Plaintiff relatedly contends that Greene "paid utilities March 1995 to March 2003 when utilities were included in the rental lease" for Plaintiff's residence, and "[i]t is unknown whether checks were cashed by the landlord or whether they were added to the summary statement for utilities paid at an unknown property or were simply fabricated." (TAC ¶ 123). Even were any of these alleged actions to amount to a breach of fiduciary duty, the action would have occurred more than three years prior to Plaintiff's initial Complaint.

In sum, because none of the alleged breaches occurred within three years of Plaintiff's Complaint, Plaintiff's argument based on the continuing violations doctrine, raised in his counseled supplemental briefing, is unavailing. (*See* Pl. Supp. Br. 3 n.2). As Plaintiff correctly references, the continuing violations doctrine "applies to a series of fiduciary violations, 'where fiduciaries repeat violations of the same character over and over.'" (*Id.* (citing *L.I. Head Start Child Dev. Servs., Inc.* v. *Econ. Opportunity Comm'n of Nassau County, Inc.*, 558 F. Supp. 2d 378, 401 (E.D.N.Y. 2008))). Even accepting Plaintiff's assertion that the doctrine applies to his claims, it would not suffice to toll the statute of limitations beyond the last action taken by Defendants, which occurred more than three years prior to Plaintiff's filing.

The Court further observes that in the TAC, Plaintiff terms the transcript of his December 4, 1990 meeting with Greene a "verbal contract." (TAC ¶ 23). However, Plaintiff simultaneously acknowledges that Greene "didn't have written contracts with any of his clients" (*id.*), thereby casting significant doubt on whether Greene intended to enter any verbal contract. Moreover, "[a] plaintiff faces a heavier burden when trying to prove an alleged oral contract. To ensure that parties are not trapped into surprise contractual obligations that they never intended, *more than agreement on each detail is required*, [and] there must be an overall agreement to enter into the binding contract." *Cleveland Wrecking Co.* v. *Hercules Constr. Corp.*, 23 F. Supp. 2d 287, 293 (E.D.N.Y. 1998) (internal quotation marks and citations omitted) (emphasis added). Here, neither the "prospectus" nor the transcript offered by Plaintiff evidences any mutual intent to enter a binding agreement. In light of this absence, and Greene's undisputed refusal to enter a written contract for his services, the Court will not evaluate Plaintiff's claims under a breach of contract theory, Plaintiff's reference to their discussion as a "verbal contract" notwithstanding.[16]

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16 Notably, Plaintiff's counsel on summary judgment briefing did not raise a breach of contract theory as a rationale to extend the limitations period. Nonetheless, in light of Plaintiff's *pro se* status throughout the proceedings prior, the Court has evaluated whether the TAC could adequately plead such a claim.

As noted above, Plaintiff does not indicate in the TAC or any briefing that any of the alleged actions underlying the asserted breaches of fiduciary duty occurred on or after the date on which MPS terminated its services, thereby severing any fiduciary ties between Plaintiff and Defendants. Nonetheless, the Court has evaluated Plaintiff's allegations individually and come to the conclusion that all of the alleged actions must have predated December 31, 2011, and thus all are untimely unless Plaintiff presents sufficient justification for extending the relevant statute of limitations. The Court will now consider each of Plaintiff's proffered bases for tolling.

d. The Statute of Limitations Is Not Tolled by the Open Repudiation Doctrine

Plaintiff alleges that (i) "[i]n an email to [him], MPS dropped [him] as a client effective December 31, 2011 without completion of paid for work," and (ii) "Mr. Greene resigned as trustee of JCI Defined Contribution Pension Plan on May 18, 2012." (TAC ¶¶ 25-26). Plaintiff then states that "[i]n some actions involving breach of fiduciary duty, a special tolling rule provides that … the statute of limitations (whether six years for claims seeking equitable relief or three years for money damages) is tolled until the relationship terminates or the fiduciary 'openly repudiates' his or her fiduciary obligations, whichever occurs first." (*Id.* at ¶ 27). In his supplemental briefing, Plaintiff reiterates this argument, contending that MPS repudiated its relationship on December 31, 2011, and that Greene repudiated his relationship — at the earliest — on May 18, 2012, "when he stepped down as lawyer and trustee of the JCI pension account." (Pl. Supp. Br. 8). Further, Plaintiff argues that Greene's letter, which was written on MPS letterhead, "indicates he [was] working on the JCI pension account on behalf of MPS," and thus, "[t]he May 18, 2012 date should apply to all of the Defendants when calculating the open repudiation date." (*Id.* at 8-9). Plaintiff's arguments miss the mark.

"Under New York law, the limitations period for claims arising out of a fiduciary relationship does not commence 'until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated.'" *Golden Pac. Bancorp* v. *F.D.I.C.*, 273 F.3d 509, 518 (2d Cir. 2001) (quoting *Westchester Religious Inst.* v. *Kamerman*, 691 N.Y.S.2d 502, 503 (1st Dep't 1999)). "In such cases, the 'statutory period [is] tolled between the alleged fiduciary misconduct' and the date on which the fiduciary relationship is openly repudiated or otherwise ended, so that any misconduct alleged before that end date 'falls within the permissible temporal scope.'" *Id.* at 519 (quoting *Kamerman*, 691 N.Y.S.2d at 503). Significantly, however, "[t]he open repudiation doctrine applies only [ ] to claims for equitable relief, and not to claims for money damages." *Willensky* v. *Lederman*, No. 13 Civ. 7026 (KMK), 2015 WL 327843, at *10 n.21 (S.D.N.Y. Jan. 23, 2015); *see also Kaszirer* v. *Kaszirer*, 730 N.Y.S.2d 87, 88 (1st Dep't 2001) ("[T]he requirement of a clear repudiation applies only to claims seeking an accounting or other equitable relief.").

As noted above, while Plaintiff asserts the need for an accounting, the TAC ultimately sounds in law and merely seeks an accounting as a method of determining damages, rather than as a separate equitable claim. *See supra* at

38-42; *cf. Bd. of Trustees ex rel. Gen. Ret. Sys. of Detroit* v. *BNY Mellon, N.A.*, No. 11 Civ. 6345 (RJS), 2012 WL 3930112, at *9 (S.D.N.Y. Sept. 10, 2012) ("[T]he open repudiation doctrine is inapplicable to Plaintiffs' claim because the doctrine only applies to the six-year statute of limitations for equitable relief — not the three-year period for monetary damages."); *see also NEM Re Receivables, LLC* v. *Fortress Re, Inc.*, — F. Supp. 3d —, No. 15 Civ. 3875 (VM), 2016 WL 3144390, at *5 (S.D.N.Y. May 5, 2016) (rejecting open repudiation argument where plaintiff "failed to meet at least one of the remaining requirements for a claim of accounting," namely, the absence of an adequate remedy at law) (opinion denying reconsideration). Accordingly, despite Plaintiff's request for an accounting to determine his prospective legal damages, the open repudiation doctrine will not serve to toll the statute of limitations. Using a similar analysis, the Court rejects Plaintiff's claim (*see* Pl. Supp. Br. 8-9) that the statute of limitations for the entirety of the TAC is tolled until May 18, 2012, when Greene resigned as Trustee of the JCI Pension Plan; rather, as discussed above, any claim for redress concerning the pension plan accrued when Greene's alleged mismanagement began.

e. The Statute of Limitations Is Not Tolled by Equitable Tolling or Equitable Estoppel

In the alternative, Plaintiff notes that "equitable estoppel permits circumstances to extend the three-year limitations period when a plaintiff is 'prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant,'" and argues that "[a]t every turn, [Plaintiff] was denied access to his records from Mr. Greene et al and began making discoveries only after obtaining records through his own tireless efforts by various other means." (TAC ¶ 54). In his supplemental briefing, Plaintiff adds that the monthly summary statements were "deceptive, incomplete, misleading, and fraudulent," which he claims "prevented [him] from discovering the Defendants['] breaches of fiduciary duty and malpractice," consequently inducing him to refrain from filing a timely action. (Pl. Supp. Br. 9).

As the Second Circuit has explained, "[e]quitable tolling is an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances." *Veltri* v. *Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004). Specifically, "equitable tolling has been held appropriate where plaintiff filed and served defective papers before the expiration of the statutory period, or where defendant induced plaintiff to file late through trickery or deception." *Id.* at 322-23 (internal citation omitted). "Equitable tolling has also been held appropriate where plaintiff was somehow prevented from learning of [his] cause of action within the statutory period." *Id.* at 323. Further, in instances of "fraudulent concealment," or "[w]here defendant is responsible for concealing the existence of plaintiff's cause of action," the Second Circuit has found equitable tolling warranted. *Id.* In sum, "[t]he relevant question is not the intention underlying defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action." *Id.*

Here, Plaintiff has neither pleaded nor presented facts demonstrating that Defendants "induced [him] to file late through trickery or deception"; rather, he contends that they "denied [him] access to his records," presumably to delay him in filing his Complaint. (TAC ¶ 54). However, numerous documents submitted by the parties — documents that Plaintiff possessed or prepared long before the filing of the Complaint or the expiration of the statute of limitations — belie these contentions. For instance, in an October 10, 2011 letter from Plaintiff to Greene, Plaintiff raised accusations of tax evasion, larceny, embezzlement, and misappropriation of funds, and stated, "[y]ou have breached your fiduciary duty. You have breached our contract. You have been negligent. There has been malpractice. And I believe, without question or doubt, that fraud is involved." (Pl. Greene Opp., Ex. 3).

On February 16, 2012, Plaintiff filed a complaint concerning Greene with the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department. (Kolatch Decl., Ex. B). In it, Plaintiff outlined his grievances against Greene, including: (i) breach of fiduciary duty, involving, *inter alia*, "[n]on-notification of IRS delinquencies," "[r]efusal and failure to provide accounting records, bank account statements, and documentation," "[n]on-filing of taxes for 8 straight years," and "[d]ropping [Plaintiff] as client with paid for work not completed"; (ii) breach of contract, involving, *inter alia*, overcharges of Greene's commission fee, non-filing of taxes, making investments and opening accounts without consultation, and "[p]oor investment strategy"; (iii) malpractice and negligence, involving, *inter* *alia*, falsely re-filing delinquent taxes, failing to send regular summary statements, making "[m]isleading and untruthful statements," making large transactions not verified by the summary statements, and performing "[s]hoddy, sloppy[] accounting work"; (iv) misappropriation of funds, involving missing money, large unauthorized debits and "[u]nexplained large transactions"; and (v) fraud, involving "[u]nderreporting of income, over-reporting expenses," "IRS fraud," acting on behalf of a corporation which had been dissolved, "[m]issing money," and shifting Plaintiff's money — including to Greene's account — without Plaintiff's knowledge. (*Id.*).

Later, on December 28, 2013, Plaintiff wrote a letter to Mark Levenfus, Managing Director of MPS, stating that Plaintiff had reviewed tax returns and monthly statements from Greene, had compared these against earnings statements, and had determined that "[t]here [was] money missing," and "[i]t [was] a very large number." (Pl. Greene Opp., Ex. 16). In a letter to Greene on the same date, Plaintiff made the same assertions and demanded reimbursement "for [ ] missing and unaccounted for funds, fraudulent checks and transactions, [and] any incurred costs and lost interest suffered by [Plaintiff] due to [Greene's] and [MPS's] gross and extreme negligence." (*Id.*).

Plaintiff's numerous accusations of wrongdoing, including tax evasion, breaches of contract and fiduciary duty, malpractice, negligence, and fraud, in conjunction with his particularized assertions to the Departmental Disciplinary Committee, evince an awareness, years before the expiration of the statute of limitations, of the substance of the instant action. While Plaintiff may have wanted additional documents to bolster these claims, his purportedly unmet requests cannot suffice to show that Defendants somehow obstructed Plaintiff's awareness of his claims. Defendants' alleged failure to produce these documents does not constitute "trickery or deception" intended to impede Plaintiff's complaint until after the limitations period, particularly as Plaintiff's filings and correspondence show a continuing and growing disaffection with Defendants' services and responses. Accordingly, given the content of Plaintiff's numerous allegations and threats of legal action (at least one of which came to fruition in Plaintiff's Disciplinary Committee complaint against Greene), he cannot reap the benefit of equitable tolling.

f. Plaintiff's Claims Regarding His 2009 and 2010 Tax Returns Are Timely Under the Continuous Representation Doctrine

Plaintiff further contends that the statute of limitations for his claims should be tolled under the continuous representation doctrine under New York law, by virtue of Plaintiff's "all-encompassing" relationship with Defendants. (Pl. Supp. Br. 6-7). Under New York law, "[c]ontinuous representation tolls the statute of limitations until an accountant stops rendering professional services to his or her client on a particular matter." *Cuccolo* v. *Lipsky, Goodkin & Co.*, 826 F. Supp. 763, 768 (S.D.N.Y. 1993) (citing *Muller* v. *Sturman*, 437 N.Y.S.2d 205, 207-08 (4th Dep't 1981)); *see also Zaref* v. *Berk & Michaels, P.C.*, 595 N.Y.S.2d 772, 774 (1st Dep't 1993) (finding the doctrine applicable where the defendant advises the client "in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship") (internal citations omitted).

Notably, "[t]he mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services," *Hall & Co., Inc.* v. *Steiner & Mondore*, 543 N.Y.S.2d 190, 192 (3d Dep't 1989), and the doctrine's application is limited "to instances where the professional's involvement after the alleged malpractice is for the performance of the same or related services and is not merely continuity of a general professional relationship," *Muller*, 437 N.Y.S.2d at 207. "Thus, unless services relating to the particular transaction sued upon were rendered within the limitation period, even the defendant's 'general and unfettered control of [the plaintiff's] financial, tax and investment affairs' … is 'insufficient to sustain the timeliness' of the action." *Booth* v. *Kriegel*, 825 N.Y.S.2d 193, 195 (1st Dep't 2006) (citing *Zaref*, 595 N.Y.S.2d at 774).

In his submissions, Plaintiff claims that the continuous representation doctrine must toll all of his claims, as the Defendants had previously provided "nearly complete financial planning, accounting, and legal services." (Pl. Supp. Br. 7-8). However, as noted above, a comprehensive relationship in and of itself does not suffice to establish continuing representation, *see Booth*, 825 N.Y.S.2d at 195, and in order for his claims to be timely, Plaintiff must instead demonstrate a mutual understanding of the continuation of services pertaining to a particular task or undertaking until at least December 31, 2011.

Defendants, in response, cite the continuous representation standard in legal malpractice cases, which requires "a predicate of continuing trust and confidence" between attorney and client. *De Carlo*, 204 F. Supp. 2d at 636. This standard has not clearly been transferred, however, to the accounting context, rendering Defendants' arguments on that point inapposite. In any event, as discussed below, the parties evidence — at least in part — "a mutual understanding of the need for further representation on the specific subject matter" at issue, the concept at the heart of the doctrine. *Symbol Tech., Inc.* v. *Deloitte & Touche, LLP*, 888 N.Y.S.2d 538, 541 (2d Dep't 2009) (internal quotation marks omitted).

In a timeline submitted by Plaintiff of "Record Requests/Emails" (Pl. Opp., Ex. 9), Plaintiff indicated that on December 16, 2011, he received an email from "A. Forslund," identified as "MPS General Counsel," repudiating Defendants' "representation and services including taxes and book keeping." Plaintiff also made a note that "MPS will provide all records in MPS possession upon complet[ion] of tax returns or shortly after 1/15/2012." (*Id.*). In an email to Levenfus dated December 29, 2011, with the subject line "Discontinuation of services," Plaintiff stated that he "reject[ed] and [did] not accept [Defendants'] random date to discontinue any services," and demanded certain documents and information and completion of a number of tax returns. (*Id.*). Then, in a further email to Plaintiff dated January 6, 2012, Thomas Manisero of MPS stated:

> Indeed, it appears that you do not appreciate that MP&S is not obligated to continue providing professional services for or on your behalf effective December 31, 2011. A mutual agreement to this effect is not required.... To be clear, MP&S has resigned as your accountants effective December 31, 2011. You will be well advised to engage new accountants. *MP&S will work to finalize your 2009 and 2010 tax returns so long as they can be completed within the next 30 days*, and will cooperate with the transition to new accountants in accordance with its professional obligation.

(TAC Ex. C (emphasis added)).

In light of this representation by Manisero, the Court finds that there is a genuine issue of material fact regarding the parties' understanding of continuing work by Defendants MPS and Greene on Plaintiff's 2009 and 2010 tax returns, each of which may be deemed a "particular transaction" governed by the doctrine of continuing representation.[17] Apart from these two returns, Plaintiff has not adequately alleged, and the record does not demonstrate, mutual understanding of any other work to be performed. Accordingly, while Plaintiff's other claims are not saved by his assertion of continuous representation, his allegations pertaining to his 2009 and 2010 tax returns must be evaluated on their merits under Rule 12(b)(6).

3. Plaintiff's Has Adequately Alleged a Claim for Breach of Fiduciary Duty Regarding His 2009 and 2010 Tax Returns

"To prevail on a claim for breach of fiduciary duty under New York law, a plaintiff must prove [i] a breach by a fiduciary of obligations to another, [ii] that

[17] Because Defendant ABG Co. had ceased to exist or was in the process of winding up its business at the time of this communication (*see* Levenfus Aff. ¶ 4), the Court finds that the continuous representation doctrine applies here only to Defendants MPS and Greene.

the defendant knowingly induced or participated in the breach, and [iii] that the plaintiff suffered damages as a result of the breach." *Cohen* v. *Cohen*, 993 F. Supp. 2d 414, 427 (S.D.N.Y. 2014) (internal quotation marks and citation omitted); *see also Pokoik* v. *Pokoik*, 982 N.Y.S.2d 67, 70 (1st Dep't 2014) ("To establish a breach of fiduciary duty, [a plaintiff] must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct."). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." *Grund* v. *Del. Charter Guar. & Trust Co.*, 788 F. Supp. 2d 226, 249 (S.D.N.Y. 2011).

With regard to the first prong, "[a] fiduciary relationship exists under New York law when one … is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." *Flickinger* v. *Harold C. Brown & Co., Inc.*, 947 F.2d 595, 599 (2d Cir. 1991) (internal quotation marks omitted); *cf. Facella* v. *Fed'n of Jewish Philanthropies of N.Y., Inc.*, No. 98 Civ. 3146 (DAB), 2004 WL 1700616, at *6 (S.D.N.Y. July 30, 2004) ("New York courts conduct a fact-specific inquiry into whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge."). "As such, courts cannot determine the existence of a fiduciary relationship by recourse to rigid formulas." *Kottler* v. *Deutsche Bank AG*, 607 F. Supp. 2d 447, 465 (S.D.N.Y. 2009) (internal quotation marks omitted).

Typically, "the accountant-client relationship does not generally give rise to a fiduciary relationship absent special circumstances," such as the accountant's commission of affirmative fraud on a client. *VTech Holdings Ltd.* v. *Pricewaterhouse Coopers LLP*, 348 F. Supp. 2d 255, 268 (S.D.N.Y. 2004) (internal footnote omitted). Still, New York courts have recognized that a "role as [ ] financial advisor with discretionary authority to manage [ ] investment accounts" can create a fiduciary duty. *Brooks* v. *Key Trust Co. Nat'l Ass'n*, 809 N.Y.S.2d 270, 273 (3d Dep't 2006). However, "courts routinely have held that conclusory allegations of a special relationship [or] complete trust and confidence are insufficient to state a claim of a fiduciary duty." *Abercrombie* v. *Andrew Coll.*, 438 F. Supp. 2d 243, 275 (S.D.N.Y. 2006) (internal quotation marks omitted).

Plaintiff contends generally in the TAC that Greene "represented [Plaintiff] as his lawyer, tax advisor, CPA, bookkeeper, financial planner, investment advisor, and overall business manager from 1990 through at least 2012." (TAC ¶ 8). More specifically, Plaintiff contends that Defendants mismanaged his investments (*id.* at ¶¶ 79-80) and Treasury Bills (*id.* at ¶¶ 105-08), which might give rise to fiduciary duty on the theory of discretionary authority. *See Brooks*, 809 N.Y.S.2d at 273.

However, with regard to his *timely* claims — the non-filing of his 2009 and 2010 taxes — Plaintiff does not allege Defendants' commission of affirmative fraud, but rather claims that Defendants *negligently* failed to file his tax returns or to notify him of the "IRS delinquencies, liens, levies, and garnishment warnings." (TAC ¶¶ 28, 29). Thus, the survival of these claims hinges on Plaintiff's assertion of "special circumstances" elevating his negligence-based tax return claims to breaches of fiduciary duty by Defendants. Here, Plaintiff alleges that (i) Defendants were entirely responsible for preparing and filing his taxes but failed to do so (*id.* at ¶¶ 9, 29); and (ii) Defendants received all of Plaintiff's mail, and thus received numerous IRS notices informing them of the delinquencies in Plaintiff's taxes, but failed to inform Plaintiff (*id.* at ¶¶ 3, 29). Accordingly, Plaintiff contends that he was entirely reliant on Defendants to take care of his taxes (or to inform him of any issues), warranting a duty on Defendants' part to act within the scope of that agreement and permitting inference of the "special circumstances" required for a fiduciary relationship. *See Flickinger*, 947 F.2d at 599.

