

No.

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**In The  
Supreme Court of the United States**

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ROBYN ABRAHAM

*Petitioner,*

v.

ABBY LEIGH, AS EXECUTRIX OF MITCH LEIGH ESTATE, ET AL.

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI**

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March 27, 2026

## QUESTIONS PRESENTED

This Court long has recognized the strong First Amendment precedent of public access to judicial proceedings and records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). These precedents rest on the foundational principle that public access safeguards the fairness, legitimacy, and public trust in the judicial process. The questions presented are:

1. Whether the First Amendment, Article III and the Due Process Clause permit a federal court to *without judicial review or analyses*, strike, seal and delete thousands of pages of judicial materials submitted directly related to summary judgment, dispositive motions and without review, thereafter grant summary judgment to the non-sealed party on the grounds that ‘no genuine issue of material fact exists’.
2. Whether a federal appellate court, without review, may Affirm the Denial of motions to unseal judicial documents related to dispositive motions for summary judgment by characterizing judicial documents as “non-dispositive,” where the sealed judicial documents directly address disputed issues of material fact, financial issues, dispositive issues and the fairness of the adjudicative process.
3. Whether the First Amendment, Article III and the Due Process Clause permit a Bar Grievance Committee to without trial or administrative review, Disbar and/or Impose Sanctions Against an Attorney based upon the Bar Grievance Committee's Use of Offensive Collateral Estoppel of the District and Appellate Court Orders issued pursuant to a District Court’s striking, sealing and deletion of thousands of pages dispositive judicial materials submitted directly related to the district court’s summary judgment and dispositive motions and the federal appellate court’s affirmance of all district court orders, including the Appellate Court’s Denial of all Motions to Unseal the District Court’s sealing, striking and deletion of thousands of pages of dispositive judicial materials related to the federal motion for summary Judgment and dispositive motions?

## **Parties to the Proceeding**

**Petitioner Robyn Abraham is a private citizen.**

**Respondent Abby Leigh is a private citizen representing the Estate of Mitch Leigh and other entities.**

**No publicly held corporation owns 10% or more of any Corporate party.**

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## RELATED PROCEEDINGS

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*Leigh v. Darion* 1:16-cv-07896 (KPF)

*Petroleos de Venezuela S.A.<sup>2</sup> (PDVSA) v. MUFG Union Bank, N.A* 1:19-cv-10023

*Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 495 F. Supp. 3d 257 (S.D.N.Y. 2020)

### **United States Court of Appeals (2nd Cir.):**

*Abraham v Leigh* 2<sup>nd</sup> Circuit 20-3320

*Abraham v Leigh* 2<sup>nd</sup> Circuit 23-7779

*Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 106 F.4th 263 (2d Cir. 2024)

### **United States District Court for the Middle District of Florida (11<sup>th</sup> Cir.)**

*Dolin<sup>3</sup> v. FDLE Agent West, et al.* 97-757-Civ-Orl-B

### **Florida Supreme Court**

*Abraham<sup>4</sup> v. Monarch Care, et al.* SC2025-0761

### **Florida Fourth District Court of Appeals**

*Weiss<sup>5</sup> v. Abraham*, 4D2025-1962

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<sup>1</sup> On behalf of 100 year old reportedly legally incompetent Plaintiff Hellen Darion, the Florida founded Akerman Lobbyist Firm and NYSD Opposing Counsel Cozen O' Conner filed the above 2016 sham NYSD lawsuits (which resulted in no financial settlement and no attorney fees/costs) for the sole purpose of changing jurisdiction of Petitioner's pending British Schillings and Arnold and Porter filed \$250M breach of Petitioner's Exclusive Contract from London to the New York Southern District. The Akerman Firm which also represents Petitioner's multimillionaire ex-husband Dr. Philip Dolin filed these lawsuits AFTER receiving Petitioner's British Schillings' counsels registered receipt of British requisite 'meet and confer' proceedings of Petitioner's fully favorable case to be filed in London. On Dr. Dolin's behalf, the Akerman firm previously engineered the filing of several unrelated frivolous cases, filed false unrelated pleadings in the below NYSD case and reportedly filed several false (and Dismissed) Bar Complaints against Petitioner's flawless records. The Akerman Lobbyist Firm also facilitated the filing of repeated fraudulent foreclosure actions against the Palm Beach home which Petitioner purchased for her father Franklin Abraham. The FBI West Palm Beach Office reported that Dr. Dolin, his Akerman Lobbyist attorneys and his politically powerful Brooklyn family facilitated the filing of Three (3) back to back fraudulent foreclosure cases against Petitioner's Father Franklin Abraham while facilitating and synchronizing the filing of Three (3) simultaneous fraudulent eviction actions of fully paid rentals against Petitioner in California.

<sup>2</sup> On October 7, 2019, Non-Party Lobbyist Wiss Partners representing NYSD Opposing Counsel in the below cases and Venezuelan Dictator Maduro and his PDVSA multibillion dollar not yet filed cases met ex parte with the District Judge. Days later, following Wiss' ex parte discussions with the Court, PDVSA's cases were filed and assigned to the same Judge.

<sup>3</sup> USDOJ/EPSTEIN File reported Florida abduction, hospital reported sexual assault and law enforcement reported child sex trafficking of Petitioner's 3 year old Toddler by Petitioner's ex-husband Dr. Dolin and others at a Florida Club Med. This federal case memorializes the parallel 'Brooklyn Playbook' shredding of the Toddler's child sex abuse reports and the parallel shredding, destruction and sealing of evidence – following by the Taking of Petitioner's Violated Toddler, the Taking of Petitioner's executive home which Petitioner alone purchased and repeated sanction awards ordered by self-assigned Florida Probate Judge R. James Judge. The Amended Complaint filed by former New York Organized Crime Prosecutor Jeremiah McKenna often is referenced as "*The National Brooklyn Playbook*"

<sup>4</sup> Petitioner's Discretionary Florida Supreme Court Case against Florida court appointed Temporary Guardian Monarch Care et al, which following NYSD Opposing Counsel threatened Abduction of Plaintiff's Mother from Mother's Florida home, Monarch Care and others Deprived Petitioner's healthy Mother Joyce Olshen Abraham of necessary lifesaving medications. Monarch Care drugged Joyce Abraham, threatened and filed a DNR Motion against Petitioner's Mother on behalf of New York Opposing Counsel (NYSD17-05429), stole Mother's new BMW vehicle and stole \$1Million of Petitioner's and Mother's monies, gold, silver, jewelry, art, antiques, valuables and irreplaceable family heirlooms.

<sup>5</sup> Florida attorney Scott Weiss filed one of 21 other frivolous SLAPP lawsuits against Petitioner for facilitating Wiss Partners' and New York Opposing Counsel's (NYSD 17-05429) threatened Deprivation of Mother Joyce Abraham's necessary lifesaving medications and facilitating New York Opposing Counsels' DNR Order against Petitioner's Mother Joyce Abraham. Mr. Weiss is not Petitioner's attorney. Mr. Weiss represents NYSD 17-05429 Opposing Counsel and Court Appointed Temporary Guardian Monarch Care, for which Weiss facilitated the theft of Joyce Abraham's new BMW vehicle and theft of approximately \$1Million of Mother's and Petitioner's monies, gold, jewelry, silver and assets.