The Court finds these allegations suffice to plead the existence of a fiduciary duty in this regard. That said, it remains skeptical that Plaintiff will ultimately be able to substantiate all of his factual assertions, particularly his claims that Defendants were responsible for signing *and* filing Plaintiff's taxes on his behalf. Nonetheless, taking the factual assertions as true at this stage, Plaintiff has adequately alleged a fiduciary relationship. Beyond this, Plaintiff has alleged that Defendants knowingly participated in the breach of this relationship, by virtue of their receipt and neglect of the relevant delinquency notices, allegedly allowing Plaintiff to accrue a tax liability of approximately $100,000 (TAC ¶ 28); as a result, Plaintiff has properly pled the remaining factors involved in a breach of fiduciary duty claim.

4. Plaintiff's Legal Malpractice Claims Are Untimely and Inadequate on the Merits

In the TAC, Plaintiff asserts a number of legal malpractice claims against all three Defendants, based on Greene's work over the years. Specifically, Plaintiff alleges that Greene served as his attorney in a number of specific capacities: (i) as his trusts and estates attorney, advising Plaintiff on protecting his assets (TAC ¶ 125); (ii) as his tax attorney, "advising him on all aspects of his taxes and providing tax planning strategies" (*id.* at ¶ 126); (iii) as his immigration attorney, helping Plaintiff obtain a green card for his then-wife (*id.* at ¶ 127); and (iv) later, as his divorce attorney (*id.* at ¶ 128). More generally, Plaintiff claims Greene helped to draft and negotiate Plaintiff's business contracts, and to handle his finances, including his taxes and estate planning. (*Id.* at ¶¶ 131-32).

Plaintiff contends that Defendants, through Greene, committed legal malpractice principally by (i) failing to file Plaintiff's tax returns (TAC ¶ 136); (ii) controlling Plaintiff's finances but failing to invest his savings prudently (*id.* at ¶ 137); (iii) failing to pay Plaintiff's bills promptly (*id.* at ¶ 138); and (iv) failing to keep JCI in good standing (*id.* at ¶ 140).[18] Plaintiff further alleges that Defendants violated a number of New York's Rules of Professional Conduct, including by (i) failing to communicate adequately the scope of Greene's representation, or his rate or expenses, as required by Rule 1.5(b) (*id.* at ¶ 130); (ii) "neglect[ing] a legal matter" by failing to keep JCI in good standing

[18] Here, too, the Court is doubtful that Plaintiff has standing to raise claims on behalf of JCI.

and failing to file Plaintiff's taxes as required by Rule 1.3(b) (*id.* at ¶¶ 139-41, 144-45); and (iii) entering a conflicted business transaction with a client — *i.e.*, serving as Secretary and Treasurer of JCI for Plaintiff — without advising Plaintiff to seek independent counsel, in violation of Rules 1.7 and 1.8 (*id.* at ¶¶ 141-43). Further, Plaintiff alleges that "Defendants breached their duties of care, skill, and diligence by, among other things, an abuse of [Plaintiff's] trust account, commingling trust account funds with the defendants' personal funds." (*Id.* at ¶ 153). As set forth in the remainder of this section, the claims fail on multiple grounds.

a. Plaintiff's Legal Malpractice Claims Are Time-Barred

Under New York law, the statute of limitations for a legal malpractice claim is three years. N.Y. C.P.L.R. § 214(6). "It is well-established that a cause of action for legal malpractice accrues on the date of the allegedly improper action, not on the date when the malpractice was discovered," *Xie* v. *Lin*, No. 06 Civ. 142 (HB), 2007 WL 423806, at *3 (S.D.N.Y. Feb. 7, 2007), "even if the aggrieved party is then ignorant of the wrong or injury," *Ackerman* v. *Price Waterhouse*, 84 N.Y.2d 535, 541 (1994).

Here, Plaintiff does not allege any malpractice in the context of Greene's immigration or divorce work. Rather, his allegations center on Defendants' purported failure to file Plaintiff's tax returns;[19] their failure to invest Plaintiff's savings well, promptly pay his bills, or keep JCI in good standing; and Greene's

[19] As noted above, Plaintiff's contention relates to Defendants' alleged failure to file his tax returns, rather than any purported negligence in the context of tax-planning services.

decision to enter a business transaction with Plaintiff (through JCI) while serving as his attorney. (TAC ¶¶ 136-38, 140). All of these claims — for the same reasons cited with regard to Plaintiff's breach of fiduciary duty claims — accrued more than three years before Plaintiff's filing of this suit, as all occurred before the date on which MPS sent its letter formally revoking its representation of Plaintiff. (*See supra* at 43-50). Moreover, as discussed in the context of Plaintiff's fiduciary duty arguments and again below, Plaintiff's arguments for tolling the statute of limitations are ineffectual.

i. The Doctrine of Continuous Representation Will Not Toll the Statute of Limitations for Plaintiff's Legal Malpractice Claims

As in the context of his fiduciary duty claims, Plaintiff asserts that the statute of limitations for his legal malpractice claims should be tolled by the doctrine of continuous representation. Plaintiff is correct that "the statute [of limitations] may be deemed tolled under the theory of continuous representation until the attorney ceases representing the client in the specific matter at issue." *Nobile* v. *Schwartz*, 56 F. App'x 525, 526 (2d Cir. 2003) (summary order); *see also Shumsky* v. *Eisenstein*, 96 N.Y. 2d 164, 167-68 (2001) ("[A]pplication of the continuous representation or treatment doctrine is … generally limited to the course of representation concerning a specific legal matter."). However, unlike in the accounting context, which merely requires a mutual understanding of continued work on a specific issue, in the legal malpractice context, "[f]or the continuous representation doctrine to apply, a predicate of continuing trust and confidence must exist," and "if there is a breakdown in that relationship, the doctrine is not applicable." *De Carlo*, 204 F. Supp. 2d at 636. For instance, where it is

> clear from correspondence written by the plaintiff that he perceived that his relationship with his attorneys had been "irretrievably broken" prior to the formal termination of this relationship … "the relationship necessary to invoke the continuous treatment rule did not persist until formal termination of the nominal representation by defendants, but rather ceased with the disruption of the client's trust and confidence."

De Carlo, 204 F. Supp. 2d at 636-37 (quoting *Aaron* v. *Roemer, Wallens & Mineaux, LLP*, 707 N.Y.S.2d 711, 714 (3d Dep't 2000)).

While Plaintiff successfully argued that Defendants undertook continuous representation in the accounting context by virtue of their promise to attempt to complete Plaintiff's 2009 and 2010 tax returns, Plaintiff's argument fails in any attorney-client context because he cannot demonstrate continued "trust and confidence." On October 10, 2011, almost one year after discovering that certain of his monies had been garnished due to a tax lien, Plaintiff wrote a letter to Greene outlining his frustrations and his suspicions of wrongdoing. (Pl. Greene Opp., Ex. 3). In the letter, Plaintiff accused Defendants of withholding information about IRS warnings and the dissolution of JCI, stating "[t]his, I believe, is called fraud. You were putting me in incredible harm's way by not informing me of what you were doing with my corporation.… If that doesn't breach any reasonable interpretation or notion of fiduciary duty, then I seriously do not know what does." (*Id.*). Later in the letter, Plaintiff states that he "entrusted [Defendants] with [his] life and [his] future," but "[t]hat trust has been severely broken, almost gone." (*Id.*). Moreover, in the letter, Plaintiff accuses Greene of tax evasion, and "quite possibly larceny, embezzlement, or misappropriation of funds." (*Id.*). Plaintiff states that "after a relationship of 25 years, [he felt] an extreme and utter sense of betrayal" and was "truly devastated." (*Id.*). Toward the end of the letter, Plaintiff writes that "[i]f [he did] not get paid back for these various offenses and negligence, [he would] expose and prosecute whoever ha[d] done [him] wrong." (*Id.*). He concludes, "[y]ou have breached your fiduciary duty. You have breached our contract. You have been negligent. There has been malpractice. And I believe, without question or doubt, that fraud is involved." (*Id.*).

In light of this letter, which predated the filing of Plaintiff's Complaint by more than three years, Plaintiff could hardly argue that there was an ongoing relationship of "trust and confidence" that extended past October 2011; rather, as in *De Carlo*, the "correspondence written by the plaintiff [demonstrates] that he perceived that his relationship with his attorneys had been 'irretrievably broken' prior to the formal termination of this relationship." 204 F. Supp. 2d at 636-37. Accordingly, the doctrine of continuous representation cannot serve to toll Plaintiff's legal malpractice claims.

ii. Equitable Estoppel and Equitable Tolling Will Not Toll the Statute of Limitations for Plaintiff's Legal Malpractice Claims

Plaintiff also contends that equitable estoppel should toll the statute of limitations for his malpractice claims, as "Defendants[] cannot be allowed to escape their obligation to [Plaintiff] due to their own fraudulent misstatements and omissions." (Pl. Supp. Br. 9). As described above, "[e]quitable tolling is an extraordinary measure that applies only when [a] plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances." *Veltri*, 393 F.3d at 322. And, as this Court has already found, Plaintiff possessed *and prepared* a number of documents — including the October 2011 letter — underscoring his awareness of these claims long before the expiration of the statute of limitations. *See supra* at 54-56. In sum, for the same reasons discussed in the context of Plaintiff's fiduciary duty claims above, equitable estoppel and equitable tolling will not save his legal malpractice claims.

b. Plaintiff Fails to State a Claim for Legal Malpractice

Plaintiff's legal malpractice claims also fail on the merits. Under New York law,

> [a] cause of action for legal malpractice poses a question of law which can be determined on a motion to dismiss. In order to state a claim for legal malpractice under New York law, a plaintiff must adequately allege [i] an attorney-client relationship, and [ii] attorney negligence, [iii] which is the proximate cause of[] [iv] actual damages.

Kirk v. *Heppt*, 532 F. Supp. 2d 586, 591 (S.D.N.Y. 2008) (internal citations omitted). With regard to the first factor, "[i]t is fundamental that an *explicit undertaking* to perform a *specific task* is required to establish an attorney-client relationship." *Mason Tenders Dist. Council Pension Fund* v. *Messera*, 4 F. Supp. 2d 293, 298 (S.D.N.Y. 1998) (emphases in original) (internal quotation marks omitted). "A party's unilateral belief that one is his or her attorney is not dispositive," and "[w]hile there can be an attorney-client relationship without a former retainer letter and without compensation, their absence may support the proposition that no attorney-client relationship was intended." *Secured Worldwide, LLC* v. *Kinner*, No. 15 Civ. 1761 (CM), 2015 WL 4111325, at *3 (S.D.N.Y. June 24, 2015).

At the outset, Plaintiff faces a difficult burden alleging legal malpractice against two accounting firms; both MPS and ABG Co. assert that they cannot be held liable for attorney malpractice, as they operate solely as accounting firms. (Greene Br. 25; Greene Reply 19; MPS Br. 1-2, 9; MPS Reply 2, 18-19). In his opposition papers, Plaintiff contends that "[i]t is widely recognized that the 'Big Four' accounting firms are basically, for all intents and purposes, law firms. Being one of the 30 largest firms on the eastern seaboard, it is disingenuous for MPS to state otherwise." (Pl. MPS Opp. 7-8). The Court does not find Plaintiff's mere assertion of similarities to be persuasive, as accounting firms plainly are not one and the same as law firms. *See Cahill* v. *Contemporary Perspectives, Inc.*, No. 81 Civ. 7754 (LBS), 1986 WL 4696, at 86 (S.D.N.Y. Apr. 15, 1986) ("Under New York law, there must be an attorney-client relationship before an attorney is deemed to owe a duty to a client such that a claim for legal malpractice may lie. As [defendant] indisputably was not an attorney, he could not have had an attorney-client relationship with [plaintiff]." (internal citations and footnote omitted)). However, because both ABG Co. and MPS employed Greene at various times, and because Greene was in fact a lawyer, the Court will proceed, for purposes of argument, on the assumption that those firms may be held liable for any malpractice committed by Greene in his capacity as an attorney.

Even construing the pleadings liberally, Plaintiff fails to state a claim for legal malpractice; for each claim, he either (i) fails to plead the existence of an attorney-client relationship or, where the Court will assume an attorney-client relationship existed, (ii) fails to allege that Defendants' conduct amounted to negligence that proximately caused actual damages.

For the most part, Plaintiff's claims for legal malpractice duplicate his claims for breach of fiduciary duty: Plaintiff contends that Greene (i) "prepared [Plaintiff's] tax returns (and then failed to file them)" (TAC ¶ 136); (ii) "controlled [Plaintiff's] savings and purported to invest them suitably and prudently (and then lost nearly all of his life savings)" (*id.* at ¶ 137); and (iii) "paid nearly all of [Plaintiff's] bills for him, including his monthly credit card bills, rent payments, and car payments (and then allowed creditors to attach liens to his property after he failed to pay [Plaintiff's] bills)" (*id.* at ¶ 138). As evidenced by the "prospectus" and the transcript Plaintiff appended to the TAC, Defendants' work on Plaintiff's taxes and finances, discussed at length above, related to Greene's role as Plaintiff's business manager, accountant, and investment manager.

Put simply, Plaintiff fails to allege that Greene specifically undertook to provide legal services in any of these areas; with respect to Plaintiff's taxes, Plaintiff alleges only that Greene "advis[ed] him on all aspects of his taxes and provid[ed] tax planning strategies" (TAC ¶ 126),[20] and in the context of his finances, Plaintiff claims that Greene "handled nearly every aspect of [Plaintiff's] finances, and advised him on tax consequences and estate planning matters" (*id.* at ¶ 132). All of these allegations are consistent with Plaintiff's earlier claims regarding Defendants' breach of fiduciary duty, and they do not establish an "explicit undertaking" to provide legal advice, as required for a claim of legal malpractice.

Along the same lines, Plaintiff's assertion that Greene "represented that he would 'assume responsibility in connection with insurance, taxes, wills, trusts and estate planning and investments'" (TAC ¶ 134), fails for the same reasons. While Plaintiff cites a portion of the "prospectus" letter stating that Defendants "tr[ied] to become involved in every aspect of [their] clients' activities" (*id.*), the remainder of the letter makes clear that there was no agreement to provide any services, including legal services:

> Our responsibility would cover all financial planning and handling and we would be available for advice and supervision of all of your assets and property. *I am sure you realize that it is difficult to explain all of the details in writing but perhaps this letter should be just introductory and I would be pleased to answer any questions you may have.*

[20] Even if Plaintiff's reference to "providing tax planning strategies" (TAC ¶ 26) suggests performance by Greene of legal work, Plaintiff does not allege negligence in this regard. Rather, his tax-related allegations focus on Defendants' alleged failure to prepare and file his taxes, a duty discussed in the context of the accounting services Defendants offered. (*See* TAC, Ex. 1A, 1B).

(*See* TAC Ex. A (emphasis added)). Nowhere in the prospectus, nor in the transcript of Plaintiff's meeting with Greene, does Greene reference or discuss legal representation. (*See generally id.*).

Again, Plaintiff does not establish any explicit undertaking by Greene to provide legal advice on a specific issue or matter, and Plaintiff's mere belief that Greene was working broadly as his attorney — in fact "blurr[ing] the line between being [Plaintiff's] attorney and being his accountant" (TAC ¶ 135) — does not suffice to plead such a relationship. Indeed, Plaintiff admits in the TAC that Greene "had no written contract with [Plaintiff]" and "[t]he scope of [Greene's] representation was never defined." (*Id.* at ¶ 130). While Plaintiff alleges generally that Greene "represented himself on his letterhead as 'Arthur B. Greene, Attorney at Law'" and "communicated with other attorneys on behalf of [Plaintiff] on the firm letterhead, both expressly and impliedly representing to other attorneys that [Defendant] was [Plaintiff's] attorney" (*id.* at ¶ 129), such allegation is insufficient to demonstrate an explicit undertaking to perform legal work on some specific matter, *see Mason Tenders*, 4 F. Supp. 2d at 298, much less that the work was performed in a negligent manner leading to damages. Accordingly, even taking such representation as true, it cannot save Plaintiff's legal malpractice claims.

For certain other claims unrelated to Defendants' accounting or investment management services, Plaintiff fails to allege that Greene acted negligently or proximately caused any damages. Specifically, with regard to Plaintiff's claims that Defendant (i) represented him "as his immigration attorney providing legal advice and services for [Plaintiff] as part of his effort to obtain a green card for his then wife" (TAC ¶ 127); (ii) represented him "as his divorce attorney, providing legal advice regarding separation and divorce, composing post-nuptial agreement" (*id.* at ¶ 128); and (iii) "drafted and negotiated nearly every contract [Plaintiff] entered into in his career" (*id.* at ¶ 131), Plaintiff does not allege any negligence or resultant damages. Further, even if Plaintiff had adequately pled that Greene engaged in such legal work separate and apart from his work on Plaintiff's taxes and investments, this would not suffice to establish a general attorney-client relationship covering those other matters. *See Mason Tenders*, 4 F. Supp. 2d at 298 (requiring "an *explicit undertaking* to perform a *specific task*" (emphasis in original)).

Separately, Plaintiff asserts a number of claims based on violations of the New York Rules of Professional Conduct: (i) failure to communicate the scope of representation and basis or rate of fees and expenses as required by Rule 1.5(b) (TAC ¶¶ 130, 139); (ii) neglect of a legal matter entrusted to the lawyer, including by failing to keep JCI in good standing and failing to file Plaintiff's taxes, as required by Rule 1.3(b) (*id.* at ¶¶ 139, 141, 144-45); (iii) representation of Plaintiff in spite of a "significant risk that the lawyer's professional judgment … will be adversely affected by [his] own financial, business, property or other interests," based on Greene's role as Secretary and Treasurer of JCI, in violation of Rule 1.7 (*id.* at ¶¶ 141-43); and (iv) entry "into a business transaction with a client" without advising Plaintiff to seek independent counsel, again based on his role as Secretary and Treasurer of

JCI, in violation of Rule 1.8 (*id.*). However, violations of the Rules of Professional Conduct give rise to no private right of action. *See Jiau* v. *Hendon*, No. 12 Civ. 7335 (PAE), 2014 WL 559004, at *6 (S.D.N.Y. 2014) ("[T]hat [Plaintiff] has alleged violations of New York's Rules of Professional Conduct does not … rescue [his] legal malpractice claim. The ethical rules governing lawyers have their own means of enforcement; a violation of such a rule does not, without more, give a client or former client a malpractice claim."); *see also Arkin Kaplan LLP* v. *Jones*, 840 N.Y.S.2d 48, 51 (1st Dep't 2007) ("[E]ven if a violation of the Code of Professional Responsibility had occurred, that, in itself, would not create a private right of action.").

Accordingly, this Court will not find validly pled legal malpractice claims based on Plaintiff's assertion of these violations. And, because Plaintiff has otherwise failed to plead an attorney-client relationship in conjunction with negligence causing actual damages, his legal malpractice claims must be dismissed.

CONCLUSION

For the reasons stated in this Opinion, all of Plaintiff's claims are time-barred, with the exception of his claims against Greene and MPS for breach of fiduciary duty relating to his 2009 and 2010 tax returns. As Plaintiff has adequately stated a claim for breach of fiduciary duty against those Defendants based on the non-filing of those two tax returns, Defendants' motion to dismiss is DENIED as to those claims.

In his supplemental briefing opposing summary judgment, Plaintiff requested leave to file a Fourth Amended Complaint with the assistance of counsel. (Pl. Supp. Br. 5 ("If the Court does determine that the TAC fails to adequately state a claim for constructive fraud, [Plaintiff] respectfully requests that the Court permit him to submit an amended complaint now that he has the assistance of counsel.")). Precisely because "motions to amend should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party," *Burch* v. *Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) (internal citation omitted), the Court will require Plaintiff to proffer his proposed arguments for a Fourth Amended Complaint before it resolves his request for leave to amend. Accordingly, it is hereby ORDERED that the parties appear for a conference with the Court on **September 15, 2016, at 10:00 a.m.** in Courtroom 618 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York. Plaintiff should be prepared to discuss any viable, non-time-barred claims that he would propose to bring in a Fourth Amended Complaint, if permitted by the Court, within the strictures of Federal Rule of Civil Procedure 11.

SO ORDERED.

Dated: August 10, 2016
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

APPENDIX C

18-1773-cv
Anderson v. Greene

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of May, two thousand nineteen.

PRESENT: JOHN M. WALKER, JR.,
JOSÉ A. CABRANES,
PETER W. HALL,
Circuit Judges.