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ROBYN ABRAHAM, PETITIONER

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ABBY LEIGH, AS EXECUTOR OF MITCH LEIGH ESTATE, ET AL,  
RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Robyn Abraham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

**OPINIONS BELOW**

The May 27 2025 Opinion of the 2<sup>nd</sup> Circuit Court of Appeals is reported at unreported. (App.1A) The 2<sup>nd</sup> Circuit Denial of Petitioner's timely Petition for Rehearing En Banc on November 4, 2025 (App 8A) is reported at unreported. The July 15, 2021 Opinion of the 2<sup>nd</sup> Circuit of the Court of Appeals (App. 10A ) is reported at unreported. The February 18, 2021 Opinion of the 2<sup>nd</sup> Circuit of the Court of Appeals (App. 13 A) is reported at unreported. The July 8, 2020 District Court Order Granting Respondent's Motion for Summary Judgment is reported at 471 F. Supp. 3d 540 (N.Y.S.D. 2020) (App.18A ) . The District Court August 28, 2020 Order Denying Unsealing of Judicially Sealed Motions and Denying related Orders is reported at unreported. (App. 69A).

**JURISDICTION**

The judgment of the court of appeals was entered on May 27, 2025. A petition for rehearing was denied on November 4, 2025 (App., *infra*, 86a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## APPLICABLE CONSTITUTIONAL LAW

The First Amendment, Article III and the Due Process Clause long have provided strong First Amendment protections ensuring public access to judicial proceedings and records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). These US Supreme Court precedents rest on the foundational principle that public access safeguards fairness, legitimacy, and public trust in the judicial process. US Supreme Court precedent requires judicial transparency. Constitutional provisions US Constitution Art. III, the First Amendment and Amendment V are at issue.

This case presents important structural questions of national constitutional and adjudicative integrity: Whether a court may seal, delete and strike thousands of pages of Petitioner's court filed judicial documents, including depositions, declarations and affidavits related to summary judgment proceedings, defaults, sanctions and dispositive financial issues, and without addressing requisite constitutional mandates requiring review and analyses, whether adjudicative integrity permits courts to remove and strike thousands of pages of judicial documents from the record; and thereafter grant summary judgment, grant default and grant dispositive orders and conclude 'no genuine dispute of material fact exists'<sup>6</sup>

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<sup>6</sup> This case is one of *Twenty-Two (22) "National Brooklyn Playbook" similarly formatted retaliatory cases* filed against Petitioner and family since the EPSTEIN File reported 1993 Shands Hospital/University of Florida and Law Enforcement confirmed sexual assault of Petitioner's then 3-year-old and child sex trafficking by Petitioner's multimillionaire former Florida CPT physician ex-husband Dr. Philip Dolin and others at a Florida Club Med. "*The National Brooklyn Playbook*" is memorialized by the below steps memorialized in the Amended Complaint filed by retired New York Organized Crime Prosecutor Jerry McKenna in *Dolin v. FDLE Agent West*, 97-757-Civ-Orl-18B. The USDOJ/FBI reported repeated political interference by Dr. Dolin's powerful Brooklyn New York family and by Florida Child Protection Team officials who ordered the destruction of hospital child sexual abuse reports and bloody physical evidence on behalf of Dr. Dolin.

### "The National Brooklyn Playbook"

- 1) A Specific Case is Requested, Assigned, or Self-Assigned Against a specific Target.
- 2) The Target's favorable evidence, depositions, declarations, witnesses and documentation are Stricken, Sealed and/or Deleted Irregular court orders issued solely against the Target are Sealed and/or not Docketed.
- 3) The Target's family member/s, homes, assets and/or resources are threatened and/or taken, often without notice.
- 4) The Target is required to spend vast sums of money to attempt to protect their family, home and resources.
- 5) Opposing counsel file nationally synchronized weekly and often daily vexatious series of fabricated 'Tag Team' lawsuits intentionally timed and coordinated simultaneously in different states against The Target.
- 6) The Target is forced to defend daily and often hourly litigation attacks in several states, hearings and different courtrooms simultaneously. Opposing counsels' vexatious litigation intentionally deprives the Target of the ability to work and/or continue gainful employment;
- 7) Standard "National Brooklyn Playbook" hallmarks include but are not limited to fabricated evidence, false claims, false witnesses, illegal evidence, perjured testimony, false pleadings, Trojan Horse attorneys who file a Notice of Appearance on behalf of the Target and instead file pleadings Against the Target and on behalf of Opposing Counsel and which Trojan Horse attorneys intentionally Sabotage the Target's case;
- 8) Thousands of pages of the Target's fully favorable judicial documents and rebuttal evidence are sealed, deleted and stricken from the record without judicial review and analyses.
- 9) After sealing, deleting and eliminating all Target dispositive judicial documents absent analyses and/or legal justification, and often contrary to facts and law, the Court GRANTS All Opposing Counsel Motions and Claims.

Summary Judgment, Defaults and Default Judgments often are substitutes for trial.

The District Court, after excluding, sealing and deleting thousands of pages and volumes of Petitioner's Favorable Dispositive Judicial Documents and Petitioner's Favorable Evidence without review or analysis and without trial and unilaterally determining summary judgments, financial sanctions and other dispositive Orders in favor of Respondent and without Petitioner's Favorable Dispositive Judicial Documents; the materials remaining in connection with these arbitrary adjudications raise First Amendment, Due Process and Article III concerns.

This case presents important structural questions of national constitutional and adjudicative integrity: Whether a district court may seal, delete and strike thousands of pages of only one party's court filed judicial documents related to summary judgment proceedings, defaults, sanctions and dispositive financial issues, and without addressing requisite constitutional mandates requiring review and analyses of deleted and sealed documents, whether adjudicative integrity permits courts to remove and strike judicial documents from the record, grant summary judgment, default and dispositive orders and conclude 'no genuine dispute of material fact exists'<sup>7</sup>.

The court below issued dispositive adjudication on every key issue in sole favor of Respondent, after sealing, deleting and striking thousands of pages of Petitioner's fully favorable adjudicative record. The Court often struck, sealed and deleted the court record and issued sealed Orders on behalf of non-parties. By restructuring the parameters, the Court facilitated outcomes counter to First Amendment, Due Process and US Constitutional mandates.

## **STATEMENT**

This case presents questions of exceptional importance involving the First Amendment, Article III and the Due Process Clause. The questions presented implicate the structural integrity of federal adjudication and

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10) Per "*The National Brooklyn Playbook*" format, by deleting, sealing, and striking thousands of pages of judicial documents filed in relation to summary judgment and other dispositive issues absent constitutionally required judicial review and/or analyses, The Target's Case is fully reversed against The Target. Per "*The National Brooklyn Playbook*" format, absent requisite constitutional accountability, the Target's case and often The Target and The Target's family professionally, personally and financially are destroyed.

specifically concern the structural integrity of summary judgment adjudication and directly related series of sealed sanction orders resulting from the deletion, striking and sealing of volumes of dispositive judicial documents which are removed from public review resulting in the fact that the public's right of access to judicial records is precluded.