KEVIN CARROLL ANDERSON,

Plaintiff-Appellant, 18-1773-cv

v.

ARTHUR B. GREENE, ARTHUR B. GREENE & COMPANY, P.C., MARKS, PANETH & SHRON LLP,

Defendants-Appellees,

DOES 1–10, INCLUSIVE,

Defendants.

FOR PLAINTIFF-APPELLANT: HILLEL IRA PARNESS, Parness Law Firm, PLLC, New York, NY.

FOR DEFENDANTS-APPELLEES ARTHUR B. GREENE, ARTHUR B.

GREENE & COMPANY, P.C.: SARI KOLATCH, Cohen Tauber Spievack & Wagner P.C., New York, NY.

FOR DEFENDANT-APPELLEE MARKS, PANETH & SHRON LLP: Peter J. Larkin, Wilson Elser Moskowitz, Edelman & Dicker LLP, White Plains, NY.

Appeal from orders of the United States District Court for the Southern District of New York (Katherine Polk Failla, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the District Court be and hereby are **AFFIRMED**.

Plaintiff-Appellant Kevin Carroll Anderson ("Anderson") appeals from orders of the District Court dismissing the majority of his third amended complaint and denying leave to file a fourth amended complaint. He also appeals several other preliminary orders. Anderson sued defendants-appellees Arthur B. Greene, Arthur B. Greene & Company, P.C., and Marks, Paneth & Shron LLP ("defendants") for claims arising from a decades-long financial relationship gone sour. After defendants filed a motion to dismiss Anderson's third amended complaint, the District Court *sua sponte* converted the motion into a motion for summary judgment for the purposes of defendants' statute of limitations defense. The Court then granted defendants' motion in part and dismissed the vast majority of the third amended complaint.[1] The Court further denied Anderson's request to file a fourth amended complaint based on futility, undue delay, and prejudice. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review *de novo* a grant of summary judgment, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in his favor." *Natofsky v. City of New York*, 921 F.3d 337, 344 (2d Cir. 2019) (internal quotation marks omitted). We review a District Court's denial of motions for a stay of discovery, extension of time, and preliminary injunction for abuse of discretion. *See Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 226 (2d Cir. 2004) (extension of time); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004) (staying discovery);

[1] Anderson's third amended complaint included two claims—breach of fiduciary duty based on constructive fraud and legal malpractice—which were supported by twenty factual allegations. The District Court held that both claims were largely time barred because the factual allegations supporting them occurred prior to the limitations period. However, a limited portion of the breach of fiduciary duty claim was not time-barred. The District Court conditionally dismissed this surviving claim at Anderson's request so that he could immediately pursue this appeal.

Zervos v. Verizon New York, Inc., 252 F.3d 163, 167 (2d Cir. 2001) (preliminary injunction). We review a District Court's ruling on equitable tolling for abuse of discretion. *See Torres v. Barnhart*, 417 F.3d 276, 279 (2d Cir. 2005). We review a denial of leave to amend a complaint for abuse of discretion, unless the denial was based on an interpretation of law, in which case we review *de novo*. *See Allen v. Credit Suisse Sec. (USA) LLC*, 895 F.3d 214, 227 (2d Cir. 2018).

I.

Anderson contends that the District Court erred in denying certain preliminary motions. He first argues that the District Court abused its discretion by denying his motion, filed five months after his first amended complaint, to stay the case so that he could hire a forensic accountant to analyze his financial records. Anderson identifies no legal basis to support his claim that he was entitled to stay a case that he brought in order to investigate, during the pendency of the action, materials in his own possession. We can discern none. Accordingly, we conclude that the District Court did not abuse its discretion in denying the request.

II.

Anderson contends that the District Court abused its discretion in denying his motion for extension of time following the filing of his third amended complaint, while defendants' motion to dismiss was already pending. The District Court did not abuse its discretion by denying the request in light of Anderson's repeated delays and its previous order that no further extensions would be granted.

III.

Anderson contends that the District Court abused its discretion by denying his request for an order to compel certain banks to keep open particular bank accounts. We construe this as a motion for a preliminary injunction, and we conclude that the District Court did not abuse its discretion in denying the request.

IV.

Anderson next contends that the District Court erred by converting defendants' motion to dismiss into a motion for summary judgment. When documents outside the pleadings are presented on a motion to dismiss and are "not excluded by the court, the motion must be treated as one for summary judgment under Rule 56" and each party must be given an opportunity to present all relevant materials. Fed. R. Civ. P. 12(d). If the plaintiff is *pro se*, the District Court must provide prior notice before converting the motion. *See Hernandez v. Coffey*, 582 F.3d 303, 307–08 (2d Cir. 2009). Anderson does not dispute that the parties submitted ample documents outside of the pleadings, but argues that the District Court did not provide sufficient notice to him of the conversion. But the District Court expressly informed Anderson, then proceeding *pro se*, that the motion would be converted into a motion for summary judgment and gave Anderson three weeks to submit additional materials, including additional briefing. Following this order, counsel appeared on Anderson's behalf and requested a further extension of time; the Court granted an additional week. Anderson's opposition brief to defendants' motion reflected a clear understanding of summary judgment. We conclude that the District Court provided adequate notice and did not err in converting the motion to dismiss into a motion for summary judgment.

V.

Anderson also argues that the District Court erred in granting defendants' motion for summary judgment and dismissing the majority of his third amended complaint based on its conclusion that his two claims were largely time-barred. Anderson argues that the District Court erred in failing to construe his complaint as stating a breach of contract claim and consequently, by failing to apply the six-year statute of limitations for contract claims under New York law. We conclude that the District Court did not err in finding that, to the extent that the third amended complaint intended to assert a claim for breach of contract, Anderson did not adequately allege the existence of an oral contract or the breach of any such contract. The third amended complaint states that the parties entered into a verbal contract during a meeting on December 4, 1990; a transcript of this meeting is incorporated by reference into the third amended complaint. Under New York law, "an oral agreement is not enforceable unless there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Kelly v. Bensen*, 58 N.Y.S.3d 169, 172 (3d Dep't 2017) (internal quotation marks omitted). Here, the transcript that allegedly recorded the oral agreement makes clear that the parties did not clearly enter a contract with "sufficiently certain and specific" terms. *Rosenbaum v. Premier Sydell, Ltd.*, 659 N.Y.S.2d 52, 53 (2d Dep't 1997) (internal quotation marks omitted). Moreover, a complaint must plead the specific provisions of the contract that were allegedly breached and the specific actions of the defendants that constituted that breach. *See Sud v. Sud*, 621 N.Y.S.2d 37, 38 (1st Dep't 1995). The District Court did not err in concluding that the third amended complaint failed to meet this standard.

VI.

Anderson argues that the District Court erred by declining to equitably toll the statute of limitations. He contends that the Court should have equitably tolled the statute of limitations because he engaged in due diligence and extraordinary circumstances had prevented him from filing suit. But the District Court did not abuse its discretion by declining to toll the statute of limitations, a decision based on materials in the record that made clear that Anderson was aware of defendants' alleged wrongdoings several years prior to the filing of this suit. He also argues that the District Court erred in concluding that the continuous representation doctrine does not render any of his claims timely except for the surviving claims for breach of fiduciary duty for failure to file his 2009 and 2010 tax returns. But according to Anderson's own submissions, defendants had "repudiate[ed] all "representation and services" (except for completing his 2009 and 2010 tax returns) on December 16, 2011— outside of the relevant three-year statute of limitations. Doc. No. 64-2 at 34.

VII.

Finally, Anderson contends that the District Court erred in denying leave to amend to file a fourth amended complaint, particularly so that he could reinstate his civil RICO claim. Anderson had included this claim in his original complaint and the first amended complaint, but he had not included it in his second or third amended complaints. We conclude that the District Court did not abuse its discretion in finding that Anderson unduly delayed in moving for leave to file his fourth amended complaint and that allowing him to file this complaint would unduly prejudice defendants.

CONCLUSION

We have reviewed all of the arguments raised by Anderson on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 28, 2019
Docket #: 18-1773cv
Short Title: Anderson v. Greene

DC Docket #: 14-cv-10249
DC Court: SDNY (NEW YORK CITY)
DC Judge: Failla

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

Date: May 28, 2019
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CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 14-cv-10249
DC Court: SDNY (NEW YORK CITY)
DC Judge: Failla

VERIFIED ITEMIZED BILL OF COSTS

Counsel for
____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the
____

and in favor of
____

for insertion in the mandate.

Docketing Fee ____________________

Costs of printing appendix (necessary copies ______________) ____________________

Costs of printing brief (necessary copies ______________ ____) ____________________

Costs of printing reply brief (necessary copies ______________) ____________________

(VERIFICATION HERE)

____
Signature

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of June, two thousand and nineteen,

Before: JOHN M. WALKER, JR.,
JOSÉ A. CABRANES,
PETER W. HALL,

Circuit Judges.

Kevin Carroll Anderson,

Plaintiff - Appellant,

v.

Arthur B. Greene, Arthur B. Greene & Company, P.C., Marks, Paneth & Shron LLP,

Defendants - Appellees,

Does 1-10, inclusive,

Defendants.

ORDER
Docket No. 18-1773

Appellant Kevin Carroll Anderson having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
SDNY PRO SE OFFICE
2015 OCT -5 AM 11: 28

Kevin Carroll Anderson

(In the space above enter the full name(s) of the plaintiff(s).)

Third Amended

COMPLAINT

-against-

Arthur B. Greene
Arthur B. Greene and Company P.C.
Marks Paneth & Shron LLP
DOES 1 through 10, inclusive

Jury Trial: ☒ Yes ☐ No
(check one)

14 CV 10249 KPF

(In the space above enter the full name(s) of the defendant(s). If you cannot fit the names of all of the defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Part I. Addresses should not be included here.)

I. Parties in this complaint:

A. List your name, address and telephone number. If you are presently in custody, include your identification number and the name and address of your current place of confinement. Do the same for any additional plaintiffs named. Attach additional sheets of paper as necessary.

Plaintiff
Name Kevin Carroll Anderson
Street Address 1575 Spinnaker Drive 105B
County, City Ventura
State & Zip Code California 93001
Telephone Number 805-612-2790

B. List all defendants. You should state the full name of the defendant, even if that defendant is a government agency, an organization, a corporation, or an individual. Include the address where each defendant may be served. Make sure that the defendant(s) listed below are identical to those contained in the above caption. Attach additional sheets of paper as necessary.

Defendant No. 1
Name Arthur B. Greene
Street Address 166 E. 64th Street

County, City New York County, New York
State & Zip Code New York 10065
Telephone Number 212-679-8542

Defendant No. 2
Name Arthur B. Greene & Company P.C.
Street Address [merged with Defendant No. 3 in 2009]
County, City
State & Zip Code
Telephone Number

Defendant No. 3
Name Marks, Paneth, & Shron LLP
Street Address 622 Third Avenue
County, City New York County, New York
State & Zip Code New York, 10017
Telephone Number 212-201-3110

Defendant No. 4
Name
Street Address
County, City
State & Zip Code
Telephone Number

II. Basis for Jurisdiction:

Federal courts are courts of limited jurisdiction. Only two types of cases can be heard in federal court: cases involving a federal question and cases involving diversity of citizenship of the parties. Under 28 U.S.C. § 1331, a case involving the United States Constitution or federal laws or treaties is a federal question case. Under 28 U.S.C. § 1332, a case in which a citizen of one state sues a citizen of another state and the amount in damages is more than $75,000 is a diversity of citizenship case.

A. What is the basis for federal court jurisdiction? *(check all that apply)*

☐ Federal Questions ☒ Diversity of Citizenship

B. If the basis for jurisdiction is Federal Question, what federal Constitutional, statutory or treaty right is at issue? Not applicable

C. If the basis for jurisdiction is Diversity of Citizenship, what is the state of citizenship of each party?

Plaintiff(s) state(s) of citizenship California
Defendant(s) state(s) of citizenship New York

III. Statement of Claim:

State as briefly as possible the facts of your case. Describe how each of the defendants named in the caption of this complaint is involved in this action, along with the dates and locations of all relevant events.

You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach additional sheets of paper as necessary

A. Where did the events giving rise to your claim(s) occur? New York, New York, USA

B. What date and approximate time did the events giving rise to your claim(s) occur?
Please see the attached.

C. Facts:
Please see attached

What happened to you?

Who did what?

Was anyone else involved?

Who else saw what happened?

IV. Injuries:

If you sustained injuries related to the events alleged above, describe them and state what medical treatment, if any, you required and received.
Not applicable

Rev. 05/2010

V. **Relief:**

State what you want the Court to do for you and the amount of monetary compensation, if any, you are seeking, and the basis for such compensation.

Please see attached.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 2 day of October, 2015.

Signature of Plaintiff

Mailing Address c/o Marilyn Anderson
5905 Delaware Avenue
Gurnee, IL 60031

Telephone Number 805-612-2790

Fax Number *(if you have one)* Not applicable

Note: All plaintiffs named in the caption of the complaint must date and sign the complaint. Prisoners must also provide their inmate numbers, present place of confinement, and address.

For Prisoners:

I declare under penalty of perjury that on this _____ day of _________________, 20__, I am delivering this complaint to prison authorities to be mailed to the *Pro Se* Office of the United States District Court for the Southern District of New York.

Signature of Plaintiff: Not Applicable

Inmate Number

THIRD AMENDED COMPLAINT

III. Statement of Claim

B. Kevin Carroll Anderson ("Plaintiff " or "Mr. Anderson"), appearing pro se, and for a complaint against the defendants above named, states, alleges, and avers as follows: 1) Breach of Fiduciary Duties based on Constructive Fraud and 2) Legal Malpractice. These claims occurred during the business relationship between Mr. Anderson and Defendant, Arthur B. Greene ("Mr. Greene"), from 1985 through 2012 and as the owner of Defendant Arthur B. Greene & Company ("ABG&Co"), from 1985 - 2009 and then as a senior partner at Defendant Marks Paneth & Shron LLP ("MPS") from 2009 - 2012.

C. Facts

INTRODUCTION

1. This is an action to recover damages for breach of fiduciary duty based on constructive fraud and legal malpractice and request for an equitable action for an accounting in connection to the systematic mismanagement of Mr. Anderson's finances and abuse of trust by the Defendants. Mr. Greene, ABG&Co, and MPS, having full custodial control of all Mr. Anderson's accounts, failed to manage Mr. Anderson's corporation, Joe Coyote Inc. ("JCI"), and Mr. Andersons personal finances leaving Mr. Anderson financially damaged.

PARTIES

2. Plaintiff, Mr. Anderson was a client of Mr. Greene, ABG&Co, and MPS. Mr. Anderson was President and Co- Trustee of Joe Coyote Inc. ("JCI"). Mr. Anderson's principal

place of business and legal mailing address is in the state of California and was a resident of New York from 1985 to 1995.

3. Mr. Greene, CPA, JD, owned the accounting firm ABG&Co and was also self-appointed Secretary, Treasurer, and Trustee of JCI, a corporation he created for Mr. Anderson. ABG&Co offered tax, family office and business management services. Mr. Greene's primary place of business was at 101 Park Avenue, New York, New York 10178, from 1985 to 2009 and then at MPS on 622 Third Avenue, New York, New York, 10017, 2009 through at least 2012, where he, Mr. Greene, received all monies and mail for Mr. Anderson. Mr. Greene is a resident of the state of New York.

4. Marks Paneth & Shron is a Limited Liability Partnership (LLP) accounting firm, also offering tax, family office and business management services, previously located at 622 Third Avenue, New York, New York, 10017.

5. On April 30, 2009 a public announcement was made announcing the "merger" between ABG&Co and MPS making Mr. Greene a senior partner at MPS. Mr. Greene's partner Richard Guttenberg and other employees from ABG&Co were employees of MPS from at least 2009-2012 when various wrong doing took place. Mr. Anderson was led to believe the services provided by Mr. Greene and Mr. Guttenberg would continue as usual and were transferred to the newly merged company MPS. Since MPS merged with Mr. Greene and ABG&Co and apparently owns all or most of of ABG&Co's assets, then MPS is also liable for any wrongdoing. As such, MPS is included as a defendant in this complaint.

6. Mr. Anderson is unaware of the true identity, nature and capacity of each of the defendants herein designated as DOES 1 through 10, inclusive. Mr. Anderson alleges,

on information and belief, that each of defendants designated herein as a DOE is in some manner responsible for the actions, damages and injuries alleged in this complaint. Upon learning the true identity, nature and capacity of the DOE defendants, Plaintiffs will amend this complaint to allege their true names and capacities.

7. Mr. Anderson alleges, on information and belief, that all material items herein, Defendants and DOES 1 through 10, and each of them, were the agents of the other defendants, and the acts of each defendant were within the course and scope of their firm and/or employment.

BACKGROUND

8. Mr. Anderson started a business relationship with Mr. Greene in 1985. Mr. Greene was recommended to Mr. Anderson by his talent agent at the time, the late legendary Sam Cohn who discovered many great talents including Meryl Streep. Mr. Greene had an office on Park Avenue and his clients included icons like Stephen King and Kathy Bates. Mr. Greene first prepared Mr. Anderson's taxes from 1985 through 1990 and consequently gained Mr. Anderson's trust. Mr. Greene then represented Mr. Anderson as his lawyer, tax advisor, CPA, bookkeeper, financial planner, investment advisor, and overall business manager from 1990 through at least 2012. Having come from a small Midwestern town, Mr. Anderson was understandably impressed by Mr. Greene's credentials and clients.

9. Mr. Greene represented to Mr. Anderson that he was a financial expert and that he could handle and invest the money in Mr. Anderson's savings account ($650,000) more efficiently and with more financial gain and prowess than Mr. Anderson could himself. Mr. Greene stated and insisted quite strongly that the best and most efficient way to

manage Mr. Anderson's financial affairs was for Mr. Greene to have complete signature authority and full custodial control of his funds which included receiving all of Mr. Anderson's mail at Mr. Greene's office at 101 Park Avenue, NYC. As the financial expert, Mr. Greene received all monies, salaries, and residuals, created a corporation appointing himself as Secretary/Treasurer, was a Trustee of the JCI Defined Contribution Pension Plan and in charge of distributing all investments of the pension plan, made all bill payments, was responsible for all taxes, negotiated contracts, invested all monies, and was responsible for the overall complete and comprehensive wealth and business management. Mr. Anderson respected Mr. Greene and believed and trusted that Mr. Greene would perform the services as he stated.

10. Mr. Greene, during continuous representation from 1990 through 2012, maintained full custodial control and signature authority on all of Mr. Anderson's accounts. Mr. Greene received all monies and mail for Mr. Anderson including film, studio, and theatre payments, bills, residuals, and royalties. Mr. Greene insisted this was the best way to do accurate IRS reporting and the best way to provide his services. Mr. Greene also strongly recommended that he have durable and individual power of attorney.

11. Mr. Greene took advantage of Mr. Anderson's gullible nature and lack of financial knowledge during his continuous representation and custodial control of Mr. Anderson's accounts. Mr. Anderson earned $50,000 from 1981 to 1985 as a novice actor in the very beginning of his career. Having only ever dealt with a savings account, Mr. Anderson was not versed in reading financial packages, bank statements, or financial summaries, and relied on Mr. Greene's superior accounting and financial knowledge. Mr. Greene used his superior knowledge and exploited his position of trust

and confidence, and fiduciary relationship to gain control of Mr. Anderson's funds and to enrich himself.

12. As Mr. Anderson's accountant, fiduciary relationship existed between Mr. Greene and Mr. Anderson. Mr. Greene rendered personal financial, investment, and tax advice to Mr. Anderson. Mr. Greene also managed Mr. Anderson's assets and business in addition to managing Mr. Anderson's defined contribution pension fund.

13. The key to Mr. Greene's ability to gain control of Mr. Anderson's substantial funds and enrich himself was all about control. Mr. Greene had complete and total control of Mr. Anderson's finances and to a certain degree, his personal life as well. In many ways during his tenure with Mr. Greene, Mr. Anderson was in servitude to Mr. Greene. Mr. Anderson gave all of his money to Mr. Greene who used it for his own purposes without Mr. Anderson's knowledge. Mr. Greene took control of all monies coming in, and all monies going out. Mr. Greene had legal control over Mr. Anderson as the Secretary Treasurer of JCI and the trustee of the JCI pension/investment account, exercising his individual and durable powers of attorney. Mr. Greene exercised control over Mr. Anderson's finances by investing with brokers, banks, financial companies, mutual funds, securities, and CDs. Mr. Greene controlled Mr. Anderson's access to his own accounts.

14. Mr. Anderson had complete and total trust in Mr. Greene's advice and wisdom. For instance, Mr. Anderson was advised by Mr. Greene to not buy a house and continue to rent properties in order to stay liquid. Mr. Anderson, believing Mr. Greene's advice was sound, never bought a house yet Mr. Greene and his partner Mr. Guttenberg had at least six houses between the two of them.

15. In late 2010 when Mr. Anderson entered a bank to cash a CD, he discovered his account had been garnished due to a federal tax bill and had liens and levies issued on his accounts because his taxes had not been filed for 6-8 years. Mr. Anderson was not aware of these levies and liens since Mr. Greene received all of Mr. Anderson's mail and did not inform him of the liens and levies. Mr. Anderson trusted Mr. Greene and believed it was a mistake and having worked with Mr. Greene closely for 25 years fully expected this mistake to be remedied. Mr. Anderson made inquiries to remedy the situation. This bank visit prompted Mr. Anderson to contact Mr. Greene and Richard Guttenberg, who were at that time both employees at MPS, to ascertain what was going on. Mr. Greene and Mr. Guttenberg became uncooperative and evasive well into 2011.

16. Mr. Anderson's pleas to meet with MPS and Mr. Greene to have explained the state of affairs of JCI were ignored. When MPS eventually sent Mr. Anderson's bank statements, the months Mr. Greene debited monies from Mr. Anderson's commercial JCI account to Mr. Greene's own personal account and then back again only into Mr. Anderson's personal Chase account during the IRS garnishment process were not included in addition to many other missing months. JCI had been dissolved in April of 2009 without Mr. Anderson's knowledge.

17. Around Christmas of 2012, MPS lawyer Thomas Manisero threatened to shred Mr. Anderson's mail if Mr. Anderson did not change his address with all vendors.

18. The Defendants breached their fiduciary duty of care by primarily showing an outrageous, reckless, abusive, and egregious disregard for their client Mr. Anderson by routinely mismanaging Mr. Anderson's finances, by not preparing, sending to him, or filing his taxes on time or at all, by failing to invest funds carefully, prudently, and

promptly, by not changing or recommending a new investment strategy where warranted by a change in circumstances, by not retaining his personal documents which are Mr. Anderson's property without his permission to discard them, by dismissing his many requests, and by diverting and draining his investments and pension account leaving him essentially homeless and almost completely bankrupt. These abuses contributed to Mr. Anderson's divorce, affected his standing and reputation in the entertainment industry, forced him to turn down acting jobs to pursue justice without a lawyer, forced him to sacrifice his privacy, isolated him from and affected his relationships with his friends and fellow associates including the Steppenwolf Theater Ensemble, and most painfully, Mr. Anderson was not able to provide for his recently deceased mother who could have had the kind of excellent care his earnings would have provided if not for the defendant's destructive and cancerous presence in his life.

19. The following allegations were not discovered until after the discovery of the unfiled taxes when Mr. Anderson began to learn the mishandling of his taxes was only a fraction of the financial wrong doings.

20. All of the transactions listed below were either done by Mr. Greene, or he directed someone within ABG&Co or MPS to do so.

<u>CONTRACT AND PROSPECTUS</u>

21. Mr. Greene under the doctrine of continuous representation, failed to perform the terms stated in the oral contract by not completing specified jobs (e.g., taxes), not paying funds/gross earnings in full or on time, and failing to invest Mr. Anderson's monies (e.g., pension fund growth).

22. Mr. Greene, during his tenure as Mr. Anderson's accountant from 1985 to 1990, periodically and quite insistently broached Mr. Anderson to become Mr. Anderson's business manager. After having filmed 3 movies back to back in 1990 and earning approximately $700,000, upon the release of "Sleeping with the Enemy" in the fall of 1990, Mr. Anderson's career dramatically started to pick up and with the constant travel he started to seriously consider ABG&Co's full business management services. Having gained Mr. Anderson's trust during his tenure as an accountant, Mr. Greene sold his business management services with a prospectus, dated November 7, 1990, (Exhibit A) detailing the services Mr. Greene would provide Mr. Anderson.

23. Less than one month after receiving the prospectus, Mr. Anderson and Mr. Greene engaged in a verbal contract December 4, 1990. The verbal contract was recorded and subsequently transcribed (Exhibit B). Mr. Greene did not provide a written contract in the beginning of tenure, stating he didn't have written contracts with any of his clients, which is why Mr. Anderson recorded the contractual meeting with Mr. Greene's consent.

24. In the contract and the prospectus, Mr. Greene states he agrees to be responsible for planning the financial future of Mr. Anderson, contract negotiations, receipt of all income, deposit all earnings, drawing checks to pay bills, maintaining records, all tax returns, wills, trusts, estate planning, insurance, supervision of investment program, determination of asset purchases, and all financial planning for an annual fee of 5% of yearly gross professional earnings. Mr. Greene failed at all of these services.

PUBLIC REPUDIATION OF SERVICES

25. In an email to Mr. Anderson, MPS dropped Mr. Anderson as a client effective December 31, 2011 without completion of paid for work including six (6) years of Mr. Anderson's personal taxes and 10-12 years of JCI returns and required reports. (Exhibit C).

26. In a letter to Mr. Anderson, Mr. Greene resigned as trustee of JCI Defined Contribution Pension Plan on May 18, 2012 (Exhibit D).

27. In some actions involving breach of fiduciary duty, a special tolling rule provides that when a breach of fiduciary duty occurs during the course of the fiduciary relationship, the statute of limitations (whether six years for claims seeking equitable relief or three years for money damages) is tolled until the relationship terminates or the fiduciary "openly repudiates" his or her fiduciary obligations, whichever occurs first.

FAILURE TO FILE TAXES

28. Mr. Greene breached his fiduciary duty as Mr. Anderson's accountant, resulting in tax liens, levies, garnishment of wages and bank accounts, and approximately a $100,000 tax bill.

29. Mr. Greene did not file or send Mr. Anderson's personal taxes in 1994, or 2004 through 2011 resulting in IRS delinquencies, liens, levies, and garnishment warnings which were issued without Mr. Anderson's knowledge. Even with notices sent by the IRS to Mr. Greene, the prepared tax returns were still not filed or sent to Mr. Anderson. Mr. Greene did not file corporate taxes and required reports and forms for Joe Coyote Inc. ("JCI") for at least 10-12 years.

30. In the early fall of 2010, MPS Partner Richard Guttenberg told Mr. Anderson "Arthur is taking your money and putting it into his personal account so that the government does

not seize it." Mr. Guttenberg made no mention of the levies, liens, garnishments, IRS warnings or notices, or the approximate $100,000 tax bill.

31. To further complicate the situation, Todd Woolrich of MPS deposited a JCI IRS refund check in 2012 when Mr. Anderson specifically asked him to hold off on depositing the refund until all tax returns had been discussed, completed, and confirmed by Mr. Anderson. After many demands, MPS and Mr. Greene have not returned past client copy corporate tax returns sent to Richard Guttenberg late fall of 2008 or W2s from 2009 to 2012.

32. 2006 through 2008 tax returns reviewed and approved by Mr. Greene were sent without the preparer signature or PTIN.

33. Mr. Anderson paid tax attorney Boyd Hudson $500 in July 2011 without an engagement letter, contract, retainer, or any power of attorney to simply make a few calls and to formally request that Mr. Greene complete the paid for delinquent tax returns. Mr. Greene originally stated to Mr. Hudson that Kevin "had slipped through the cracks", implying the returns had never been completed or filed. Later, when Mr. Anderson asked Mr. Greene why he had not been filing his returns, Mr. Greene then said that he had prepared them and sent them to Mr. Anderson but that Mr. Anderson had apparently not filed them. Mr. Greene, in a statement to the NYS Bar Disciplinary Committee stated "that he had no way of knowing that these tax returns had not been filed". This is absurd. Mr. Greene or Mr. Guttenberg merely had to simply ask Mr. Anderson if he had filed his returns over the many conversations they had over 8 years. Furthermore, the IRS transcripts show that Mr. Greene had been sent numerous warnings and notices spanning several years at 101 Park Avenue alerting Mr. Greene to

file Mr. Anderson's delinquent taxes. Mr. Greene stated he never signed tax returns even though he had at one time an IRS POA and in previous years he did sign and file extensions for Mr. Anderson and signed and filed JCI corporate returns which as Secretary Treasurer of JCI were his fiduciary duty.

34. In June of 2011, Mr. Guttenberg pre-filled in the dates 10/10/06 on a delinquent 2005 tax return on Mr. Anderson's and ex-wife Dawn Spence's signature lines even though the date was June 21, 2011 when they signed. When Mr. Anderson expressed dismay that the dates were already filled in, Mr. Greene said it was acceptable and that the return would be accepted by the IRS as the date on the return and not when it was actually signed. Mr. Anderson was instructed to sign 3 copies; keeping 1 copy, and sending back 2 of the post-dated 2005 returns. These instructions and acts created a situation that made it appear that Mr. Anderson and Ms. Spence were simply refiling their returns when it appears it was in actuality a manipulative ploy by Mr. Greene to cover his negligence for not initially preparing, sending to the Mr. Anderson, or filing the taxes initially with the IRS. The instruction was further complicated when Mr. Greene told Mr. Anderson to send them to him personally and Mr. Guttenberg instructed Mr. Anderson to send them directly to the IRS.

35. Mr. Greene has also stated that all the returns over the years were completed and saved on his computer records. In fact, in his original prospectus, he states that "he has double entry computer records which are important for tax returns". Yet when Mr. Anderson requested that the delinquent returns be completed starting in November of 2010, he was kept waiting for at least 6-9 months while Mr. Greene completed them

instead of printing the allegedly prepared taxes off his computer and promptly mailing them Mr. Anderson.

36. While attempting to complete the delinquent taxes from 2009-2011, Mr. Anderson was asked to recall expenses and spending from years earlier without access to any of his account records or checks. During his tenure with Mr. Greene, Mr. Anderson had never been asked to recall expenses and spending, not for 26 years. Mr. Greene received all of his mail including checks and salaries and paid all of his bills. When he asked for various records to answer these questions about expenses and spending from Mr. Greene and then eventually Managing Director of MPS Mark Levenfus he was denied access to the records requested.

37. The Code of Federal Regulations Title 31 Money and Finance: Treasury Subtitle A, Office of the Secretary of the Treasury Part 10, Practice before the IRS Subpart B, Duties and Restrictions relating to practice before the IRS (refs & Annos) 31 C.F.R. §10.28 Return of Client's records states that "In general, a practitioner must, at the request of a client, promptly return any and all records of the client that are necessary for the client to comply with his or her Federal tax obligations." Additionally, "Practitioner must provide the client with reasonable access to review and copy any additional records of the client retained by the practitioner under state law that are necessary for the client to comply with his or her federal tax obligations. Records of the client include all documents or written or electronic material provided to the practitioner or obtained by the practitioner in the course of the practitioner's representation of the client that pre-existed the retention of the practitioner by the client. This also includes materials that were prepared for the client by a third party.

This includes any return, claim for refund, schedule, affidavit, appraisal, or any other document prepared by the practitioner or his or her employee or agent." By not giving Mr. Anderson the necessary records in a timely manner, the Defendants not only blocked Mr. Anderson from completing his already delinquent tax returns but also prevented him from obtaining his records and learning the true facts that would substantiate his claims which are the basis of this complaint.

38. Around that time Mr. Anderson contacted Mr. Mark Levenfus, managing director of MPS and asked for his assistance in resolving these matters. Instead of receiving help during the time that Mr. Anderson was trying to resolve the tax issues with Mr. Greene, Dan Kessner and Betty Russo (both MPS employees) attempted to move Mr. Anderson's Chase accounts to a retail branch without Mr. Anderson's consent. After Plaintiff's objections, MPS managing director, Mark Levenfus, stated in an email that Mr. Anderson's accounts would not be changed. The account address was indeed eventually changed anyway without Mr. Anderson's verbal consent or written signature approval.

39. There is a discrepancy between Social Security reported earnings ($3,500,000) as reported by Mr. Greene and earnings on Mr. Anderson's union statements ($7,100,000 including foreign earnings).

40. Mr. Anderson suffered liens, levies, tax bills, penalties and interest, and overpayment of taxes which affected his credit rating. The federal tax bill will remain on his credit report for 10 years.

<u>INCOMPLETE RECORDS AND OMISSION OF DATA</u>

41. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by not disclosing all relevant facts relating to matters regarding Mr. Anderson's finances.

42. Mr. Greene typed up monthly summary statements without providing complete financial statements and copies of bank, financial, investment statements from Chase, JPMorgan Chase securities, Chase Treasury Bills, Chase mutual funds, any Chase accounts, Citibank, Citiglobal, and the Salomon Brothers/Smith Barney/Citiglobal/Morgan Stanley account. Mr. Greene did not include separate itemized invoices for services rendered for Mr. Anderson or JCI.

43. These summary statements prepared by Mr. Greene contained unexplained large transactions and failed to provide full, detailed, and accurate account of all monies. Moreover, there were multiple summary statements that did not include mutual funds or pension summaries, investments, records of where debit memos were distributed, a complete list of all checks disbursed, and months when no summary statements were prepared at all.

44. Mr. Anderson was sent a Smith Barney statement in the late 1980's indicating an off-shore account but the account never appeared on the monthly summary statement. This off-shore account was never discussed or explained to Mr. Anderson.

45. As co-trustee of JCI defined contribution pension plan account, Mr. Anderson did not receive separate statements sent to his home address.

46. After over 30 requests to provide the records, Mr. Greene failed and refused to provide complete personal and JCI accounting records, bank account statements and checks, and other documentation from 1990 through 2014.

47. MPS sent Mr. Anderson incomplete Chase Bank statements in 2011, omitting the months Mr. Greene was transferring Mr. Anderson's money into his account during the IRS levy/lien/garnishment process.

48. It was not until April 18, 2012 that MPS sent Mr. Anderson approximately 6-7 boxes of incomplete records with many statements and checks missing from approximately 2004 forward and essentially omitting almost all of the JCI records. As reported in letters to the FBI, the NY and CA DOJ, and the NYC and LA DA, there were no checks provided at all for the years 2009 and 2011. There are only 14 checks provided for the entire year of 2010. There are no JCI checks provided at all. Between 2004 and 2010, there were a total of 329 missing checks; 164 missing from 2009 alone. The missing check total includes only a part of 2010, and does not include 2011 or any JCI checks.

49. In August 2012, Mr. Anderson received a QuickBooks disk of his accounting records which according to accountant Don Fontana was incomplete and omitted the years 1990 to 2003 but was also in his words "messed up". That QuickBooks disk has disappeared. Neither ABG, MPS, lawyer G. Katchroo, D. Fontana or Assistant District Attorney Heather Manley seem to have the original disk or another copy. Ms. Manley informed Mr. Anderson in the summer of 2013 that the QuickBooks disk she received was blank.

50. In April 2013 MPS lawyer Thomas Manisero of Wilson Elser sent Mr. Anderson a completely blank JCI corporate kit.

51. In the summer of 2014, through Mr. Anderson's efforts, the Chase Brokerage account records from only 2003 through 2007 were obtained through the Consumer Financial

Protection Bureau. On February 10, 2015, Mr. Anderson received his complete Royal Bank of Scotland statements through his own efforts.

52. The accounting work in Mr. Greene's typed up summary statements sent to Mr. Anderson for over 20 years was not performed to Generally Accepted Accounting Principles (GAAP) standards and practices according to more than one financial professional.

53. The defendants made misrepresentations regarding records that led Mr. Anderson to delay commencement of this action. MPS did not return documents until April 2012 and even then returned only partial documents. Eventually, MPS changed Mr. Anderson's address on his bank accounts without his written authorization and signature or verbal consent.

54. The doctrine of equitable estoppel permits circumstances to extend the three-year limitations period when a plaintiff is "prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant". At every turn, Mr. Anderson was denied access to his records from Mr. Greene et al and began making discoveries only after obtaining records through his own tireless efforts by various other means.

<u>MISMANAGEMENT OF PENSION FUND</u>

55. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by taking substantial control over JCI and by mismanaging Mr. Anderson's money that he entrusted to Mr. Greene.

56. Mr. Greene was a self-appointed trustee to Mr. Anderson's JCI pension plan. The lawyer/client relationship is one of the highest fiduciary relationships. The Trustee/fiduciary relationship is even higher, requiring an especially close, confidential,

and intimate fiduciary relationship and demanding the utmost in loyalty and trust from the Trustee to the beneficiary.

57. Mr. Greene had a joint Chase Bank account presumably having possession of the Chase bank ATM/Credit card. After many attempts, Mr. Anderson has not definitively received the specific names of the actuary, plan administrator, or the plan documents specifying the authority and rights Mr. Greene possessed as a Trustee of Mr. Anderson's pension account.

58. There is evidence of withdrawals from the pension by Mr. Greene; the latest deposit/transaction of $34,930 from a Citibank Deposit Program and subsequent withdrawal (listed as a delivery) was on May 4, 2012 which was 14 days prior to Mr. Greene removing himself as trustee of the account. Mr. Anderson was unaware of this transaction until a securities specialist pointed this out to Mr. Anderson on or around February 11, 2015.

59. The pension and investments records were neither provided by Mr. Greene nor included in the monthly summary statements for over 20 years and subsequently were not received until the winter of 2012 from the Kaufman Katz Financial Group at Morgan Stanley in Boca Raton, Florida ("Kaufman Katz"). No Form 1099s were provided. Mr. Anderson's pension /mutual fund was liquidated in 2012 without Mr. Anderson's consent or knowledge. Mr. Anderson was unaware of this transaction until again a securities specialist pointed this out to Mr. Anderson on or around February 11, 2015.

60. Prior to receiving the records, when Mr. Anderson attempted to obtain the records from Rosita Kaufman, Cynthia Katz, and Lorrie Donlon at Kaufman Katz Financial Group of Morgan Stanley in Boca Raton FL, they refused to send requested statements from the

beginning of the account to 1999 even though Mr. Anderson is a trustee. Ms. Rosita Kaufman stated to Mr. Anderson in the spring of 2014 that perhaps Mr. Anderson couldn't get his records "because a warehouse had burned down in NJ".

61. Lorrie Donlon of Kaufman Katz sent an email around the winter of 2012 to Mr. Anderson stating he was not a trustee and that Mr. Anderson had to disengage Mr. Greene as trustee of JCI in order to withdraw money even though Mr. Anderson himself was also a trustee. Mr. Anderson was also told by Ms. Donlon that they could not provide statements from pre-1999 because they were destroyed in the Twin Towers collapse on 9/11. Ms. Donlon stated Kaufman Katz merely "housed" funds and did not invest them and stated Mr. Greene only kept money in cash, no investments, just cash.

62. Prior to the initiation of the contract, Mr. Greene, as Mr. Anderson's accountant, apparently opened an IRA account at a Citibank in Sonoma California in or around about 1985, without Mr. Anderson's consent or knowledge. Mr. Anderson discovered this abandoned IRA account in the spring of 2012 when he received a letter from CitiBank Wealth Management advisor Glendale Sylvester stating he needed to claim the account before it was sent to the Secretary of State of CA. Ms. Sylvester informed Mr. Anderson that he had been sent notifications from Kaufman Katz /Morgan Stanley but they had been sending statements to an address that Mr. Anderson had not occupied for almost 10 years. As Mr. Anderson's business manager, Mr. Greene had all of Mr. Anderson's addresses over the years and should have advised the investment firm of Mr. Anderson's current addresses. Mr. Anderson later received a letter from a Citibank Sonoma branch in the fall of 2014, dated June 13, 2014, stating the branch would be closing September 19, 2014. To the best of Mr. Anderson's knowledge and memory at

the time, he did not have a Citibank account in Sonoma, CA, having never been to Sonoma, CA. He later found out from Citibank employee Jessica Steeber in Vernon Hills, IL that apparently this Sonoma, CA IRA account appears to be the same IRA account that had been abandoned in 2003 and that she had transferred for him in the spring of 2012 from CA to IL through Ms. Glendale Sylvester in NY. After 27 years, this IRA account had $4,000 in it. As Mr. Anderson's business manager, Mr. Greene should have been contributing funds to this IRA annually and had control and knowledge of all IRA's he set up for Mr. Anderson and should not have allowed them to be abandoned.

63. Mr. Greene oversaw Mr. Anderson's pension investment program at Kaufman Katz of Morgan Stanley through which CDs from over 45 different banks in the US and South America were purchased and sold with limited growth. In the winter of 2012, Mr. Anderson obtained from Kaufman Katz Morgan Stanley the statements for the CDs. The total amount of monies used to purchase the CD's was $2,706,000 yet the total sell price was $2,670,469. The CDs were purchased for $20,000 to $96,000 and were sold for an average of $958 profit with the exception of one $50,000 that was allowed to mature for 3 years for a sell profit of $25,595. There is one CD that was purchased for $42,000 and was sold three months later for a profit of $96,894. There are 7 CDs purchased for a total of $652,000 that were not sold and are unaccounted for. As a comparison, the previously referenced CD that Mr. Anderson purchased for $3500 in 1985 at the beginning of his career and that he had sole control over for 25 years, had doubled in value even after the financial collapse of 2008 before he painfully discovered it had been garnished without his knowledge in 2010.