This Petition concerns the question of exceptional importance regarding the public's constitutional and common law right of access to judicial documents submitted related to summary judgment and dispositive proceedings. The case presents issues of exceptional importance regarding the applicability of the First Amendment, Article III and Due Process constitutional requirements to judicial proceedings and public trust.

Because Lower Courts Inconsistently Apply the Public Access Doctrine in the Summary Judgement Context resulting in Doctrinal Uncertainty, this Case is of National Importance. This case is an excellent vehicle to address the issues presented. The Court should grant review to resolve the inconsistency among the court of appeals and make clear that district courts need to adhere to constitutional standards prior to sealing, striking and deleting relevant judicial documents in dispositive proceedings, and particularly in summary judgment proceedings.

In this case, during federal district court proceedings, Petitioner's extensive relevant judicial materials were submitted prior to court orders of dispositive motions. More than One Third of Petitioner's District Court Fully Favorable Case including Thousands of Pages of Petitioner's Court Filed Dispositive Documents; the Court's Ex Parte Communications with Opposing Counsel and the Court's Ex Parte Communications with Non-Parties and Court Record Hearings promptly were Sealed, Struck and/or Deleted from the Record by the District Court absent constitutionally required judicial review or analyses and contrary to United States Supreme court precedent.

The District Court, After deleting, striking and sealing thousands of pages of Petitioner's fully favorable judicially relevant and dispositive documents, Granted Summary Judgment to Respondent and Granted Sanctions to Respondent Against Petitioner, contrary to Petitioner's fully favorable court filed documentation. The District Court, After Suspending Petitioner's PACER Filing Rights Without Cause or Court Order to preclude Petitioner from filing And Deleted, Struck and Sealed Thousands of Pages of Petitioner's Fully Favorable Evidence, issued Orders solely favorable to Respondent, that 'No Genuine Issue of Fact Exists'. The District Court also scheduled, conducted and sealed dispositive hearings on behalf of non-parties. On behalf of non-parties, the Court issued, sealed and did Not docket several dispositive Ex Parte Orders on behalf of non-parties.

## **As a Matter of Law, The Courts' Thousands of Pages of Selectively Sealed, Stricken, Deleted Judicial and Dispositive Documents and Ex Parte Communications Must be Unsealed**

Petitioner timely repeatedly moved to Unseal all judicial materials, invoking the strong presumption of public access to judicial documents, particularly those submitted in connection with summary judgment and dispositive Orders. The court also issued orders creating financial obligations to non-parties following sealing, deleting and striking of voluminous dispositive materials bearing on voluntariness and fairness of court issued ex parte sealed orders.

The Court of Appeals Twice Denied Unsealing on the merits absent requisite US Supreme Court mandated review.

The First Amendment provides "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In the American legal system, "fairness" is generally defined through Due Process, which ensures that the government follows established rules rather than acting arbitrarily. Due Process is divided into two primary categories: Procedural and Substantive Due Process.

Procedural Fairness focuses on the mechanics of the legal process to ensure everyone has a fair chance to defend their rights. Key elements include Notice, Right to be Heard, Evidence, Confrontation and Reasoned Decisions based exclusively on the evidence presented and provision of written findings of fact based upon all evidence presented.

Substantive Due Process concerns the fairness of the proceedings themselves and the outcomes they produce. Fundamental rights cannot be abridged without a compelling reason, regardless of the procedure used. Under the Equal Protection clause, similar cases must be treated similarly.

Petitioner Robyn Abraham (aka Robin Abraham) is an accomplished American Disney trained business executive (JD/MBA) who has a stellar record of successfully creating, structuring and closing multimillion dollar US and international media and entertainment business tractions<sup>8</sup>. As confirmed by thousands of pages

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<sup>8</sup> Petitioner is also a domestic violence survivor who, per the EPSTEIN files in which Petitioner's violent physician ex-husband Dr. Philip Dolin is named for child sex trafficking, per University of Florida Hospital Reports, Florida CPT physician Dr. Philip Dolin sexually assaulted Petitioner's then 3 year old at a Florida Club Med, 3 years after an

of Petitioner's District Court sealed, stricken and deleted New York Arnold and Porter and her elite British counsels' filed court record evidence, Petitioner successfully created, negotiated and closed Petitioner's Arnold and Porter filed \$250Million Exclusive Business Production Contract memorialized in the Complaint. As the result of the District Court's deletion, striking and sealing of thousands of pages of court record judicial documents, these key judicial documents have been removed.

The District Court record reflects that Two (2) of the Three (3) Serial Defendants Settled in Petitioner's Favor. Former Defendant Alan S. Honig provided a filed Declaration that Respondent Leigh Committed Fraud Against Petitioner in this case by assigning Petitioner's Exclusive Rights to a Third Party without notice.

US and international cases in which Respondent and former Defendants repeatedly have been named reflect many US and international cases in which Respondent and Defendants solicited and contracted professional services, received the benefits of these contracted services, systematically breached provider services' contracts without paying for services rendered and countersued service providers with sham claims. Petitioner's Arnold and Porter filed \$250M contract reflects Respondent's same hallmark pattern and practice.

The District Court, upon notice of the Partial Settlement by Two (2) of the Three (3) Defendants in favor of

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uncontested divorce in which Dr. Dolin did not seek custody and weaponized 'visitation' to repeatedly physically attack Petitioner and her Toddler. While Petitioner was working in New York as lead finance counsel, Dr. Dolin abducted the Toddler from Petitioner's home, drugged the Toddler and transported the Toddler to a Florida Club Med where Dr. Dolin and his friends sexually assaulted, photographed the naked Toddler and sex trafficked the Toddler.

Per the 1997 Florida Federal Court filed, *Dolin v FDLE Agent West* 97-757-Civ-Orl-18B, Dr. Dolin, Dr. Dolin's politically powerful Brooklyn family, his Akerman political attorneys – which political lobbyist counsel also appeared as NYSD counsel in the NYSD case and his Florida Child Protection Team colleagues facilitated and targeted several criminal schemes pursuant to which all evidence confirming Dr. Dolin's sexual assault evidence were shredded, deleted and destroyed, and Dr. Dolin's EPSTEIN file named accomplice Dr. Deborah Day ordered the shredding of the Toddler's sexual abuse report. Dr. Day replaced the Toddler's sexual abuse report with a newly fabricated false psychologist report claiming, 'No Evidence of Child Sexual Assault'. Together with court appointed unlicensed fraud psychologist Nancy Sutherlin (prosecuted by Florida AHCA for fraud and perjury) Dr. Day and Nancy Sutherin falsely labeled Petitioner with a non-existent mental disease for attempting to protect her sexually assaulted Toddler.