64. Early in their relationship, Mr. Greene stated the JCI defined contribution pension plan was good for Mr. Anderson because he could invest up to $30,000 tax free every year. Mr. Greene then went on to state that when Mr. Anderson was ready to retire, he would have well over $1,000,000 if contributions were made every year. By 2008, after 18 years with Mr. Greene as Mr. Anderson's business manager, there was only $350,000 in the account when $30,000 a year for 18 years would total $540,000 not including any compound interest. When Mr. Anderson started with Mr. Greene full-time as his business manager in late 1990, he had $650,000 in his savings account after only 5 years without any financial help.

65. There is $652,000 in missing CDs, the missing original $650,000 in savings, and the difference in the pension plan of $190,000 totaling $1,492,000 in missing monies. The true nature of missing monies from the pension fund is not known until accountings of the pension fund have been made.

FAILURE TO DISCLOSE DISBURSEMENT OF CHECKS

66. Mr. Greene, as an accountant, breached his fiduciary duty by not disclosing relevant facts regarding the payments and disbursement of checks.

67. Beginning 2000 through 2004 Mr. Greene excessively wrote and disbursed 20 to 30 checks per month when 9 to12 checks would have covered expenses.

68. There are multiple checks to unidentified recipients disbursed by Mr. Greene (including but not limited to: e.g., January 1991, $125,000 - Check #171; April 1995 Western Union payment of $11,268).

69. Throughout the tenure, multiple checks were written by Mr. Greene to Marilyn Anderson (Plaintiff's mother) that were not received by Mrs. Anderson.

70. There are multiple reimbursed expenses made by Mr. Greene followed by disbursements to Mr. Anderson account 6670 that are unexplained (including but not limited to: April 2003 check #1717 reimbursed expenses of $30,000 to Kevin Anderson followed by $30,000 disbursements; July 22, 2003 check #1725 reimbursed expenses of $15,000 to Kevin Anderson followed by $25,000 disbursements).

71. There is at least $177,018 unaccounted for from undisclosed checks and disbursements. The true nature and sum of the undisclosed checks and disbursements made by Mr. Greene is not known until accountings of the checks and disbursements have been made.

OVERPAYMENT OF FEES

72. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by secretly profiting from the fiduciary relationship.

73. Mr. Greene paid himself for un-agreed upon expenses of approximately $5,000 per year in addition to overcharging the agreed upon 5% of gross professional earnings commission fee from late 1990 through 2011 totaling a sum of at least $90,746.

74. In addition, it appears that Mr. Greene fraudulently paid himself approximately $75,000 a year to oversee JCI disguised as business expenses for JCI for over 20 years. These additional fraudulent expenses appear to be part of a profit sharing plan/scheme that was never approved by Mr. Anderson either verbally or in writing. It should be noted that an accurate summation of the actual amount of overcharge is unknown because the itemized records were not received from Mr. Greene.

75. Mr. Anderson paid Chase Bank and JPMorgan Chase $200 in 2012 to duplicate past checks to attempt to investigate these various discrepancies; 30-40 of those checks were

unreadable and blacked out. Mr. Anderson could not resolve this and did not receive readable checks even with the help of the Consumer Financial Protection Bureau. Mr. Anderson still has not received the requested and paid for checks.

76. Mr. Anderson was disenabled by MPS from receiving past statements online after putting through a password in the fall of 2011 with Elaine Martinez, his key Chase contact for the JCI Commercial account. This also impeded progress towards filing this action.

77. At the very beginning of the business management relationship in early 1990 and on December 4, 1990, Mr. Greene instructed Mr. Anderson to sign Individual and Durable Powers of Attorney, Corporate Resolution papers and a Chase Bank signature card filled out in Mr. Greene's handwriting and giving Mr. Greene exclusive power on any and all Chase accounts. These accounts were not indicated or checked in the appropriate boxes and leaving blank spaces next to Mr. Anderson's name. The entire form was completely blank other than Mr. Anderson's requested signature (without a date) and the assigning to Mr. Greene certain financial powers and exclusive rights. Even after requesting them at the time and then over 20 years later, Mr. Anderson has never received the filled out documents and only has possession of the partially signed and essentially blank signature forms. This appears to be a fraudulent scheme from the very beginning to skillfully and manipulatively gain control of Mr. Anderson's funds. Mr. Anderson never had his own Chase Bank ATM or Chase credit card until the fall of 2011 and was only obtained to try to receive his statements. Mr. Anderson has never laid eyes on a Chase checkbook.

78. Mr. Greene overpaid himself at least $90,746 in fees plus $105,000 in un-agreed to expenses and approximately $75,000 a year in fraudulently charged business expenses.

The true nature and sum of overpayments made by Mr. Greene is not known until accountings of the overpayments have been made.

MISMANAGEMENT OF INVESTMENTS

79. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by failing to invest Mr. Anderson's monies when Mr. Anderson reasonably believed they were being invested. Mr. Greene did not exercise due care in the management of Mr. Anderson's assets.

80. In the early to mid-1990's Mr. Greene represented that he would be Mr. Anderson's financial advisor and broker, rejecting Mr. Anderson's proposal to retain Larry Beshel (Mr. Anderson's cousin) as broker; stating that "we" (Mr. Greene and ABG&Co) can do what Larry does. Mr. Greene represented that he would be responsible for all investments after consultation yet Mr. Anderson was never consulted regarding investments. Mr. Greene used other brokers without consultation and without specifying the brokers on the monthly summary statements. Mr. Greene hired brokers from JP Morgan Chase Securities, Salomon Brothers/Smith Barney, Citiglobal, and Morgan Stanley without consent from Mr. Anderson (these included Greenspon & Weiland, Jim Martzman, Robert Weinberger, Stephanie Gianetti, Larry Finkelstein, Salas Benbrahim & Toledo, Kaufman Katz) instead of using his cousin Larry Beshel as requested.

81. In October 2012 Dr. Gaytri Kachroo, attorney in Cambridge Massachusetts, stated after reviewing some of Mr. Anderson's records that Mr. Greene appears to have used the ABG client account with various client's comingled monies putting them "in one big

pot". The Arthur B. Greene client account and profit sharing plan conflicts with NY State Bar IOLTA agreement rules prohibiting comingling of client accounts.

82. JCI pension fund start up manager and third party administrator Larry Finkelstein started up many corporate pension accounts for Mr. Greene. In the spring of 2012, when asked about JCI, Mr. Finkelstein claimed he knew nothing about JCI and had nothing to do with it. In the summer of 2014, with the help of Kerry McGovern of the SEC, Morgan Stanley attorney Wendy McDermott informed Mr. Anderson that Mr. Finkelstein was indeed the Third Party Administrator at one point in time. It appears that Mr. Finkelstein does not want to be associated with the JCI pension fund bringing into question the authenticity of the account and its investments.

83. Chase Bank representatives Thomas Racanelli, Dave De Lorenzo, Steve Gibbs, stated to Mr. Anderson that they had no record of brokerage account, CL5518042, yet this account did exist at one point in time.

84. The true nature and sum of all investments made by Mr. Greene is not known until accountings of the investments have been made.

NON-DEPOSIT OF EARNINGS AND PAYMENT IRREGULARITIES

85. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duties by not acting solely for the benefit of Mr. Anderson, to whom he owed the duty.

86. Mr. Greene did not consistently deposit Mr. Anderson's earnings into Mr. Anderson's accounts.

87. Mr. Greene received the Sunset Boulevard settlement payment of $410,792 on July 18, 1994 from Mr. Anderson's entertainment attorney Ira Schreck at Frankfurt, Garbus, Klein & Selz (488 Madison Avenue, New York, New York, 10022), with instructions

to immediately deposit it into the appropriate accounts. Mr. Greene deposits $226,818 on December 30, 1994, leaving $183,974 unaccounted for.

88. Two to three $50,000 payments from Nothing Sacred ABC television series were unaccounted for on the monthly summary statements January to March of 1998; verified by meeting on September 11, 2014 with Screen Actors Guild (SAG) Pension Benefits Specialist, Maggee Claudio, at 3601 West Olive Avenue, Suite 200, Burbank CA 91505 that only 20 of 23 payments were made to pension contributions. David Manson, executive producer of Nothing Sacred, winter of 2012 stated in a phone conversation that 23 of 24 episodes were filmed.

89. In 2009, during the British Shawshank Redemption production, Mr. Anderson was paid in US dollars when the contract specified Mr. Anderson was to be paid in British pounds. The producers withheld 45 - 50% of Mr. Anderson's paycheck and after many pleas to rectify this situation, the Defendants were unresponsive and ineffective. Mr. Anderson was informed in the summer of 2012 by accountant Don Fontana that he was only paid in US dollars. Mr. Anderson was never informed of this by MPS or Mr. Greene. The funds converted from British pounds of approximately $40,000 from the Shawshank Production were never received.

90. There is at least $323,974 missing and unaccounted for earnings. The true nature and sum of missing and unaccounted for funds is not known until an accounting of Mr. Anderson's earnings has been made.

UNAPPROVED MONEY TRANSFER AND LOAN REPAYMENTS

91. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by not disclosing all relevant facts regarding money transfers and loan repayments.

92. Mr. Greene represented he would take care of all of Mr. Anderson's bank accounts and inform Mr. Anderson of any changes.

93. On September 2003, unknown to Mr. Anderson, Mr. Greene closed a Mid-America bank account.

94. There were unexplained loan repayments made by Mr. Greene to Mr. Greene (including but not limited to: e.g. February 1996 $10,000; November 1996 $10,000; August 1997 $10,000). In December 1991 - undisclosed and unauthorized $30,000 Steppenwolf Theatre loan indicated on statement. Mr. Anderson personally paid $10,000 to the Steppenwolf fundraiser campaign.

95. There were unexplained balance drops or missing funds from earnings in bank accounts (including but not limited to: e.g., December 1990 to June 1991 accounts drop $298,279; April 1997 earned $100,000 for pilot for nothing Sacred; no increase in account balance; September 1997 $150,000 grossed; account balance increases $50,000; October 1997 $150,000 grossed; account increases $50,000; December 1997 $101,000 grossed; account balance drops $50,000; March 1998 $203,755 grossed; account balance increases $81,000; November 2001 two transfers of $5000 each from Plaintiff account #1 but only one $5000 transfer is accounted for; January 2002 $30,000 account balance drop; September 2003 to October 2003 accounts drop $427,000; November 2003 to November 2004 account balance drops $675,153).

96. There are funds totaling at least $1,838,187 for undisclosed loan repayments and money transfers. The true nature and sum of the loan repayments and money transfers are unknown until an accounting has been made.

UNDISCLOSED ATM WITHDRAWALS

97. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by not disclosing all relevant facts regarding ATM withdrawals.

98. There were excessive ATM Cash withdrawals not executed by Mr. Anderson or Dawn Spence (ex-wife) from Account #3. The locations of the withdrawals were not included on the Mr. Greene, monthly summary statements [NOTE: cash withdrawal limit was $500 per day] (including but not limited to: e.g., November 1991- $3800; January 1992 - $9500; December 1997 $2700; February 1999 - $4480; March 1999 - $4000; April 1999 - $4654; May 1999 - $5740; June 1999 - $5968; July 1999 - $5980; March 2000 - $2583; April 2000 - $4681.89; September 2000 - $5736; August 2001 - $7200; January 2002 - $6000; August 2003 - $9000). The withdrawals from Account #3 ranged from 15 withdrawals over 11 days to 39 withdrawals over 13 days. In a 5 month period, the unknown ATM withdrawals totaled $31,504, yet ATM withdrawals from Mr. Anderson's personal account (#4) on the same months totaled $3138.

99. The undisclosed ATM withdrawals total at least $82,023. The true sum and nature of the undisclosed ATM withdrawals remain unknown until an accounting of the withdrawals has been made.

<u>UNAPPROVED WIRE TRANSFERS AND CREDIT CARD TRANSACTIONS</u>

100. Mr. Greene, as Mr. Anderson's accountant, breached his fiduciary duty by making unauthorized wire transfers and credit card transactions.

101. In September 2009 to May 2010 Anita Asmah and Richard Guttenberg (both employees at MPS) requested Mr. Anderson to wire monies totaling approximately $30,000 from his Royal Bank of Scotland British account to a U.S. Chase account for "payroll", yet JCI was dissolved on April 29, 2009 unknown to Mr. Anderson.

102. Credit card transactions to Halifax Bank and Bank of Scotland, both in England, starting in 1996 for over 10 years, totaling $132,651.27 were made out to Dawn Spence (Plaintiff's ex-wife). [NOTE: name was listed as "Dawn Spe" on the monthly summary statement provided by Mr. Greene.] Ms. Spence verified the monies were never received.

103. There were numerous unexplained credit card transactions including advanced credit card payments (including but not limited to: e.g., November 1995 - $14,174; December 1997 $31,000 advanced credit card payments; January 2001 $22,000 in credit card bills - Citibank account #4 closed; October 2001 large credit card bills totaling $13,459; January 2002 $20,000 credit card bill).

104. There is a total of at least $263,284 in undisclosed money transfers and credit card bills. The true sum and nature of the transfers and bills is unknown until an accounting of them has been made.

MISMANAGEMENT OF TREASURY BILLS

105. Mr. Greene breached his fiduciary duty by not exercising due care in the management of Mr. Anderson's assets.

106. Mr. Greene opened a Bank of New York Treasury bill account in January 1991 without agreed upon consultation or Mr. Anderson's verbal or written consent. Mr. Greene then preceded to short sell Treasury bills (T-bills), through Chase Bank and JP Morgan Chase Securities with associated investment brokers Greenspon and Weiland, Salas Benbrahim and Toledo, and rampantly cashed out T-bills before they matured with no explanation or reason.

107. In1997 the JP Morgan Chase Securities account held $1,000,000 in T-bills but by 2003 only $40,000 remained in T-bills. During that same time from 1997-2003, Mr. Anderson earned over $4,000,000 bringing into question the need for the short sale of $1,000,000 worth of T-bills. There is no record of what happened to the monies after the short sale of the T-Bills (including but not limited to: e.g., June 1994 $19905 sale received - not deducted from T-bill statement; March 1994 Treasury bills drop $75,000; June 1994 $20,000 account decrease; August 1995 T-Bill just matured and sold short $30,000; March 2000 T-bills mature one month early; short sells $30,000; June 2001 T-bill costs don't match; February 2002 $40,000 account decrease; April 2002 $20,000 mutual fund decrease; June 2002 $25,000 account decrease due to "disbursements"; November 2002 $15,000 sold short; April 2004 $252,000 in T-bills matures; only repurchases $160,000 in T-bills; January 2005 T-bill statement $40,000 decrease; July 2005 $50,000 sold; August 2005 $30,000 sold; November 2005 $30,000 not repurchased).

108. There is $1,000,000 in Treasury bills unaccounted for and with undisclosed disbursement. Until an accounting is made, the true nature and sum of the missing monies from the T-bills is unknown.

MISMANAGEMENT OF JCI CORPORATE ACCOUNTS

109. Mr. Greene, breached his fiduciary duty, by mismanaging Mr. Anderson's money and corporation that he entrusted to Mr. Greene. Mr. Greene did not exercise due care in the management of Mr. Anderson's corporation.

110. Prior to the verbal contract, Mr. Greene, on May 17, 1990, filed for incorporation in the state of New York to the Secretary of State, Gail S. Shaffer. Mr. Anderson received no signed records of the transaction originally and not until 2012.

111. Mr. Greene, as secretary/treasurer of JCI, failed to notify Mr. Anderson that NY State dissolved JCI in 2009 for the non-filing of tax returns. Mr. Greene merger with MPS was announced the following day.

112. Even when Mr. Anderson asked Richard Guttenberg about JCI taxes in 2010, Mr. Anderson was not notified that JCI was dissolved in 2009. Around the fall of 2011, MPS asked Mr. Anderson to send them the New York state proclamation of dissolution, which he did send to MPS. MPS then did nothing to assist Mr. Anderson with obtaining knowledge as to what happened with JCI as requested.

113. The JCI pension statements provided by the Kaufman Katz Financial Group of Morgan Stanley in the winter of 2012 from 1999 through 2011 were incomplete.

114. February 1995, Mr. Greene, through JCI advanced an undisclosed payment of $34495 that was changed to Mr. Anderson loan repayment.

115. Mr. Greene used a different FEIN number for JCI from 1997 onward; no record of new FEIN number from 1997 to 2011 with IRS: July 1990 to 1997 FEIN = 13-3572948; 1997 onward FEIN = 11-3572948; as reported to Mr. Anderson by Don Fontana (accountant) on August 16, 2012.

116. JCI was not registered with NY state department of revenue as of August 2012. New York Secretary of State had no record of JCI according to accountant Don Fontana. It is unknown what Mr. Greene did in regards to JCI.

117. Mr. Greene disbursed check #1698 (account 2700) issued on 10/10/2002 in the amount of $10,000 to K. Anderson, which was listed as "shareholder loans" as written on the monthly summary statements. Mr. Anderson was unaware of any loans and additionally was informed he was the sole shareholder for JCI.

118. The true nature of JCI as created and used as a corporation to benefit Mr. Anderson is not known until an accounting of the corporation has been made.

FORGERIES INCLUDING FORGED AND FRAUDULENT CHECKS

119. Mr. Greene breached his fiduciary duties by disbursing forged and fraudulent checks.

120. May 21, 2014 at ~ 9:00 a.m., Peggy Anderson, landlady for loft at 39 Spring Street, New York City, New York, 10012 stated that the signature on Check 7126 was not her signature; additionally, she stated that the "5" in the account number on the signature endorsement line for check 7145 was not how she wrote the number five. The false signatures resemble Mr. Guttenberg's handwriting.

121. Mr. Guttenberg forged Mr. Anderson's signature on an IRS corporate tax document. Mr. Guttenberg signed as president of JCI on IRS corporate tax document in winter of 2009 even though Mr. Anderson is President of JCI. Mr. Guttenberg holds no officer position according to original corporate resolution papers.

122. Mr. Guttenberg notarized a divorce document in the ABG CO office with an expired notary stamp crossing out expired date and adding current date. Mr. Guttenberg had Mr. Anderson and Ms. Spence sign divorce papers on a completely blank separate page in ABG CO office.

123. Mr. Greene paid utilities March 1995 to March 2003 when utilities were included in the rental lease for Whalers Village, 11170 Pacific Coast Highway, Unit K, Malibu CA

90265 (Peter and Karen Wollons, landlords). It is unknown whether checks were cashed by the landlord or whether they were added to the summary statement for utilities paid at an unknown property or were simply fabricated.

124. There is approximately $9,600-$19,200 in utility payments unaccounted for and with undisclosed disbursement. Until an accounting is made, the true nature and sum of the undisclosed disbursements and forged checks is unknown.

LEGAL MALPRACTICE

125. Mr. Greene represented Mr. Anderson as his trusts and estates attorney providing legal advice on protecting his assets through different legal entities, including a pension plan created in the name of his corporate entity.

126. Mr. Greene represented Mr. Anderson as his tax attorney, advising him on all aspects of his taxes and providing tax planning strategies.

127. Mr. Greene represented Mr. Anderson as his immigration attorney providing legal advice and services for Mr. Anderson's as part of his effort to obtain a green card for his then wife.

128. Mr. Greene represented Mr. Anderson as his divorce attorney, providing legal advice regarding separation and divorce, composing post-nuptial agreement.

129. In connection with this legal representation, Mr. Greene represented himself on his letterhead as "Arthur B. Greene, Attorney at Law". Mr. Greene also communicated with other attorneys on behalf of Mr. Anderson on the law firm letterhead, both expressly and impliedly representing to other attorneys that Mr. Greene was Mr. Anderson's attorney.

130. In addition, Mr. Greene violated specific rules of professional conduct. Rule 1.5(b) of the New York Rules of Professional Conduct provides that a lawyer "shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible". Mr. Greene had no written contract with Mr. Anderson. The scope of Mr. Greene's representation was never defined, and Mr. Greene took over all aspects of legal representation for Mr. Anderson.

131. Mr. Greene drafted and negotiated nearly every contract Mr. Anderson entered into in his career.

132. Mr. Greene handled nearly every aspect of his finances, and advised him on tax consequences and estate planning matters.

133. Moreover, Mr. Greene helped Mr. Anderson file papers with the Immigration and Naturalization Services in order to obtain a Green Card for his then wife, writing Mr. Anderson that he, Mr. Greene, could help Mr. Anderson "better understand the legal ramifications of what is happening."

134. Mr. Greene also represented that he would "assume responsibility in connection with insurance, taxes, wills, trusts and estate planning and investments." Indeed, at the outset of their relations, Mr. Greene represented that he and his partners would "try to become involved in every aspect of our client's activities so that we can best render services."

135. Mr. Greene also blurred the line between being Mr. Anderson's attorney and being his accountant, investment manager and personal assistant.