Per 1997 federal lawsuit and Florida court record, self-assigned Florida Circuit Judge R. James Stroker Granted Motions in Limine Deleting all Hospital Evidence of Child Sexual Abuse and Eliminating all confirming physical and psychological evidence of child sexual abuse. Judge Stroker then Ordered the Taking of Petitioner's Executive Home (Solely Purchased by Petitioner), Ordered Petitioner to Deliver all Petitioner Assets and pay Child Support to the Toddler's abuser Dr. Dolin, contrary to court record evidence. Per court record evidence, in addition to sexually assaulting the Toddler and child sex trafficking, Dr. Dolin committed aggravated batteries, aggravated assaults with motor vehicles, batteries requiring Petitioner's hospitalization and full right hip replacement. Dr. Dolin and his colleagues nationally stalked Petitioner while weaponizing the legal system and Bar Grievance Committees against Petitioner's flawless Bar records. The FBI advised that due to Dr. Dolin's politically powerful Brooklyn New York family and Dr. Dolin's Florida Child Protection Team privileges, Dr. Dolin could not be arrested for sexual assaults of the Toddler, child sex trafficking, death threats against Petitioner's family and Petitioner, nor Dr. Dolin's repeated documented physical attacks of Petitioner.

Petitioner, Ordered Petitioner's Partial Settlement Funds paid to Non-Party Lobbyist Wiss Partners as 'legal fees'. Petitioner immediately advised the Court that non-party lobbyist Wiss was not Petitioner's attorney, was not admitted to the case and was not admitted to the New York Southern District. Following court record notice, the Court Ordered Petitioner's NYSD partial settlement checks paid to non-party Washington DC Lobbyist. The Court Ordered Petitioner to continue paying DC Lobbyist Wiss's documented demands for unearned monies. The Court also Ordered Petitioner to Dismiss Her DC Bar Grievance Against DC Lobbyist Wiss re: the larceny by extortion of Petitioner's Partial Settlement Funds.

Similarly, after substantially financially benefiting from Petitioner's uncompensated exceptional London business work product which services Respondent Leigh exclusively contracted, implemented and enjoyed in London, Respondent Leigh similarly implemented Petitioner's exceptional work product in New York and reportedly is prospering from Petitioner's exclusively contracted stellar unpaid business work product and services in the US as well.

### **BACKGROUND AND FACTS**

In early January 2014, Broadway Tony Award winning musical "Man of La Mancha" ("MOLM") composer and majority rights holder Mitch Leigh solicited Petitioner Robyn Abraham, an American citizen and highly accomplished Disney trained business affairs executive (JD/MBA) with a flawless 20+ year history of successfully creating, structuring and closing multimillion dollar entertainment/media transactions to create, structure and close the 25<sup>th</sup> Anniversary Revival of "Man of La Mancha" first in London, and then when successful in London, and per industry standard, facilitate the Broadway transfer. Mr. Leigh, an accomplished businessman insisted on drafting his own Exclusive Production Agreement himself <sup>9</sup>.

On January 23, 2014 Broadway iconic musical "Man of La Mancha" ("MOLM") composer and majority rights holder Mitch Leigh faxed Mitch Leigh's corporate drafted and signed the *Exclusive* Man of La Mancha Production *Contract* from New York to Plaintiffs Beverly Hills office. Petitioner countersigned

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<sup>9</sup> Petitioner subsequently learned that due to Respondent's US and international vexatious litigation Respondent Leigh repeatedly had been unsuccessful in reviving the 1965 iconic musical. The Man of La Mancha rightsholders are so litigious that the Los Angeles Times referenced them as *"The Warring Men of La Mancha"*. Los Angeles Times December 8, 1991.

Leigh's Exclusive Contract in California and faxed and mailed Mr. Leigh's contract to him in New York.

Per the terms of Respondent Leigh's Exclusive Production Contract which Mr. Leigh himself drafted, Leigh contracted Petitioner to create, negotiate and close the 25<sup>th</sup> Revival Business Production of 'Man of La Mancha' Revival, first in London - and upon notice that award winning Sir Trevor Nunn's directed London production was successful, Respondent Leigh agreed to award the Broadway/US 'Man of La Mancha' stage and ancillary rights to Petitioner and transfer the successful production.

Mitch Leigh, an excellent businessman and MOLM majority rights holder who earned millions solely on his only musical, "Man of La Mancha" proposed, memorialized and contracted the win/win 'barter agreement', providing Petitioner the Exclusive Man of La Mancha London and Broadway stage and ancillary rights in exchange for Petitioner's expedited business performance of Mr. Leigh's Exclusive Production Contract. Respondent Leigh's Exclusive Production Contract only payment to Petitioner upon Petitioner's performance were the British and American Production Rights to "Man of La Mancha".

Mr. Leigh specifically requested Petitioner's Disney trained London professional entertainment business services. Mr. Leigh's Exclusive Business Contract specified that this was solely an exclusive business contract. This was not a contract for legal services. There was no contract for American legal services because this was a British stage production governed by British law. There was No American legal work. Because Petitioner is not authorized to practice law in Britain, Petitioner's British Schillings counsel facilitated necessary legal arrangements since Schillings is authorized to practice law in Britain.

Similarly, Mr. Leigh's Exclusive Contract was Not a Talent Agreement. Talent Agreements are governed by British and American Talent Unions including Actors' Equity. Petitioner's Exclusive Production Contract which Mitch Leigh himself personally drafted and faxed to Petitioner is a 'win/win' barter transaction. Per Respondent Leigh's terms, the Exclusive Contract provided Respondent and the "Man of La Mancha" rightsholders with millions of dollars in potential ticket sales, even before the shows were to be staged in Britain and the US.

Per Respondent Leigh's express request, British theatre director Sir Trevor Nunn, the world's leading musical theatre director who Directed and Helmed Several MultiBillion Dollar Productions Each of 'Cats', 'Les Miserables' and 'Starlight Express' and the iconic award-winning Old Vic agreed to be onside as director and co-producers respectively, subject to availability. Director Trevor Nunn and Respondent Leigh agreed that given Sir Trevor's internationally iconic status, Sir Trevor would facilitate cast selections.

Sadly, following Petitioner's Full performance of Petitioner's Exclusive 'Man of La Mancha' Contract', Mitch Leigh died on March 16, 2014. Approximately one month after Mr. Leigh's death, Petitioner's Schilling's managing law partner Rachel Atkins emailed, mailed and faxed Respondent's Counsel Cozen O'Conner confirming Petitioner's Full Contract Performance and requesting delivery of the Exclusively Contracted and Petitioner's Fully Performed Exclusive Business Contract Rights.

On July 11, 2014, in an email from Respondent's counsel Lester Lipschutz to Petitioner's British counsel Rachel Atkins, Respondent's counsel advised that Respondent and Defendants breached Petitioner's Exclusive Business Contract. Respondent's counsel requested 'a nonrefundable advance of \$50K' to continue discussions re: the same Exclusive Business Contract which Petitioner fully performed and closed by February 26 2014. Petitioner's London Schillings counsel promptly advised Respondent's Counsel that Schillings would be pursuing legal action re: Respondent's breach of Petitioner's Exclusive Business Production Contract in London. Per British legal requirements prior to filing suit in London, Petitioner's Schillings' counsel requested Respondent's Counsel to 'Meet and Confer'.

**Respondent's/ Defendants' Three (3) Synchronized "Red Herring" New York Lawsuits Filed To Change London Jurisdiction to the New York Southern District**

Rather than responding to Petitioner's Schillings' and British law required "Meet and Confer" notice, Respondent, having been advised by their counsel that they likely would lose Petitioner's pending British Motion for Summary Judgment, Respondent and Defendants devised a scheme to change the venue and

jurisdiction of this British matter from London to the New York Federal Southern District.<sup>10</sup>

NYSD Court record reflects that in 2016, 101 year old reportedly legally incompetent Defendant Hellen Darion who historically worked favorably with Respondent Leigh, this time – when represented by the same Akerman Lobbyist firm which represented Petitioner’s violent ex husband Dr. Philip Dolin in previously filing false cases against Petitioner and her family for more than 20 years, on Mrs. Darion’s behalf, the Akerman firm initiated Two New York Southern District Lawsuits, falsely alleging ‘creative differences’.<sup>11</sup> New York Southern District record reflects that the Akerman firm filed and dismissed *1:1:16-cv-08023 (CM) and proceeded with 1:16-cv-08026- KPF. Respondent Leigh filed Leigh v Darion 1:16-cv-07896 (KPF)*

Petitioner’s British counsel advised that Respondent/Defendants’ filed ‘creative difference’ cases appeared to be sham lawsuits designed solely to change jurisdiction from London to New York. Noting that this is a common US defense ploy, Schillings advised Plaintiff to engage New York counsel and file suit in New York because a British court likely would dismiss given Respondent’s newly filed New York lawsuits.

As Petitioners’ London Schillings counsel correctly surmised, just weeks after Arnold and Porter filed Petitioner’s \$250M lawsuit in NYSD, on 11/17/2017, Respondent and Defendants dismissed the New York ‘creative difference’ red herring Lawsuits without fees, costs and/or damages - and joined forces in a ‘Master Agreement’ to jointly attack Petitioner in the New York Southern District.

Pursuant to Defendants’ joinder, Respondent Leigh filed a frivolous Counterclaim against Petitioner alleging Petitioner breached her fiduciary duty as an attorney to Respondent by successfully closing the \$250M British Exclusive Business Contract solicited by Respondent Leigh and fully performed by Petitioner prior to Exclusive Contract deadline.

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<sup>10</sup> Petitioner’s Arnold and Porter counsel reported that New York Southern District Judge Failla requested assignment of the Three (3) Man of La Mancha cases.

<sup>11</sup> See *Darion v. Leigh Docket Sheet Case 1:1:16-cv-08023 (CM) and 1:16-cv-08026- KPF; Sham Red Herring NYSD Lawsuit #2* was filed by the Akerman Lobbyist Firm reportedly on behalf of then reportedly legally incompetent 101 year old Hellen Darion and others. These ‘creative difference’ suits were filed 10/10/2016 for the specific purpose of relocating jurisdiction of Appellant’s fully favorable case from London to NYSD. All 2016 MOLM ‘creative difference’ suits were dismissed on 11/17/2017 without damages, fees or costs, after causing Appellant to file in New York Southern District when the Two (2) sham Red Herring 2016 ‘Man of La Mancha’ cases ‘settled’.

The lower court record confirms the only Exclusive Contract between Respondent and Petitioner was an Exclusive Business Production contract. There was no evidence of any 'legal contract' between Respondent and Petitioner. There was no evidence that Petitioner ever acted as Respondent's nor Defendants' counsel.

The lower court record reflects that Not only was Petitioner never engaged as Respondent's nor Defendants' attorney, there was also No American legal work in this British business matter. The court record confirms that Petitioner's British legal counsel Schillings represented Petitioner in the UK.

### **TWO (2) OF THREE (3) SERIAL DEFENDANTS' PARTIAL SETTLEMENT IN FAVOR OF PETITIONER**

In 2016, Two (2) of the Three (3) Defendants settled in Petitioner's Favor. Former Defendant Alan S. Honig provided a Filed Declaration that Respondent Leigh committed Fraud against Petitioner because Respondent Leigh assigned Petitioner's Exclusive Production Contract Rights to a Third Party without Notice to Petitioner.

The NYSD transcript reflects that on October 7, 2019, Respondent's Washington DC lobbyist Marcia Wiss, without notice, physically ambushed Petitioner in open NYSD Court, committed perjury falsely claiming that Wiss Partners was Petitioner's counsel and Demanded Petitioner's Partial Settlement Funds Negotiated in this Arnold and Porter filed \$250Million case.

Court record confirms that in violation of New York statute 22NYCR 1215 1) DC Lobbyist Wiss Had No Retainer Agreement Signed by Petitioner; 2) That DC Lobbyist Was Not Admitted to the Case; 3) That DC Lobbyist Committed Fraud and Perjury Falsely Claiming to Be Petitioner's Counsel; 4) DC Lobbyist Produced No Work Product for Petitioner and 5) DC Lobbyist Represented Respondent and Defendants without Filing a Motion for Pro Hac Vice Admission to the Case.

**THE DISTRICT COURT ORDERED PETITIONER'S CASE SETTLEMENT MONIES PAID TO VENEZUELA DICTATOR MADURO'S DC LOBBYIST WISS PARTNERS AFTER RECEIPT OF OPEN COURT NOTICE AND DOCKETED LETTER MOTION THAT LOBBYIST WISS NEVER WAS PETITIONER'S ATTORNEY AND NOT ADMITTED TO THE CASE**

On October 7, 2019 non-party DC Lobbyist Marcia Wiss stated that Wiss came to New York Federal Court that day to discuss Wiss Partners' (undocketed and not federal court admitted) lobbying representation of Respondent and Defendants in Petitioner's NYSD case. Ms. Wiss stated that she also came to New York to discuss Wiss Partners representation of Venezuela Dictator Maduro and Maduro's PDVSA interests in the 'not yet filed' Venezuela PDVSA case with Judge Failla.<sup>12</sup> Marcia Wiss reported that Wiss Partners enjoyed a 'Special Relationship' with New York Southern District Judge Failla. Wiss Partners demonstrated this "Special Relationship" with series of Motions and Proposed Orders, many of which the Court Granted and Sealed.