136. Mr. Greene prepared Mr. Anderson's tax returns (and then failed to file them).

137. Mr. Greene controlled Mr. Anderson's savings and purported to invest them suitably and prudently (and then lost nearly all of his his life savings).

138. Mr. Greene paid nearly all of Mr. Anderson's bills for him, including his monthly credit card bills, rent payments, and car payments (and then allowed creditors to attach liens to his property after he failed to pay Mr. Anderson's bills).

139. In compensation for these various services, Mr. Greene took 5% of Mr. Anderson's gross income plus un-agreed to costs and expenses. Mr. Greene violated Rule 1.5(b) by failing to communicate the scope of his representation or explaining the reasonable basis for the fees and expenses that he charged Mr. Anderson. Rule 1.3(b) of the New York Rule of Professional Conduct provides that a lawyer "shall not neglect a legal matter entrusted to the lawyer."

140. As Mr. Anderson's attorney, Mr. Greene recommended various tax planning strategies for Mr. Anderson. One of those strategies was the creation of Joe Coyote, Inc. (JCI) a corporate entity incorporated by Mr. Greene over 20 years ago for the benefit of Mr. Anderson. Mr. Greene appointed himself Secretary and Treasurer of JCI, and represented to Mr. Anderson, either implicitly or explicitly, that he (Mr. Greene) would be responsible for all legal matters concerning JCI, such as the basic legal matter of ensuring the corporation was in compliance with all laws and remained in good standing in its state of incorporation.

141. Mr. Greene violated Rule 1.3(b) by failing to keep JCI in good standing and failing to ensure that its corporate tax returns were properly filed. The actual filing of a prepared corporate tax return is precisely the type of ministerial act that is the responsibility of the treasurer of a corporation who has signature authority. Ensuring that the corporate

tax returns were filed and that JCI was in good standing was, without questions, a legal matter entrusted to Mr. Greene that he neglected. Rule 1.7 provides that, without a specific written conflict waiver, a lawyer shall not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other interests." Rule 1.8 provides that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client," unless the lawyer advises the client to seek independent counsel and the lawyer gets informed, written consent.

142. Mr. Greene created a corporate entity for Mr. Anderson and became personally involved in the corporation by appointing himself as Secretary and Treasurer. Mr. Greene did not advise Mr. Anderson about the potential conflicts that could arise between his personal representation of Mr. Anderson and his responsibilities as a Secretary and Treasurer of JCI.

143. Mr. Greene also failed to inform Mr. Anderson that he did not intend to carry out the ordinary responsibilities of a Secretary and Treasurer. Mr. Greene violated rules 1.7 and 1.8 by taking a personal interest in JCI that could affect his legal representation of Mr. Anderson and entering into a business transaction with Mr. Anderson without advising Mr. Anderson to seek independent counsel. He never explained to Mr. Anderson what his role would be in the corporation and never advised him to seek other counsel. Now, JCI is subject to penalties and tax burdens as a result of being dissolved for failure to file tax returns. Rules 1.7 and 1.8 exist to avoid this exact scenario. Rule

1.1 provides: "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

144. Rule 1.3(b) provides that a lawyer "shall not neglect a legal matter entrusted to the lawyer." It is beyond comprehension that someone with such complete authority and control over another's financial and legal matters could allow that person's taxes to go unfiled for 8 years. Whether in his role as accountant or as tax attorney, Mr. Greene's responsibilities included ensuring that Mr. Anderson's taxes were filed. Mr. Anderson reasonably believed that the attorney and accountant, in charge of all his legal and financial matters, would not just prepare his tax returns, but also follow through with the final, ministerial act of actually filing the returns while he was away working in another country or travelling, as many accountants and attorneys do for their clients.

145. Indeed, Mr. Greene, represented to Mr. Anderson, in a letter sent to Mr. Anderson at the outset of their relationship, that he would be "responsible for all tax returns, federal, state, local as well as gift, estate, or any others" and that he would "assume responsibility in connection with…taxes." Mr. Greene violated Rules 1.1 and 1.3(b) by failing to competently represent Mr. Anderson as his tax advisor, neglecting to follow up and to confirm his tax returns were filed. Mr. Greene had authority to simply sign and file the tax returns on behalf of Mr. Anderson and, in fact, Mr. Greene signed and filed requests for extensions to file tax returns on behalf of Mr. Anderson.

146. Mr. Anderson trusted Mr. Greene with all of his finances. Mr. Greene had control over his bank accounts and his personal assets. Mr. Greene had a power of attorney from Mr. Anderson to control his finances. Mr. Greene was supposed to invest Mr.

Anderson's assets in a suitable and prudent manner. Mr. Anderson discovered that nearly all of his savings has been wiped out.

FIRST CAUSE OF ACTION – COUNT I

Breach of Fiduciary Duty based on Constructive Fraud

(Against all Defendants)

147. Mr. Anderson incorporates, by reference, the allegations of paragraphs 1through 146, as though fully set forth herein.

148. Mr. Anderson was a client of the defendants. As senior partner at or the accounting firm MPS, and through a foregoing relationship between Mr. Anderson and the defendants, there existed a foregoing relationship of dependence and influence whereby each of the defendants had a fiduciary duty to act with utmost good faith, honesty, and loyalty toward Mr. Anderson and to not favor their own interests at the expense of the interests of Mr. Anderson. The Defendants' fiduciary duties include obligations to exercise good business judgment, to act prudently in that operation of the Defendants' business, to discharge their actions in good faith, to act in the best interests of their clients, and to put the interests of the clients before their own.

149. The Defendants breached their duties of loyalty, honesty, and good faith by, among other things, not disclosing relevant facts and making material misrepresentations and omissions, by not rendering accounts or by not keeping accurate records of the persons involved, of the dates and amounts of the monies received, and of payments made, and by failing to disclose material facts regarding the status of Joe Coyote Inc. The defendants breached their duty by mismanaging Mr. Anderson's finances and corporation.

150. As a direct and proximate result, Mr. Anderson has been financially damaged by the Defendants' breach of their fiduciary duties.

SECOND CAUSE OF ACTION – COUNT II

Legal Malpractice

(Against all Defendants)

151. Mr. Anderson incorporates by reference the allegations of paragraphs 1 through 150, as though fully set forth herein.

152. Mr. Anderson was a client of the defendants. As senior partner at or the accounting firm MPS, and through a foregoing attorney/client relationship between Mr. Anderson and the defendants, there existed a foregoing relationship of dependence and influence whereby each of the defendants owed competent and skillful representation to Mr. Anderson and to not favor their own interests at the expense of the interests of Mr. Anderson. The Defendants', in performing legal services, were required to exercise care, skill, and diligence in managing Mr. Anderson's assets and corporation, putting the interests of Mr. Anderson before their own.

153. The Defendants breached their duties of care, skill, and diligence by, among other things, an abuse of Mr. Anderson's trust account, commingling trust account funds with the defendants' personal funds.

154. As a direct and proximate result, Mr. Anderson has been financially damaged by the defendants' legal malpractice.

V. Relief

PRAYER

WHEREFORE, Mr. Anderson prays for the following relief against all defendants:

A. ON ALL CAUSES OF ACTION

1. For compensatory damages in the amount in excess of $3,900,000.
2. For a constructive trust be imposed on all property owned, in whole or in part, by Defendants which was acquired, in whole or in part, by Defendants with the funds misappropriated from the Plaintiffs accounts.
3. For statutory treble damages.
4. For lost wages from 2011- 2015 in the sum of $1,200,000 ($300,000 per year).
5. For lost pension funds in the sum of $300,000 plus interest that were withdrawn during the course and preparation for this action.
6. For prejudgment interest at the highest legal rate from the date of the breach of fiduciary duties.
7. For punitive damages.
8. For legal, accounting, and mailing fees in the sum of $100,000.
9. An equitable accounting of missing monies and investments, and undisclosed disbursements.
10. For such further and other relief as this Court deems just and proper to which plaintiff is entitled at law or in equity.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury.

Dated: October 2, 2015

By: ______________________

Kevin Carroll Anderson, Pro Se
C/O Marilyn Anderson
5905 Delaware Avenue
Gurnee, IL 60031

Exhibit "A"

Prospectus

ARTHUR B. GREENE AND COMPANY P.C.
CERTIFIED PUBLIC ACCOUNTANTS
101 PARK AVENUE
NEW YORK, NEW YORK 10178

TELEPHONE
(212) 561-8200
TELECOPIER-FAX
(212) 370-7884

ARTHUR B. GREENE, C.P.A.
SURENDRA D. PATEL
RICHARD GUTTENBERG, C.P.A.
SCOTT GILDEA, C.P.A.

Exactly what rights have I signed away so far?

November 7, 1990

Could I have copies of things I've signed!
What I permit him to do?

Mr. Kevin Anderson
108 Wooster Street
New York, New York

Dear Kevin:

I enjoyed our meeting, and as you requested I enclose some information concerning the extent of services that we perform. We are an all purpose company and try to become involved in every aspect of our clients' activities so that we can best render services. We have been successful operating this way in the past and experience shows that the more information we have and the more time we can spend with the clients' activities, the better will be the result produced.

We want to make certain that your assets already accumulated and those that will be accumulated in the future are safe. This would require looking after them so that they are retained in assets which would not be subject to wide downward fluctuations and where possible the assets should be insured against loss.

We want to be current with the clients activities so that the services that we perform and the asset maintenance will be as uptodate as possible. This would involve continuous review so that the positions will be continuously appraised.

We would be concerned that the assets would continue to achieve the highest type of income and be involved in situations in which they would continue to grow in value. We would make plans for the clients financial future so that they can be assured of sufficient assets and maintain a certain standard of living presently and later on in their lives. This would also consider certain periods of time in which they may not want to work and to provide the financial security so that they may not have to during these periods. One of our happiest thoughts is seeing how we succeed in providing this financial well being.

what is power of attorney?

We would start with participation in planning of clients activities and being involved in negotiations of clients contracts. We would be especially concerned with the tax aspects of the contracts but would be interested in going over all of the financial and other details. Based upon the contracts we would arrange for all the income due therefrom to come to this office so that we can keep track of all of the sources to make certain that you have received all that you are entitled to. We then make deposits to accounts and draw checks in payment of bills. We do budgetary work and adopt procedures for the bill paying to conform best to the clients activities and requirements. We send the client a deposit letter each time a check is deposited into his account along with an explanation of the source of the deposit and any comments we may have on the income. We also provide a monthly statement which shows the beginning balances in all of your accounts to which is added all the deposits and from which is subtracted all the disbursements. In addition we provide you with a summary of the transactions which would show you on this monthly statement the sources of all the deposits and the details in connection with the disbursements.

We maintain double entry computerized sets of books so that we can account for all of your assets and every dollar in your account at the beginning of the accounting period and also maintain records of all deposits and disbursements so that we can prove out the ending balances. These are important for preparation of tax returns, and making decisions regarding your finances.

We also assume responsibility in connection with insurance, taxes, wills, trusts and estate planning and investments. We place, schedule and keep track of all insurance presently in existence and in addition make determinations as to what further protection may be required in order to protect life and property.

We are responsible for all tax returns, federal, state, local as well as gift, estate or any others. We prepare wills to conform with the client's plans for disposition of property and trusts as well, which are useful in income and estate planning. In regard to the estate planning we are involved in all aspects of client's assets and liabilities and make suggestions as to the best types of disposition. We supervise client's investment program and make determination as to the assets to be purchased for client's individual accounts or in regard to pension and or profit sharing plans. It is our objective to plan from the point of view of the individual client's and their families what their requirements are and the best way to meet these requirements.

Our responsibility would cover all financial planning and handling and we would be available for advice and supervision of all of your assets and property.

Investments - must have my approval?

I am sure you realize that it is difficult to explain all of the details in writing but perhaps this letter should just be introductory and I would be pleased to answer any questions you may have.

Sincerely yours,

ARTHUR B. GREENE

ABG:cmh

Exhibit "B"

Contract

 contract 12/4/90

Transcript of Meeting between Kevin C. Anderson ("K") and Arthur B. Greene ("A")
(Richard Guttenberg "R" comes in later)

K: Recording . . . recording. . . recording . . . as far as suggestions and stuff like that.

A: Okay.

K: I guess the main thing we're . . . I'm wondering about is, like, what would you suggest as how to . . . what to do with my money, you know?

A: Well . . . uh . . .

K: I mean, what kind of investments would you recommend and stuff?

A: I have your summary here. Uh . . . the first thing we should do is . . . uh . . . reduce the balances in your accounts by spreading your . . . your monies around.

K: M-hmm.

A: You've got . . . uh . . . uh . . . two seventy-two . . . over two hundred and twenty-five thousand . . . or about two hundred and twenty-five thousand dollars . . . uh . . . in an individual account at . . . uh . . . at Citibank.

K: Yeah, money . . .

A: Now, the insurance on that account is one hundred thousand dollars.

K: Right.

G: Uh . . . so that there are two choices . . . uh . . . uh . . . just as an immediate step. First of all . . . uh . . . you should reduce the balance at Citibank to under one hundred thousand dollars and you should open a second account at . . . uh . . . uh . . . at another bank.

K: M-hmm.

G: Uh . . . another alternative would be, as far as the monies are concerned . . . uh . . . on the short-term basis . . . uh . . . you could possibly put some money into United States Treasury Bills. Once again . . . uh . . . they're not insured as such, but they've got the backing of the Federal government and . . . uh . . . uh . . . they're as safe as you could . . . you could . . . you could put any money.

K: M-hmm.

A: The return on treasury bills, now . . . uh . . . is not as high as the return would be on certificates of deposit, but you've got the factor that they're obligations of the U.S. government, number one, and number two, the interest on your treasury bills are not taxable –

K: Mm.

A: -- for State income tax purposes. So you could make up the difference between . . . uh –

K: M-hmm.

A: -- the return on . . . uh . . . uh . . . like, on CDs or something else by the non-taxability --

K: Right.

A: -- of the interest on the treasury bills. Uh . . . as far as Joe Coyote is concerned . . . uh . . . uh . . . we should follow the same rules with the corporation . . . uh . . . in that we should keep the balances in Joe Coyote down to . . . uh . . . uh . . . under one hundred thousand dollars, and we should also open another Joe Coyote account, and we could do the same thing with the treasury bills as well. Uh . . . in addition –

K: So I can have an account at . . . uh . . . Citibank --

A: Chase or Bank of New York.

K: -- for a hundred thousand and also an account for Joe Coyote, right? Those are two separate people?

A: Yeah, it's an individual . . . if it's a Kevin Anderson account you're insured up to a hundred thousand; Joe Coyote is insured to a hundred thousand. If there's a Kevin Anderson . . . uh . . . regular checking account and a Kevin Anderson money market account, there's just one insurance.

K: Mm.

A: As far as the corporation is concerned, a corporation is an artificial entity. It's . . . uh . . . like a separate person.

K: M-hmm.

A: So you've got separate protection for the . . . for the company as well. Now, we're in the process of . . . uh . . . putting numbers together . . . uh . . . uh . . . for your individual . . . 'cause you're going to need some money before the end of the year. Uh . . . first of all . . . uh . . . we have to prepare tax returns for Joe Coyote at this point and . . . uh . . . what we do is we level out Joy Coyote so that there's no Federal tax to pay.

(*Telephone rings*. Excuse me. *Arthur answers*. Yes? Yes? Uh . . . just hold calls for me, please.)

A: Uh . . . in dealing with the corporation, we want to get the corporate advantages, but we don't want to have to pay Federal income taxes, so that we . . . before December 31st, we will zero out the corporate net income. Now let's say . . . just round it out and say the corporate net income at this point is about three hundred thousand dollars . . . uh . . . which is the three sixty-five of income less the agent commissions, et cetera, et cetera. And . . . uh . . . what we would do is to pay you a salary before the end of the year. We would also make a contribution to a corporate pension plan.

K: M-hmm.

A: And we might pay other expenses as well, so that the corporation will have deductions which will offset all of the income so there will be no income tax for the corporation to pay.

K: Mm. That pension thing . . . that was the thing you were telling me about . . . twenty thousand dollars and every nine years . . .

A: Well, it's thirty thousand.

K: Oh, thirty thousand.

A: Thirty thousand.

K: Every nine years --

A: Well . . . uh . . . every nine years is based upon what accounts are paying interest now.

K: Mm.

A: In other words, whether it's a pension account or any account . . . uh . . . if you just open a savings account in a regular savings bank and you put thirty thousand dollars there, in nine years the thirty thousand should double.

K: M-hmm.

A: Should be worth sixty thousand. And . . . uh . . . uh . . . in another nine years it'll be worth a hundred and twenty thousand, and in another nine years it'll be worth two hundred and forty thousand. This is just assuming that the interest rate stays the same.

K: M-hmm.

A: If the interest rate goes up, it will multiply more rapidly. If the interest rate goes down, it'll multiply at a slower pace.

K: So most likely it would go down, right?

A: Well, I don't know. I don't know. I don't think so. I think the . . . I think trend in interest has been . . . uh . . . certainly over the last . . . uh . . . thirty years, has been up.

K: When a recession hits, does interest rates usually do down or --

A: It depends.

K: Yeah.

A: It depends. It depends. Sometimes it can go up; sometimes it can go down. But the important thing is that, once again . . . uh . . . uh . . . if your pension is made up of . . . uh . . . uh, cash liquid assets, you want to be sure that they're insured as well --

K: M-hmm.

A: -- to the fullest extent.

K: Right.

A: And . . . uh . . . uh . . . as I say, we'll . . . we'll do the corporate projections and . . . uh . . . uh . . . we'll prepare the corporate tax return which you'll file just after the first of the year, but there'll be monies transferred from the corporation to you individually and . . . uh . . . uh . . . uh . . . as far as buying treasury bills are concerned, treasury bills can be permanent investments or they can be temporary investments. You know that they're secure. You know that you get a guaranteed return. Uh . . . uh . . . but treasury bills are also liquid. In other words, assuming you had two hundred thousand dollars in treasury bills and we bought treasury bills to mature in six months . . . uh . . . when you buy treasury bills, what they do is you pay a discounted price. In other words, you buy . . . let's make it a year; it'll be simpler. Let's say you buy two hundred thousand dollars worth of treasury bills and the treasury bills are paying ten percent. You would pay one hundred eighty thousand dollars for them now –

K: M-hmm.

A: -- and then at the end of the ten-year period, they would mature and they'd be worth two hundred thousand.

K: Mm.

A: Now . . . uh . . . let's say you bought two hundred thousand dollars worth of treasury bills for one hundred eighty thousand dollars and . . . uh . . . uh . . . for some reason . . . uh . . . before the year was up, you wanted the money. You could always sell your treasury . . . treasury bills short. Let's, once again, simplify it. Let's say on July 1st you need half of your money; you need . . . uh . . . or you need one hundred thousand dollars. Uh . . . uh . . . if you invested one eighty in January, the one eighty . . . uh . . . uh . . . July 1st would now be worth one ninety, in round numbers, of course.

K: Right.

A: And then as of July 1st if you needed the hundred thousand dollars, you could sell short your hundred ninety in treasury bills; you could get the hundred thousand dollars, and you'd still have the ninety thousand dollars.

K: M-hmm. Are the permanent treasury bills . . . they have a higher interest than the temporary, right?

A: Well, it's curious; it's curious. It used to be that they did. Uh . . . in other words, it used to be that people would buy thirty . . . they don't call them bills; they call them bonds --

K: Mm.

A: -- uh . . . bonds with long maturities. And it used to be that . . . uh . . . the longer the maturity, the greater the amount of return. Uh . . . it isn't that way anymore.

K: Hmm.

A: In fact . . . uh . . . it used to be that . . . uh . . . interest rates for thirty days or ninety days would be one figure; one hundred eighty days would be a little more than that –

K: Right.

A: -- for a year it would be more than that. Two years would be . . . it doesn't work that way --

K: Hmm.

A: -- because of the fluctuation in the interest market.

K: Hmm, I see.

A: The values change. Another interesting thing is that . . . uh . . . as far as long-term obligations are concerned . . . uh . . . well, not as much as treasury bills as with other things . . . but . . . uh . . . uh . . . if you're fixed in to a long-term obligation – a bond or a tax freeze or whatever it is . . . uh . . . your return is . . . is guaranteed, but the . . . the value isn't necessarily guaranteed. Let's say you buy . . . uh . . . a tax-free bond, a municipal bond. Once again let's say two hundred thousand dollars. And let's say they're paying eight percent. Uh . . . uh . . . let's say the interest rate goes up, and instead of interest being eight percent, it's now twelve percent. Uh . . . the interest rate goes up, but . . . uh . . . if you have a treasury bond or a municipal bond that you bought . . . uh . . . to pay eight percent and the current market is now twelve percent –

K: That's all you get?

A: Well, no, you get . . . you get . . . you get only the eight percent, but you could go out with that amount of money and buy something which would pay . . . which would pay twelve percent; so, therefore, the value that you put into the eight-percent bond goes down.

K: Mm.

A: So if you invested a hundred thousand dollars, it could be that the bond may be worth . . .uh . . . eighty thousand or eighty-five thousand.

K: M-hmm.

A: Long-term. That's why, when we go into these things, we buy short-term obligations.

K: M-hmm.

A: Now . . . uh . . . uh . . . going back to . . . uh . . . to the thirties, a lot of people with great amounts of money were investing in municipal bonds. And in the thirties, the municipal bonds were paying two and a half percent, three percent, four percent –

K: Hmm.

A: – four and a half percent. So then people who . . . in fact, I have a client who inherited about six million dollars of bonds from her father that were purchased in the thirties, and these bonds were paying two and a half to three percent or whatnot. Uh . . . the six million dollars were sold for two and a half million dollars because you could go out with the same amount of money and buy something which is going to pay you eight or nine or ten percent while these bonds are only paying two and a half percent or whatever the number was.

K: M-hmm. I see.

A: So it's . . . uh . . . uh . . . it's something that you have to watch and you have to be careful about.

K: M-hmm. Do I have a . . . I have an RA . . . an R . . . what do you call it?

A: An IRA, yes.

K: I have one of those. Now, that's different than . . . is that . . . that's a pension, too, right?

A: It's a form of a pension account, yes.

K: The Joe Coyote would have one . . . a pension . . .

A: Joe Coyote would have a regular pension plan. The Joe Coyote pension plan would be . . . uh . . . the same kind of a pension plan as . . . uh . . . General Motors might have, or IBM might have. It's just that the scale would be a little smaller.

K: Yeah. Now I have pension plans with unions, too, right?

A: Well, the union pension plans are usually based upon employers' contributions.

K: M-hmm. Because every . . . I always get these statements back –

A: At the end of every year you get a statement summary showing . . . uh . . . uh . . . the amounts of money that are being contributed to your benefit during the year --

K: Right.

A: -- and then the total figure showing what it had been at the beginning of the year and what it is at the end of the year.

K: So that just adds up –

A: That adds up as . . . well, yes. Okay, some other questions?

K: Um . . . not . . . not at the moment, no.

A: Now . . . uh . . . uh . . . I think we should do something about these cash accounts --

K: Yeah.

A: -- as soon as possible.

K: Yeah, I do, too.

A: Uh . . .

K: What are the . . . what all the . . . I mean I know there must be vast differences in investments. What . . . what have you got? Basically, you've got bills . . . treasury bills --

A: Well --

K: -- bonds . . . stocks and bonds . . .

A: Well, there's different kinds of investments. There are . . . uh . . . there are common stocks, which are called equities. Uh . . . uh . . . there are bonds, which are called fixed obligations. Uh . . . if you have a company . . . let's say . . . uh . . . let's say General Motors . . . and . . . uh . . . you buy bonds of General Motors . . . uh . . . bonds of fixed maturity obligations with fixed rates of interest. So if you buy one hundred thousand dollars of General Motors' bonds, at the end of a period of time, the bond is going to mature at one hundred thousand dollars and it's going to pay a fixed rate of interest. Uh . . .

K: It doesn't go up; it doesn't go down?

A: A bond doesn't.

K: Okay.

A: A common stock is an equity.

K: M-hmm.

A: An equity is a . . . uh . . . well, a bond is a loan. You lend money to a company. A stock is an equity, which is an investment in the company. And as the company becomes more valuable, your equity goes up. If the company becomes less valuable, your equity goes down.

K: M-hmm. So you've got that. You've got . . . what other kinds?

A: Well, we have mixed investment programs. I mean we have . . . uh . . . we have clients with . . . uh . . . some with very vast amounts of . . . of assets and . . . uh . . . what we do is we establish an investment program and . . . uh . . . we diversify the investment. Uh . . . uh . . . let's say someone has . . . uh . . . uh . . . a million dollars to invest and of the million dollars you would set up a reserve at . . . uh . . . uh . . . you might want one hundred thousand dollars in cash; you might want . . . uh . . . two hundred fifty thousand dollars in . . . uh . . . in fixed income bonds . . . uh . . . or treasury bills, and you might want a couple hundred thousand dollars in equities, in common stocks. Once again, depending upon the time and depending upon the situation. Uh . . . the value of equities over the years has . . . uh . . .uh . . . has gone up, but these are sort of tricky times now.

K: Yeah, yeah.

A: With the recession talk and . . .uh . . . uh . . .

K: You have no . . . no . . . there's no kind of insurance in . . . in stocks?

A: Well, there's . . . there's insurance . . . well, I mean, we've read about the . . . uh . . . uh . . . the problems with . . . uh . . . the savings banks or any banks and the insurance up to one hundred thousand dollars. Uh . . . if you invest in common stocks, and you buy a thousand shares of . . . uh . . . of General Motors . . . uh . . . ordinarily when you invest through a reputable brokerage company, there's insurance for the thousand shares; that your thousand shares will always be worth whatever the market is. But there is no insurance if the market is going to . . . if you buy them at a hundred dollars a share, there's no insurance against the stock going down to . . . to fifty dollars a share.

K: Yeah. Right. Makes sense.

A: Okay? It can go up and it can go down and . . . uh . . . uh . . .

K: I guess I – so most people, like, keep, like . . . uh . . . a chunk of money that they use to . . . to live on sort of? Like, would I keep . . .

A: Well, what we do is we budget people. We determine what your living requirements are and . . . uh . . . uh . . . we see what . . . uh . . . what your income is like, and then we allocate . . . uh . . . portions of your income in order to meet your. . . your living requirements. We allocate portions of your interest to take care of the payment of your taxes; there'll be portions for future investments. Uh . . . uh . . . there'll be portions for . . . for trusts or for family help or whatever other commitments that you have.

K: M-hmm.

A: And, ideally, what we try to do is . . . uh . . . uh . . . provide sufficient assets so that . . . uh . . . uh . . . ten years or twenty years or thirty years from now . . . uh . . . you can have property and income that you don't have to worry about.

K: M-hmm.

A: If you continue to work, that's fine, but if there's some reason you can't work . . . if you're . . . if you're sick or if you don't want to . . . uh . . . we try to devise a procedure whereby you've accumulated enough assets that you're okay.

K: M-hmm.

(Telephone rings. Arthur answers. Yes? I'll have to get back. Hold calls, Barbara, please.*)*

A: Other specific questions?

K: I can't think of anything. Yet.

A: Okay.

K: Would . . . if I were to invest basically the amount of money I have, the simpler the investment, the better, right? I mean, pretty much you just, like, oversee whatever the interest was and . . . uh . . . would you make any determinations as far as . . . I mean you wouldn't have the . . . uh . . . the . . . uh . . . you wouldn't be able to determine to, like, say let's take twenty grand and put it in an oil . . . uh . . . oil site or something? I mean . . .

A: Would I make the decision to put twenty thousand of your money into an –

K: Yeah.

A: -- oil well without talking to you about it? No. No. No, everything would be strictly under consultation and . . . uh . . . what we would do is we wouldn't be just taking twenty thousand dollars. What we'd be doing is taking the entire investment picture. You've got three hundred and fifty thousand dollars and of the three hundred fifty thousand we'll do this and this and this or this and this and this.

K: Yeah.

A: And . . . uh . . . maybe one of the things might be a . . . uh . . . small speculation, which is . . . but there are different types of oil investments. There are exploratory wells and there are development wells.

K: M-hmm.

A: An exploratory well is one in which . . . uh . . . it's a . . . it's a complete crapshoot because . . . uh . . . an oil developer is developing a tract of land in which there has been no oil discovery. A development well would be a situation which . . . uh . . . someone has drilled the well over here and they found oil. That was an exploratory well. But then if you find oil here, you start drilling close to where the oil was found, and these would be development wells.

K: Mm.

A: And you have a better chance on a development well than on an exploratory well that you might start off with somewhere else.

K: Right.

A: And, of course, as far as the oil is concerned . . . uh . . . there are a lot of people out there that you wouldn't want to even . . . uh . . . want to talk to, but there are some people who are honest and reliable and have got a good record that you could . . . uh . . . uh. . . I'm not suggesting that you not invest in oil at this point.

K: No, I know. You read about so many, like, shifty . . .

A: Yeah, yeah. And . . . uh . . . even in oil there's a question of . . . uh . . . degrees of . . . uh . . . of sense . . . uh . . . degrees of safety as far as your investment is concerned.

K: M-hmm.

A: And . . . uh . . . uh . . . it depends upon your age, it depends upon your income, depends upon your objectives . . . what you're looking to do. Depends upon your family . . . uh . . . what . . . uh . . . whether people depend upon you or not or what your requirements are. Are you going to be single? Are you going to get married? Are you going to have a family? With life insurance? And . . . uh . . . and everything else.

K: Mm. Right now, I'm pretty free I think.

A: Yeah, well . . . what is your date of birth?

K: Uh . . . January 13th, 1960. Thirty.

A: Yeah. Nice age. It's funny about ages and . . . and birthdays. I'm sixty-two, and . . . uh . . . the thirtieth birthday was one that . . . that struck me. I . . . uh . . . twenty-one didn't mean anything. Twenty-five didn't mean anything. But when I . . . I got to be thirty . . . I had a girlfriend at the time, and I was miserable. I said my God, I'm thirty; I'm old. And she laughed and we went out. We had a good time on my birthday, and then we sort of forgot about it. When I got to be forty, forty didn't mean anything. Thirty was the one that –

K: Yeah.

A: -- that . . . that bothered me.

K: Yeah, it sort of . . . sort of got me, too, a little bit.

A: Yeah. Fifty didn't bother me. Sixty I began to think a little bit. It didn't bother me, but, uh . . . uh . . . certainly not as much as . . . uh . . . the thirtieth birthday.

K: Yeah, yeah, it's a big one.

A: In addition to . . . uh . . . stocks and bonds and oil wells . . . uh . . . what we do is . . . uh . . . uh . . . we have groups of clients who invest in real estate. We haven't done much in real estate in the last couple of years, unfortunately, because real estate investments have been not as disastrous. But what we might do is . . . uh . . . uh . . . get together twenty clients who would each put up . . . uh . . . twenty thousand dollars, and then we'd have a sum of four hundred thousand dollars. And with the sum of four hundred thousand dollars, you could buy a piece of property that might be worth two million dollars. And you can get a mortgage on it for a million six hundred thousand. And if the . . . if the property . . . uh . . . goes from two million to three million, there's a million dollars of profit that can be spread among just the people who invested the four hundred thousand dollars. So there can be great leverage.

K: So, like, that would be a piece of land for development?

A: Well, either a piece of land for development . . . we would be more interested in . . . in developing a piece of land . . . buy a piece of land that we're going to develop.

K: M-hmm.

A: Apartment houses or . . . uh . . . office buildings or . . . uh . . . shopping centers or . . .

K: M-hmm.

A: So we've done a couple of those over the years that have . . . that have worked out nicely. Now much of the real estate . . . uh . . . many of the real estate deals have been tax shelter situations in which . . . uh . . . uh . . . they were more speculative. But once again . . . uh . . . in real estate . . . uh . . . it's over here and it's over there. There are good real estate investments, and there are real estate investments that aren't so good, and you have to look at them carefully, and you have to understand them, and see what the investment is and determine whether it . . . it makes sense.

K: What are some of the factors that . . . that make a real estate investment good? If it's . . . as far as . . . location and . . .

A: Well, the location of the property is important. One thing that we've always . . . we've always wanted to do . . . I don't want to invest in real estate . . . uh . . . in the State of Washington or Oregon. I want to invest in real estate that I can go and see, periodically. In other words, if it's in . . . uh . . . New York or New England or Pennsylvania, this . . . this makes sense. But . . . uh . . . if it's going to be thousands of miles away . . . uh . . . it might be right, but . . . uh . . . uh . . . it's not right enough for me 'cause I can't see it and I can't watch it. Because by seeing it, you get the feel of the property.

K: M-hmm.

A: Just by driving through an area, you can find out whether . . . uh . . . it's an area that's going up or an area that's going down.

K: M-hmm, yeah.

A: And the type of real estate would . . . uh . . . would depend upon . . . uh . . . classification, what you're looking for. Uh . . . land . . . investment in land, without the intention of developing it, becomes more speculative than . . . than buying a piece of land on which you expect to put up a building.

K: What does speculative mean? Just . . . uh . . .

A: Risky.

K: Risky.

A: Risk of gain or risk of loss.

K: Yeah. Unless you consider living there or something. You know, unless you're thinking of building a house on it or something.

A: Well . . . uh . . . this is . . . uh . . . this is something else. I'm talking about –

K: Yeah.

A: – the real estate group. And there were times that . . . uh . . . there were times when shopping centers were very good real estate investments. Uh . . . people would either buy land and develop a shopping center. A lot of people would buy an existing shopping center. And . . . uh . . . the purchase of a shopping center would depend upon who your tenants are. If you've got good major tenants that you can expect to stay there, it's a more stabile kind of investment and usually it costs you more. In other words, oftentimes you buy real estate in a multiple of earnings, and . . . uh . . . uh . . . a multiple of earnings from very secure long-term tenants would be higher than if the tenants are . . . are less secure.

K: Is that why malls tend to have all the same stores no matter where you go? Like in the Midwest, I mean –

A: Well, what they try to do is have an anchor store in the mall, and the anchor is usually some . . . uh . . . some large chain or . . . uh . . . a large store that you'd expect to be . . . that's important, also, because. . . uh . . . the anchor store determines the . . . uh . . . the value of the other tenants. In other words, if you've got . . . uh . . . uh . . . uh . . . half a mile of space . . . uh . . . uh . . . to rent and your anchor store is a quarter mile, then all of the other spaces alongside of it become more valuable as long as the anchor store is there.

K: M-hmm.

A: Without the anchor store . . . uh . . . people may never go into that particular mall or --

K: M-hmm.

A: -- shopping center.

K: I want to go over this. Some of the terms I didn't understand.

A: Would you like a soda?

K Sure. When you say like . . . what do you mean by client's activities? Do you mean . . . does that mean . . . uh . . . uh . . . all sort of endeavors whether it's like –

A: Do you drink diet soda or regular soda?

K: Uh . . . just water would be fine or orange juice.

A: Orange juice?

K: Yeah.

A: Caroline?

K: Thank you. I mentioned client's activities. You mean, like, uh . . . underline . . .

A: Well, activity . . . everything. Your financial life . . . uh . . . your career, your income, your expenses.

K: M-hmm. Oh, right.

A: Your family and . . .uh . . . just everything relating to . . . uh . . . activity. In other words, activity would be whatever the . . . whatever client is doing.

K: Whatever I'm doing, yeah. What is profit sharing?

A: Well, profit sharing is sharing profits . . . let me see the context of the . . .

K: Down here.

A: Oh. Uh . . . uh . . . a profit share is a particular type of pay . . .

(Recording is silent for 10 seconds)

A: And . . . uh . . . the corporate . . . the corporate resolution . . . I guess you signed the corporate resolution when you were here . . . uh . . . authorizes the officers who can act on the corporation's account. Uh . . . on an individual account there's a more specific power of attorney whereby . . . uh . . . uh . . . that is the real power of attorney because it designates someone to act as power of attorney for the individual, once again, in connection with their business activities.

K: M-hmm. Can I get, like, a copy of that just so I –

A: Sure.

K: You know, not right now. Whenever. Just so I know what it is.

A: All right. Okay.

K: So I can read it over and know what I – sometimes you sign things and you don't even know what you signed.

A: Okay, sure.

K: I don't know what you guys have figured out, but from what I've observed, my nut for the year usually is around fifty, sixty thousand dollars.

A: Well, we haven't figured it all out yet because we're . . . we're still looking for some information. Uh . . . I think Richard spoke to you about . . . uh . . . uh . . . uh . . .

K: Some checks.

A: -- explanations of checks, and . . . uh . . . uh . . . that we have to put together a whole year's operation as far as 1990 is concerned.

K: A couple of . . . it's hard to remember exactly what I . . . what I do is I put my receipts in a monthly . . . sort of a --

A: Did you bring your receipts with you today?

K: No.

A: No.

K: And then at the end of the year if I have a check that looks funny or I can't remember what it was, I usually have a receipt or a bill to back it up so I know what it is.

A: Well, what we do is we . . . uh . . .uh . . . keep everything in a ledger on a monthly basis. And . . . uh . . . uh . . . the ledger accounts for all your transactions, all your deposits, all your disbursements and . . . uh . . . uh . . . they end up being in a . . . uh . . .

(*Arthur gets on the telephone*. Uh . . . uh . . . Nicky? Do you want to ask Richard to come in, please? Is Richard there?)

K: So I would . . . I would basically have an account . . . my own personal account that I do my daily life out of . . . like, at Citibank, let's say.

A: Well, what we would do is we would have the corporate account . . . we would vary the corporate account, as we discussed, based upon . . . uh . . . uh . . . uh . . . the best way to handle it. As far as your . . . you would have an individual account. Uh . . . income would flow into your individual account from the corporate account.

K: So you'd pay me on, like, a weekly or –

A: Well, we would set up a weekly budget. (*To someone else*: Why don't you bring in a sample general ledger showing a year's transactions for one of the clients?)

K: So you guys would send, like, a . . . it would be like a paycheck. All year I'd get a certain . . . that I could pretty much live off of.

A: That's right. We'd set up a budget and . . . uh . . . your number one account would be a . . . uh . . . a regular account. Uh . . . in addition to your number one account, we'd have a money market account in which we'd keep all excess monies. And then there would be a number two account, and we would decide that . . . uh . . . in an individual account what we do . . . at the end of the year we would have a . . . a breakdown of all the expenses by . . . well, in addition to the monthly figures, there would be . . . uh . . . accounting, automobile expenses. There would be a breakdown of all the checks that went towards automobile expenses with the name of the payee, the check number, the amounts, auto rentals, books, camera expenses . . .

K: So this is something you have so if you get audited, you just . . .

A: That's right. That's right. Dues, conferences and meetings, country clubs. And everything is . . . uh . . . office supplies and expenses. Right to the year, the specific date, the amount. Each one is backed up by a check. Periodicals –

K: M-hmm.

A: -- telephone . . . each one during the year . . . theatre tickets. And you would have . . . this would be maintained for you in addition to . . . uh . . .

R: How did you do yesterday on your audition?

K: Hmm?

R: You said you went to an audition yesterday.

K: I did? No, I had a meeting.

R: Oh.

K: It wasn't . . . uh . . . an audition.

A: In other words, each month you'd get a statement like this, which is a summary of all the accounts. This man has two accounts. This would be the balance at the beginning of the month, the deposits, the disbursements, and the balance at the end of the month. And attached to the statement would be a summary, which would show . . . these are the individual deposits during the month. In other words, the amount of three sixty-two sixteen, which is . . . went into that account, and there's eleven thousand two fifty which is . . . went into that account.

K: M-hmm.

A: And then --

K: Those are deposits?

A: The deposits, yes.

K: Is that from interest or something or --

A: Well, income . . . interest . . . whatever it happens to be. This man is a writer so it's principally writing income. Then on disbursements from this account . . . the disbursements are fifteen four twenty-eight thirty-two.

K: Yeah.

A: These are the totals . . . fifteen four twenty-eight thirty-two.

K: Disbursement is, like –

A: The check.

K -- payment of bills?

A: The check, yeah.

K: Okay.

A: And . . . uh . . . this account . . . the disbursements are twelve o-eighty-six twenty-eight. Now, on this particular account, the . . . uh, . . . the number one account is the one that we maintain, and the number two account is the one that the client maintains.

K: I see. So you would maintain, like, the Joe Coyote . . .

A: Well . . . uh . . . Joe Coyote is the corporate account.

K: Oh, okay.

A: And in addition to the corporate account, there would be individual accounts.

K: Okay.

A: And . . . uh . . . uh . . . on this account . . . from the number one account, there are disbursements of fifteen four twenty-eight thirty-two. And just as an example, these are from our number one account disbursements. This is a thousand dollars that went to the number two account. We have three hundred – the regular transfer is three hundred a week, and it's only that because we pay most of the bills, and then there are additional items depending upon specific requirements . . . an extra thousand there, there's an extra thousand there. And these all went into the client's account. And you would get a statement like this every month. Okay? Uh . . . we put numbers together. As I . . . as I said, the . . . uh . . . uh . . . the numbers are not complete because we haven't analyzed your transactions completely, but --

K: M-hmm.

A: -- uh . . . uh . . . as far as business expenses, we have expenses of fifty-four thousand two hundred eighty-two dollars with accounting expenses . . .

A: Oh, these are from last year.

R: Yeah.

A: And these are projections for this year.

R: And the ones with the zero are the ones that we need to go over in more detail.

K: M-hmm.

R: You know –

K: Find out what they are?

A: Yeah.

R: What they are or how you pay them.

A: We have household and personal expenses. There are medical expenses, charities . . .