*Petitioner repeatedly advised the Court that Neither Non-Party Wiss nor Non-Party Wiss Partners ever were engaged as Petitioner's attorney and possessed no New York statutorily mandated retainer agreement as required by 22 NYCRR § 1215 (1) (a). NYSD court record confirms that neither DC lobbyist Marcia Wiss nor Wiss Partners ever was engaged as Appellant's attorney<sup>13</sup>, produced no signed engagement Agreement by Appellant, never filed a Motion Pro Hae Vice to be admitted to the New York Federal Case and produced no work product. The NYSD 17-05429 docket and the Second Circuit Dockets reflects that there was and is no Wiss Partners named or listed on the NYSD nor 2<sup>nd</sup> Federal Circuit Dockets.*

After receiving open Court testimony and Petitioner's Docketed pleadings that Wiss Never was Petitioner's attorney and had no retainer agreement signed by Petitioner and required by New York Statute

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<sup>12</sup> Days after Wiss Partners met in chambers with Judge Failla on October 7, 2019 and Marcia Wiss discussed Wiss Partners representation of Venezuela Dictator Maduro and Wiss Client PDVSA, PDVSA filed *Petroleos de Venezuela S.A.<sup>12</sup> (PDVSA) v. MUFJ Union Bank, N.A* 1:19-cv-10023. On October 29, 2019. Judge Failla was assigned to the Venezuelan PDVSA cases

<sup>13</sup> Similarly, foreign national New York attorney Colleen Kerwick (aka Ni Chairmhaic) who admitted to Targeting Petitioner after vacationing internationally with Respondent's Counsel Cozen O'Connor filed a Notice of Appearance as sole practitioner purportedly as Petitioner's counsel (App 98A) but refused to provide Petitioner with a Retainer Agreement. As confirmed by Ms. NiChairmhaic's 2<sup>nd</sup> Circuit Motion to Dismiss Petitioner's Appeal (App. 100A ) Ms. NiChairmhaic represented Respondent and Defendants and filed pleadings AGAINST PETITIONER and on behalf of Respondent and Defendants/ Opposing counsel.

22 NYCRR § 1215 (1) (a), the District Court ordered that Petitioner Pay DC Lobbyist Wiss Partners Petitioner's Partial Settlement Funds Paid in her \$250Million Arnold and Porter case to Wiss Partners. partial settlement funds paid to non-party Intervenor Wiss Partners.

The District Court further authorized non-party Washington DC Lobbyist Marcia Wiss and Wiss Partners to regularly appear and file pleadings against Petitioner on behalf of Respondent and Defendants without filing for admission, nor being admitted to the case.

Contrary to Petitioner's Open Court and Filed Pleadings which repeatedly confirmed that Wiss Partners Never was Petitioner's Counsel, that Wiss Partners had no Retainer Agreement signed by Petitioner required by New York law and that foreign national Colleen Kerwick aka Colleen NiChairmhaic (collectively 'Kerwick') who Targeted Petitioner and filed pleadings Against Petitioner and on behalf of Respondent and Defendants' after vacationing with Opposing Counsel outside the US, the District Court incorrectly repeatedly referenced non-party Wiss and Respondent Counsel Kerwick as Petitioner's counsel.

The District Court further Ordered Petitioner to 'agree' to non-party Wiss Partners pleadings. The Court sealed numerous ex parte communications absent judicial review. Wiss demanded more unearned monies from Petitioner and threatened Petitioner with judicial, professional and personal retaliation if Petitioner declined to pay Wiss' financial demands and comply with non-party Wiss' legal demands made on behalf of Respondent and Opposing Counsel<sup>14</sup>.

On behalf of Respondent and Opposing Counsel, Marcia Wiss, Colleen Kerwick and Wiss Partners threatened the Abduction, Deprivation of Medications and DNR Execution of Petitioner's Mother Joyce Olshen Abraham in Florida unless Petitioner 'Agreed' to Wiss Partners' larceny by extortion. On behalf of Respondent, Defendants and Opposing Counsel, Colleen Kerwick, Marcia Wiss and Wiss Partners threatened Petitioner's Mother Joyce Abraham's life. They also threatened Disbarment and Civil and Criminal Sanction Orders to be

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<sup>14</sup> As reflected by Court record, the retaliation which non-party lobbyist Wiss Partners threatened against Petitioner for declining to pay Wiss unearned fee demands, resulted in the exact national Court Orders Wiss Partners threatened against Petitioner and her Mother. These retaliatory Court Orders were issued in the New York Southern District in the unrelated Florida Abduction and Guardianship of Petitioner's Mother, in unrelated New York state, unrelated Washington DC Bar Grievance proceedings against Lobbyist Wiss and in unrelated California real estate proceedings

issued against Petitioner unless Petitioner Agreed to Terms Requested by Respondent, Defendants and Opposing Counsel. Petitioner contacted federal and state law enforcement and reported threats against Petitioner and her Mother Joyce Olshen Abraham in Florida.

Per Kerwick's and Wiss Partners' threats on behalf of Respondent and Opposing Counsel, on December 19, 2022, Petitioner's elderly Mother Joyce Olshen Abraham was Abducted from her Florida home with a False 911 call, Involuntarily Hospitalized, Denied Her Necessary Lifesaving Medications and Involuntarily Diapered to Cause Sepsis. Petitioner's Mother Joyce Abraham pleaded to be returned home.

On behalf of Respondent, Defendants and DC Lobbyist Wiss Partners, Opposing Counsels' de facto Florida co-counsel Filed Wiss Partners' threatened Florida DNR Motion Against Petitioner's formerly fully functional Mother. Pursuant to Opposing Counsel/Wiss Partners' threats on behalf of Respondent and Opposing counsel, notwithstanding Petitioner's court and filed Oppositions, Opposing Counsel/Wiss Partners' threatened fabricated DNR Motion was Granted. Joyce Abraham Died February 27, 2023.

### **PROCEDURAL HISTORY**

Pursuant to non-party Wiss Partners' and Respondent's Counsels' threats in response to Petitioner declining to pay Wiss Partners' continued unearned monetary demands and refusal to agree to Wiss Partners' represented Respondent's terms, the District Court Sealed, Struck and Deleted more than Three Thousand 3, 000 pages (more than one third of the case) of Petitioner's fully favorable Arnold and Porter and Schillings/London produced documents, depositions, expert witness statements and evidence. Petitioner's judicial documents irrefutably confirmed Petitioner successfully closed this Arnold and Porter filed \$250 Million business transaction in which Two of the Three serial Defendants Settled in Favor of Petitioner. Additionally, Respondent Leigh's 40 year Business Manager Mr. Honig provided a filed Declaration that Respondent Leigh committed fraud against Petitioner Abraham in this case.

The Court Denied and Sealed Petitioner's Filed Motions to Disqualify the District Court. The Court also Denied and Sealed Petitioner's Motions for Protective Orders against non-party Wiss Partners and New York attorney Colleen Kerwick Ni Chairmhaic, the latter of whom admittedly Targeted Petitioner, filed a Notice of

Appearance as sole practitioner purportedly on behalf of Petitioner (App. 98A) and filed Pleadings Against Petitioner on behalf of Respondent in the District Court and in the Second Circuit (App100A).

In direct response to Petitioner declining to pay non-party Wiss Partners' documented unearned financial demands and non-party Wiss' demands on behalf of Respondent and Defendants' to dismiss the case, the Court deleted, struck and sealed ex parte communications with and on behalf of non-party Wiss including reported ex parte Wiss communications regarding *Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, No. 1:19-cv-10023 (KPF) and sealed more than 3,0000 pages of Petitioner's essential dispositive judicial documents. The lower court record also reflects that the District Court ordered Petitioner's PACER rights suspended prior to Motion for Summary deadlines, thus precluding Petitioner's ability to timely file requisite judicial documents. The District Court then sealed Petitioner's filed Objections to the Court's suspension of Petitioner's Pacer account.

Pursuant to Venezuela Dictator Maduro DC Lobbyist Wiss's October 7, 2019 in person ex parte lobbying requests to NYSD Judge Failla in Judge Failla's chambers to request assignment of Dictator Maduro's Not Yet Filed NYSD *Petroleos de Venezuela S.A. v. MUFG Union Bank, NYSD 1:19-cv-10023* (KPF), on October 29, 2019, Wiss Partner client PDVSA filed the multibillion case in the New York Southern District. Per Wiss Partners' express October 7, 2019 request to the Honorable Judge Katherine Polk Failla, Judge Failla was assigned to Dictator Maduro's PDVSA cases.

## **REASONS FOR GRANTING THE PETITION**

### **A. The Decision Below Permits Dispositive Adjudication After Sealing and Striking Adjudicative Materials**

This case presents a structural question of constitutional importance: whether a federal court may seal and strike thousands of pages of materials submitted in connection with summary judgment proceedings and thereafter grant summary judgment on the ground that no genuine dispute of material fact exists.

Summary judgment is a substitute for trial. When courts resolve disputes without trial, the materials submitted in connection with that adjudication form the core of Article III judicial action.

This Court has recognized that openness in adjudication is fundamental to public confidence in the judiciary. See:

- *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984): Before sealing documents, the court must:

1. Identify an overriding interest;
2. Make specific, on the record findings
3. Demonstrate that sealing is essential
4. Consider reasonable alternatives
5. Narrowly tailor the order.

Failure to engage in the above reference steps and analyses constitutes constitutional error.

The above requisite constitutional analyses did not occur below

- *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Rule: Judicial records are subject to a strong common-law presumption of public access. “The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” Presumption of openness; Sealing requires justification; Discretion is Limited.
- *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); Closure is unconstitutional unless it serves a compelling governmental interest and is narrowly tailored. Blanket sealing orders are constitutionally suspect. In the below case, the Court sealed, struck and deleted more than 3,000 pages of judicial documents without review.
- *Virginia Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) : *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), is a United States Supreme Court case involving issues of privacy in

- correspondence with the **First Amendment to the United States Constitution**, the freedom of the press, the **Sixth Amendment to the United States Constitution** and the **Fourteenth Amendment to the United States Constitution**. After a murder case ended in three mistrials, the judge closed the fourth trial to the public and the press. On appeal, the Supreme Court ruled the closing to be in violation of the **First Amendment** and **Fourteenth Amendment**

In the New York case below, the court affirmed dispositive adjudication after sealing and striking substantial portions of the adjudicative record. The result was a determination that no genuine dispute of material fact existed, notwithstanding the removal of thousands of pages of materials filed to demonstrate such disputes.

This raises a recurring structural question:

Whether adjudicative integrity permits courts to remove materials from the record and then conclude no factual disputes remain.

#### **B. The Decision Below Undermines the Strong Presumption of Public Access to Judicial Documents**

The First Amendment, Article III and the Due Process Clause long have provided strong First Amendment protections ensuring public access to judicial proceedings and records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). These US Supreme Court precedents rest on the foundational principle that public access safeguards fairness, legitimacy, and public trust in the judicial process. US Supreme Court precedent requires judicial transparency.

The Second Circuit has recognized that documents submitted in connection with summary judgment carry a strong presumption of public access. See *Brown v. Maxwell*, 929 F.3d 41 (2d Cir. 2019). *Brown v Maxwell* addresses judicial transparency and the standards for unsealing court documents. The court clarified that materials submitted in connection with dispositive motions like summary judgment are ‘judicial documents subject to a

strong presumption of public access. In *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), the Court held that documents submitted to a court in support of or in opposition to a motion for summary judgment are judicial documents to which a presumption of immediate public access attaches under both the common law and the First Amendment.

In Petitioner's case however, the Second Circuit did not apply First Amendment mandated protections to summary judgment documents and Declined to Unseal the thousands of pages of sealed, stricken and deleted judicial documents filed in advance of summary judgment. The Second Circuit Affirmed the District Court basing its decision on *Saleh v. Sulka Trading Ltd.*, 957 F.3d 348 , 354 (2d Cir. 2020). (App. 7a).

*Saleh* focused on trademark law and the jurisdictional requirements of the Declaratory Judgment Act. The Court held that a plaintiff must demonstrate both a "definite intent and apparent ability" to use a mark in US commerce to establish a justiciable "actual controversy" under Article III.<sup>15</sup>

*The Saleh Court*, in finding that the trademark plaintiff was not prepared to enter the United States market, Saleh did not address summary judgment issues, nor the court's sealing, striking and deletion of thousands of pages of judicial documents related to summary judgment proceedings.

Summary judgment materials are quintessential "judicial documents" because they are submitted to influence the court's exercise of Article III power.

The court below denied unsealing on the ground that the materials were not "dispositive." That reasoning effectively conditions access on outcome-determinative weight, rather than on the document's role in adjudication.

This Court has never endorsed a rule that limits public access to documents only when they alter the result. The Transparency Doctrine protects the process of adjudication, not merely its outcome. Clarification by this Court is warranted.

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<sup>15</sup> In *Saleh*, the owner of an online business selling apparel bearing the mark "SULKA" filed suit against the owners of the United States trademark registration for the "SULKA" mark, seeking a declaratory judgment that the trademark had been abandoned. The *Saleh* court found that no justiciable case or controversy existed because the allegations in the complaint consisted almost entirely of conduct relating to the plaintiff's business not in the US, as opposed to his business operations in the U.S. 957 F.3d at 355.

#### **D. The Case Presents an Important and Recurring First Amendment Question**

Federal courts routinely resolve disputes through summary judgment. Litigants frequently submit substantial evidentiary materials in connection with dispositive motions.

If courts may seal, delete and strike such materials absent First Amendment and Due Process safeguards and then determine that no material factual disputes exist, the structural safeguards of adversarial adjudication and transparency are weakened.

The question presented is not confined to the particular facts here. This question concerns the very integrity of summary judgment procedure, the constitutional principles governing judicial records, accountability of the judicial process and the public's trust in the American Legal System.

#### **E. This Case Also Presents an Important First Amendment Question Regarding Offensive Collateral Estoppel by A Bar Grievance Committee:**

**MAY A BAR GRIEVANCE COMMITTEE UTILIZE LOWER COURT DECISIONS SEALING, STRIKING AND DELETING THOUSANDS OF PAGES OF PETITIONER'S FILED JUDICIAL DOCUMENTS AND FULLY FAVORABLE CASE EVIDENCE IN WHICH FOLLOWING EX PARTE COMMUNICATIONS, THE COURT SEALS, STRIKES AND DELETES EX PARTE COMMUNICATIONS BETWEEN THE COURT AND OPPOSING COUNSEL and the BAR GRIEVANCE COMMITTEE USES THE RESULTING ORDERS AS OFFENSIVE COLLATERAL ESTOPPEL TO SANCTION/DISBAR THE NON-OFFENDING ATTORNEY?**

This case presents the important First Amendment Question as to whether at the Behest of Opposing Counsel, a Bar Grievance Committee may utilize the Summary Judgment Orders resulting from the sealing, striking and deletion of thousands of pages of Petitioner's favorable documents and per threats of Disbarment by Respondent's and Defendants' Opposing Counsel and Lobbyists, may the BAR GRIEVANCE COMMITTEE Sanction and/or Disbar the Non-Offending Attorney whose Thousands of Pages of Favorable Case Documents Have Been Deleted, Sealed and Stricken by the Lower Courts.