K: So you take my nut, as far as what I spend a year . . .

A: Well, what we would do --

K: And then you --

A: -- would be --

K: -- would project --

A: -- would be . . . we would budget you . . . first of all, we would look to see what your living requirements are and then . . . uh . . . we would see how we're going to satisfy . . . how we're going to take care of those living requirements and then, beyond that, we would . . . uh . . . try to make your money grow.

K: M-hmm.

A: We have a tax projection . . . uh . . . which is just a tentative 1990 projection. Uh . . . we're projecting net income of four hundred and sixty-two thousand dollars acting income. That's after deduction of expenses. And then business expenses and deductions for taxes paid and whatnot. So at this point we're projecting a tax . . . federal tax liability of one hundred and fifteen thousand dollars, and you've already paid in ninety-nine thousand, so we're estimating a tax due of fifteen thousand dollars. And, of course, this is from records as we have them, which aren't complete and, of course we would . . . uh . . . do this from complete records when we have them.

K: M-hmm. So what . . . what do you think I should put my money in? I mean, what type of –

A: Well . . . uh . . .

K: Specifically, what do you --

A: As of the moment, you have to do it in stages and . . . uh . . .

K: Yeah.

A: And I wouldn't want to make any major commitments until we really have more of a handle on it.

K: Mm.

A: But what we should do right away . . . uh . . . is get this money out of Citibank. In other words, keep your Citibank balance like ninety, ninety-five thousand dollars, and everything additionally should come out of there and either go into another bank or . . . or go into treasury bills.

K: M-hmm.

A: I would think probably . . . uh . . . uh . . . well, I think we should open another account at Chase downstairs or Bank of New York or wherever you have a preference; and, also, put . . . uh . . . like about a hundred thousand dollars into treasury bills from your individual accounts. And then from Joe Coyote, we're going to have to disburse monies before the end of the year in the form of additional compensation to you in order to get to that zero taxable income, and . . . uh . . . when we've done that, then there'll be more monies to consider doing other things with.

K: M-hmm.

A: But I would certainly – and I don't know, as far as . . . uh . . . are you happy where you're living? In other words, you're not looking to . . . to buy an apartment or anything or --

K: Not really. Maybe a house somewhere along the line.

A: Yeah.

K: But not soon.

A: Maybe a house in the country or something?

K: Yeah.

A: Yeah. Well, we would . . . uh . . . at this point, I would like your monies to be liquid and safe. And . . . uh . . . I'd like to know what your income is going to be like next year to find out whether . . . uh . . . uh . . . you want to provide for some of next year out of this cash or whether we want to . . . uh . . . uh . . . you don't have a deal for anything else, yet, have you?

K: M-mm.

A: No.

K: Not yet.

A: See, it all . . . it all . . . it all comes together. You can't just say what're you going to do? What you do is a . . . is a part of the whole.

K: Yeah. Yeah. Um . . . so . . . so what do we do? I mean, do you need to . . . do I need to do anything?

A: Well, if you want us to take over these things, we can . . . uh . . . we can fill out some forms and we can . . . uh . . . uh . . . uh . . . certainly take care of the . . . uh . . . the banking transactions.

K: M-hmm.

A: And . . . uh . . . get this taken care of, and then just go forward from there, and we'll set up a procedure whereby . . . uh . . . uh . . . we'll adopt a number one account and a number two account. We'll . . . we'll set up a budget. We'll make weekly transfers. And we'll just keep track of everything on a . . . on a monthly basis.

K: Now what's the difference between a one account and a two account again?

A: The number one account is the one in . . . well, these are individual accounts.

K: M-hmm.

A: The number one account is the account through which your income flows and from which is paid . . . uh . . . your expenses other than the things that you're going to pay yourself. In other words, as we looked at on that other statement, we paid . . . uh . . . the rent and the electricity and the telephone and travel expenses and et cetera, et cetera, et cetera. Uh . . . uh . . . the . . . the . . . we would want, as much as possible, to flow through the number one account. And the number two account would be principally a cash account or an account that you would use if you had to pay for something right away.

K: Hmm. Like going to eat dinner or something like that?

A: Well . . . uh . . . you have your charge accounts, don't you?

K: Yeah.

A: You should use your charge accounts, but . . . uh . . . sometimes you go someplace where they won't accept a charge account and you have to pay cash or . . . or you need cash just . . . just for your pocket money for . . . uh . . . uh . . . for haircuts . . . uh . . . for taxis, for newspapers or whatever . . . whatever it is.

R: Gas for the motorcycle.

A: Gas for the motorcycle. But you would try to charge that as well.

K: See, I like to . . . one of the things is . . . the only thing is I like to pay my own bills 'cause I like to know . . .

A: Well, you would get the statement every month which would . . . which would show you exactly what's . . . what's been disbursed . . . what the amounts are. I mean . . . uh . . . I don't like to . . . uh . . . to say that we want to control these things, but we find that the best service we can perform is for us to be on top of things on a daily basis.

R: Now your rent you paid in four payments, right? It looks like there's only four checks for the rent so far this year. So what did you do when you were out of . . . out of the area? How did you pay the bill? With the money markets and all?

A: For your apartment rent.

K: How did I pay it?

R: Yes.

K: I just wrote them a check.

A: But you didn't do it every month, though? You just accumulated it.

K: Oh, no, no, no. I pay them every five months.

A: Yeah.

K: They wanted the checks in two payments.

A: Is that five months in advance or five months in arrears?

K: Five months in advance I think it was.

A: In other words, on January1st, you paid them from January 'til May?

K: Yeah. Only this year was hung over.

A: Well, whatever . . . whatever it is, yeah.

K: I pay five months at a time and then . . . this year they wanted it in two different check forms.

A: Do you have a lease?

K No.

A: Never had a lease there?

K: M-mm.

A: How long have you been living there?

K: About three and a half years.

A: And how many tenants are there in the building?

K: Hmm . . . quite a few. I mean they just have a couple lofts there, and they just sublet one of them to me. They don't own all of them, so I think it's, like, a co-op.

A: Oh, you rent from someone who doesn't own the building? You rent from someone who just . . . is yours a loft?

K: Yeah.

A: So you just rent the loft that someone else owns --

K: Yeah.

A: -- and you pay them rent?

K: Yeah. And they use it as a sub-let or . . .

A: Yeah. Are you interested in staying there a long period of time?

K: Not a long period, but . . .

A: Would you want to be protected by having a written lease?

K: I don't really think it's . . . we've talked about . . .uh . . . you know, they talk about the possibly at some point selling it, you know, but we have a good relationship, and I've told them that there might be a time when --

A: You might want to buy it?

K: -- I might want to buy it or I might just want to move out, you know, at the end of a five-month period.

A: Yes.

K: We kind of keep in touch and just let each other know what's going on.

A: Yeah.

K: Whether I'm thinking of moving or --

A: Yes.

K: -- if they're thinking they're going to sell the place, or whatever.

A: And when you're out of town . . . your telephone bill and whatnot . . . you just accumulate it or . . .

K: I just have my mail sent to me and then I just pay it.

A: Yes.

K: But, you see, I like doing that because it gives me a sense of --

(*Telephone rings*) A: Yes?

R: How much you have or how much is going out.

A: Hold the call. I'll get back to them. Take a message.

R: How much you have and how much is going out.

K There's just something about writing checks kind of makes me feel –

A: Well, you'll write the checks . . .

K: -- in control of my life.

A: You'll write the checks on your number two account.

K: M-hmm.

A: And . . . uh . . . you could . . . you could just try it. I think if you try it, you'll probably . . . you'll probably be very comfortable, and you will feel as though it's under your control. In other words . . . now, the bills will continue to go to you, and before the bills are paid, you'll just okay the payment.

K: M-hmm. So, like, everything gets sent here . . . like, all bills, all --

A: Well, ultimately. I mean . . . now a telephone bill we'd send here directly and we would pay the telephone bill directly from the bill, and then what we would do, since you haven't seen the bill, we would send you a copy of it so you can . . . you can look at it. Uh . . . other bills . . .

whatever . . . whatever they are . . . uh . . . if they're regular things that don't have to be okayed by you, the bills would just . . . would just come here and they would be paid automatically.

K: Now . . . so I would pay, like, five percent of my salary?

A: The fee. The fee would be five percent of your earnings, yes.

K: Does that include interest . . . interest on investments?

A: No. Five percent of gross professional income.

K: Which is my salary for, like, a movie or something?

A: Yes, yes.

K: So if I only made . . . what if I had a bad year?

A: Well, the next year would be a good one.

K: So if I only . . . like, say, I did a year of theatre or something and only made, like, fifty grand or something --

A: Well . . .

K: -- I would pay you five percent of that?

A: You'd owe us five percent of that.

K: If I made a million the next year, I'd --

A: It would be five per --

K: -- pay you five percent?

A: Yeh -

K: Either way it's five percent.

A: Yes.

K Sounds pretty good 'cause it's, like, I pay 'round five just for accounting anyway, so it seems like a pretty --

A: Well, it would --

K: -- reasonable --

A: -- it would cover your tax returns, certainly.

K: Yeah.

A: Okay?

K: So you're suggesting we do this and then . . . and then you take care of things and we gradually just sort of --

A: I think . . . I think . . .

K: -- work out what we're going to do.

A: I think it's a good idea. I think it's something that will make sense. I think you'll be . . . you'll be pleased, and I think . . . uh . . . you'll be relieved of some responsibilities and . . . uh . . . uh . . . you'll still know everything that's going on, and, uh . . .

K: Yeah. It's a big deal for me 'cause I've tried to . . . over the years . . . tried to avoid . . . I think part of my success as an actor is I've kept . . . I pretty much know what I'm doing even though it may appear that I don't know what I'm doing, but –

A: I think you know what you're doing.

K: -- I try to avoid . . . I've tried to avoid the machinery, the . . . uh . . . machinations of . . . uh . . . stardom . . . you know, whatever that is.

A: Yes.

K: I see a lot of actors that I know . . . or a lot of actors I've observed that accumulate so much baggage . . . so many people do . . . have various responsibilities for them that they kind of lose touch with themselves?

A: Yes.

K: And I've been trying to avoid that so that's why I've always --

A: Well, you won't . . . you won't lose touch. And as far as, uh . . . uh . . . well . . .

K: That's why I've always been a bit wary about it 'cause it seems like --

A: Yes.

K: -- I always want to have control of what happens to me.

A: Well, I mean, when you talk about power of attorneys or bank resolutions . . . uh . . . you own all the shares of the corporation so (*snaps fingers*) you can change it like that.

K: M-hmm.

A: A power of attorney is revocable at will so you can just (*snaps fingers)* . . . anytime you want to make a change, you can make a change.

K: M-hmm. Well, good.

A: So should we do something so we can get these monies moving?

K: Yeah.

A: Uh . . .

K: As far as, like . . . I think I've mentioned this before . . . like, investing in stocks or something, is it possible for you guys to, like, work through, like, someone I know or --

A: Oh, absolutely. Many of our clients have their own investment counselors. I mean, what we'll do is . . . uh . . . what we do is . . . uh . . . uh . . . work with an investment counselor and . . . uh . . . set up a program. Let's say we've allocated twenty-five thousand dollars to buy . . . to buy stocks. We would talk about . . . uh . . . uh . . . five thousand dollars in chemical industry, five thousand dollars in housing, five thousand dollars in automotive, and then we would work with your investment counselor. We would pick out the particular . . . particular stocks in the group.

K: M-hmm. And I'd always know ahead of time whatever suggestion you might think would be --

A: Oh, absolutely, absolutely. We wouldn't . . . we wouldn't invest anything without having discussed it with you.

K: Okay. Sounds good.

A: ((*Arthur gets on the telephone.* A: Vivian, can you bring in some bank resolutions, please? Uh, I want a . . . uh . . . a resolution for a new corporate account for Kevin Anderson's company, Joe Coyote, Inc., and I want a . . . uh . . . resolution for a new individual checking account along with a power of attorney form. (*Vivian: Okay.*) I guess we can use Chase and . . . uh . . . and Bank of New York. (*Vivian: All right.*) Okay?))

K: The main thing is I want to make sure I have, you know, just money that I can, like . . . available that I can just (*snaps fingers*) get right away, you know? In case I want to . . . I like to travel, you know, and sometimes I like to do things at the last minute.

A: Anything that we're going to do, until further notice, will be on a very liquid basis. It'll be available (*snaps fingers*) overnight.

K: Right.

A: And . . . uh . . . and anything that we do, we'll do in consultation with you as well. ((*Arthur confers with a female*: What do we have? We have . . . (*Female: (inaudible) . . . Bank of New York.*) This is for an individual account at Bank of New York, and this is for a new corporate account at . . . at Chase, and these are just duplicates, is that right? (*Female: No, this one is business and this one is personal, so which one --*) Well, we'd want a business account. Now these . . . well, this Bank of New York is the individual account. (*Female: This one is company; this is business.*) Well, that's the corporate account . . . the corporate resolution. Oh, this is Bank of New York, also. (*Female: Yes. This, this.*) Okay. Thank you.))

A: Do you have a preference between Bank of New York or Chase bank? They're both okay?

K: Chase, I guess.

A: Chase? Okay.

R: Likes C's.

K: I would still keep my own credit cards and stuff like that, right?

A: Yes, sure. In other words, what . . . what we'll do . . . uh . . . uh . . . and, once again, depending upon how quickly you want us to do it . . . uh . . .when we pay the first set of bills for a client, on the bills that we're going to continue to pay in the future, we send the check to . . . uh . . . uh . . . the credit card company . . . uh . . . and we say in the future please send all bills to Kevin Anderson in care of Arthur Greene at 101 Park, and then we can pay them directly. And then if there's, let's say, an American Express bill, what we would do is we would pay the American Express bill, but then we would send you a copy of the bill so you would see what all the charges are.

K: Oh, good, yeah.

A: Okay.

K: I wanted to make a . . . uh . . . a contribution to this theatre company I'm with?

A: Okay.

K: So, you said . . . I needed to know . . . uh . . . you need to have, like, a . . . an advanced thing to know whether I should donate it this year or –

R: Yeah, I can do that now. Um . . .

K: So, I just wanted to remind you of that.

R: Sure. How much are you planning on donating?

A: Can I have the corporate outfit for Joe Coyote Inc., please? Does Caroline have it? Do you have it right there?

K: I'm not sure. How much do you think would be . . . uh . . . I was thinking around, like, ten grand or something like that.

A: Which company is that?

K: The gift to the theatre . . . for that new theatre.

A: Which new theatre?

K: Steppenwolf.

A: Oh, in Chicago.

K: Yeah.

A: Well, that's . . . uh . . . that's very generous.

K: You think?

A: Yes.

K: You think it's too generous?

A; Well . . . uh . . . uh . . . do we have the corporate outfit with the seal?

K: I mean, the way they presented it to me was, you know . . . what they're looking . . . they still need to raise about . . . you know, the theatre is built; everything's . . . you know, the seats are in and everything, but they still need to raise about five hundred grand. And the ensemble members have put in . . . they're asking ensemble members to contribute whatever they can because it'll be a strong sort of symbol or reflection on getting more money in. You see what I'm saying?

A: Yeah.

K: So the way they presented it to me was, you know, I can . . . I can make the donation and pledge for them. You know . . . I can pledge fifteen . . .

A: Well, we can use the contribution deduction before December 31st this year. We can do that. As far as, uh . . .

K: They said I could raise it from other people, too. Like, if I pledged fifteen thousand, it wouldn't necessarily have to be my own money, you know?

A: Would it be helpful to you to find out what their contributions have been so far and who's contributed what?

K: Yeah, I mean, a friend of mine, Gary, said he pledged fifteen thousand, but that doesn't mean it's his own money. He knows a lot of producers and stuff that are willing to . . .

A: Well, Steppenwolf certainly has become very well respected in the theatre. A lot of good things are happening from there. But would you . . . I mean, it wouldn't be unusual for them to tell you what they've raised so far and who's contributed what, if that would be a guide for you to determine the amount.

K: Yeah. I have a good idea of what . . . like, John Malkovich, probably, I think is. . . he can afford to . . .

A: In other words, you're comfortable with . . . with ten thousand dollars?

K: Well, I wanted to talk to you about it . . . about what kind of a percentage do people usually donate to things like that?

A: Well, it depends. This is a unique kind of situation. I guess they have been very important as far as your career is concerned.

K: M-hmm.

A: And . . . uh . . . a ten-thousand-dollar contribution . . . uh . . . would be a very generous one. I . . . I . . . I . . . I don't imagine they have too many ten-thousand-dollar contributions.

K: Not in the ensemble members, no. Maybe about five or six of us could afford something like that. I figured --

A: This is from the heart . . . the real reason, and it's based upon your relationship with them.

K: Yeah. Well, I figured, like --

A: I mean your . . . your . . . your contribution will be discounted by like . . . uh . . . by forty percent, so if you're giving ten, you get a tax advantage of four, so it's costing you only six.

K: Hmm.

A: If you give them five, it's costing you only three.

K: I see. So you're saying there's no real advantage to donating more or less? In other words, it's, like . . .

A: Well . . . uh . . . there's a big advantage to Steppenwolf 'cause they want you to contribute as much as you can . . . as much as you would. Uh . . . for purposes of. . . uh . . . your tax –

(Recording abruptly ends)

Exhibit "C"

MPS email

Gmail

Kevin Anderson <joecoyoteinc@gmail.com>

Marks Paneth & Shron
1 message

Manisero, Thomas R. <Thomas.Manisero@wilsonelser.com> Fri, Jan 6, 2012 at 8:28 AM
To: joecoyoteinc@gmail.com
Cc: "Forslund, Alyssa" <AForslund@markspaneth.com>

Dear Mr. Anderson:

We are the attorneys for Marks, Paneth & Shron, LLP ("MP&S").

Your January 4, 2012 email to Anita Asmah of MP&S has been forwarded to us for reply. Indeed, it appears that you do not appreciate that MP&S is not obligated to continue providing professional services for or on your behalf, and that MP&S has determined, as you were previously advised, that it will not continue to provide professional services for or on your behalf effective December 31, 2011. A mutual agreement to this effect is not required. It is strictly and solely MP&S's determination.

We have reviewed other documentation and communications relating to your relationship with MP&S and the services that firm has provided to you in the past, and we fail to see any basis to support your suggestion that MP&S bears any liability to you. Of course, MP&S remains ready, willing and able to consider and discuss any information that you care to bring to our attention in that regard.

To be clear, MP&S has resigned as your accountants effective December 31, 2011. You will be well advised to engage new accountants. MP&S will work to finalize your 2009 and 2010 tax returns so long as they can be completed within the next 30 days, and will cooperate with the transition to new accountants in accordance with its professional obligation. MP&S also will provide the information you have requested for the period of time that MP&S were your accountants as soon as you provide us with an address to which such information should be sent. Information relating to the services Arthur Greene & Co. provided to you prior to 2009 must be obtained from Arthur Greene & Co.

Please direct any further communications regarding this matter to us, any please refrain from communicating directly with MP&S.

Very truly yours,

Thomas R. Manisero

Thomas R. Manisero
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP

3 Gannett Drive	150 East 42nd Street
White Plains, NY 10604-3407	New York, NY 10017-5639
914-872-7229 (Direct)	212-490-3000 (Main)
914-323-7000 (Main)	212-490-3038 (Fax)
914-323-7001 (Fax)	

thomas.manisero@wilsonelser.com

Exhibit "D"

Mr. Greene letter

Marks Paneth & Shron LLP
Certified Public Accountants & Consultants

Arthur B. Greene, CPA
Tel: (212) 503-6344
Fax: (212) 503-6345
agreene@markspaneth.com

May 17, 2012

Morgan Stanley Smith Barney
The Kaufman Katz Group
1801 North Military Trail
Boca Raton, FL 33431

RE: JOE COYOTE INC. DEFINED CONTRIBUTION PENSION PLAN
U/A/D 11/30/90 ARTHUR B. GREENE & KEVIN ANDERSON TRUSTEES
ACCOUNT NO. 817-26032-12 234

Dear Ms. Donlon:

Effective immediately, I resign as Trustee of the Joe Coyote Pension Plan. Please remove my name from any accounts associated with the above.

Thank you for your prompt attention to this matter.

Sincerely,

Arthur B. Greene
cc: Kevin Anderson

STATE OF NEW YORK, COUNTY OF NEW YORK ss:

On May 18, 2012, before me personally came ARTHUR B. GREENE to me known, and known to me to be the individual described in, and who executed the foregoing letter document, and duly acknowledged to me that he executed the same.

IVETA CANJURA
Notary Public, State of New York
No. 01CA6082346
Qualified in New York County
Commission Expires Oct. 21, 20 14

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1 From
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Company
Address c/o Marilyn Anderson
City Gurnee State IL ZIP 60031

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Company U.S. District Court- SDNY
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HOLD Saturday
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Use this line for the HOLD location address or for continuation of your shipping address.
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