Per the US Supreme Court case, *Parklane Hosiery, Inc. v. Shore*, 439 US 322 (1979), the Offensive use of collateral estoppel, (when, as here, the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party) does not promote judicial economy in the same manner that is promoted by defensive use (when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant), and such offensive use may also be unfair to a defendant in various ways. Therefore, the general rule should be that, in cases where a plaintiff could easily have joined in the earlier action, or where the application of offensive estoppel would be unfair to a defendant, a trial judge, in the exercise of his discretion, should not allow the use of offensive collateral estoppel.

### **Different Federal Circuits Apply Different First Amendment Standards**

Public access to court records is a cornerstone of democratic governance, enabling public oversight of the judiciary and fostering confidence in the rule of law. Despite a strong presumption in favor of openness under both the First Amendment and common law, the sealing of federal court records has become widespread, often with minimal judicial scrutiny.

Recent investigations have revealed that excessive court secrecy shields government and corporate misconduct, conceals vital public-safety information, and erodes public confidence in the courts.

In the Ninth Federal Circuit, a party seeking to seal a judicial record "must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal quotation marks, alteration, and citations omitted).

The court must then "conscientiously balance[] the competing interests' of the public and the party who seeks to keep certain judicial records secret." *Id.* at 1179

However, as noted by the Fourth Federal Circuit in *Doe v Public Citizen*, 749 F.3d 246 (4<sup>th</sup> Cir 2014) re: the Third Federal Circuit in *United States v. Antar*, 38 F.3d 1348, 1363 (3<sup>d</sup> Cir.1994) ("[T]he district judge appears not to have recognized that maintaining the transcripts under seal, though a passive act, was an active decision requiring justification under the First Amendment.").

The Doe court concluded, "the presumptive right of access to judicial documents and materials under the First Amendment and common law gives Consumer Groups an interest in the underlying litigation such that they may appeal the district court's orders disregarding their objections and depriving them of access to the information they claim a right to obtain. The district court's rejection of Consumer Groups' proffered objections to the sealing motion and pseudonymity request is tantamount to an adjudication of their rights of access. *See United States v. Antar*, 38 F.3d 1348, 1363 (3<sup>d</sup> Cir.1994) “.

In the Tenth Circuit, the *Mann v. Boatright*, 477 F.3d 1140, 1149 (10<sup>th</sup> Cir.2007).

Court held, Although "[c]ourts have long recognized a common-law right of access to judicial records," this right "is not absolute.”

In the Third Circuit, in *In re: Avandia Marketing, Sales Practices & Prod*, 924 F. 3d 662 (3<sup>rd</sup> Cir. 2019), the Court stated, “It remains an open question in this Circuit whether the First Amendment right of access applies to records of summary judgment proceedings.”

The Fifth Circuit recognizes a First Amendment right of access to records filed in criminal cases. *United States v Edwards*, 823 F.2d 111,118 (5<sup>th</sup> Cir 1987). It has not extended the First Amendment right to records filed in civil proceedings. *SEC v. Van Waeyenberghe*,990 F.2d 845, 849 (5<sup>th</sup> Cir. 1993).

The Fifth Circuit evaluates disputes over the common law right of access “on a case-by-case basis.

See: *US v. Sealed Search Warrants*, 868 F3d, 385, 395 (5<sup>th</sup> Cir. 2017)

Given the national lack of First Amendment and Constitutional uniformity and standards, and the variety of First Amendment tests and recurrent legal challenges throughout the Federal Circuits, Supreme Court review of this issue is warranted.


### **THIS FEDERAL CASE IS A SUITABLE VEHICLE**

The First Amendment and Constitutional issues were preserved at every stage in this case. Petitioner repeatedly filed and docketed evidence, depositions, declarations and documents and invoked public-access principles at every stage. The District Court Struck, Sealed and Deleted Thousands of Pages of Only Petitioner’s fully favorable evidence without analyses and/or justification. The District Court also Sealed and Failed to Docket Numerous Ex Parte Communications with Opposing Counsel and with DC Lobbyist Wiss Partners which Represented Opposing Counsel, and which DC Lobbyist declined to file any Motion for Pro Hac Vice in the District Court and the Federal Appellate Court. The District Court also Sealed and Failed to Docket Numerous Dispositive Orders. The Court of Appeals repeatedly and summarily Denied Unsealing Dispositive Judicial Documents without analyses and justification. The First Amendment Questions and Constitutional Issues are of national significance. This Court’s review is warranted.

## CONCLUSION

The Petition for a Writ of Certiorari should be Granted.

Respectfully submitted.

  
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Counsel For Applicant

March 2026

IN THE SUPREME COURT OF THE UNITED STATES

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No.

ROBYN ABRAHAM, PETITIONER

v.

ABBY LEIGH, AS EXECUTRIX OF MITCH LEIGH ESTATE, ET AL.  
RESPONDENT

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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT AND PAGE LIMITATIONS

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I, Robin Abraham aka Robyn Abraham, Petitioner Pro Se and a member of the Bar of this Court, certify that the Petition for a Writ of Certiorari in the above-captioned case contains 7,107 words, excluding the parts of the petition that are exempted by Rule 33.1(d) and is less than 40 pages.



Robin Abraham

March 25, 2026

App No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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ROBYN ABRAHAM

*Petitioner,*

v.

ABBY LEIGH, AS EXECUTRIX OF MITCH LEIGH ESTATE, ET AL.

*Respondents.*

**PROOF OF SERVICE**

I, Robyn Abraham, do swear or declare that on March 27, 2026, as required by Supreme Court Rule 29 I have served the enclosed Motion for Leave to Proceed in Forma Pauperis, Motion to File Out of Time and Petition for Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

H. Robert Fiebach, Esq  
Cozen O'Conner  
1650 Market Street  
Philadelphia, PA 19103  
Telephone 215.665.4166

Tamar Wise, Esq.  
Cozen O'Conner  
175 Greenwich Street  
New York, NY 10007  
Telephone: 212.509.9400

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

Executed on March 27, 2026

By:   
Robyn Abraham

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# APPENDIX A

23-7779(L)  
Abraham v. Leigh

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 27<sup>th</sup> day of May, two thousand twenty-five.

PRESENT:

ROBERT D. SACK,  
RICHARD C. WESLEY,  
BETH ROBINSON,  
*Circuit Judges.*

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Robyn Abraham,

*Plaintiff-Counter Defendant-Appellant-  
Counter Cross-Appellee,*

v.

23-7779 (L);  
23-7867 (XAP)

Abby Leigh, as Executrix of the Estate of  
Mitch Leigh,

*Defendant-Counter Plaintiff-Appellee-  
Counter Cross-Appellant,*

Abby Leigh in her individual capacity,  
Abby Leigh Ltd., The Viola Fund,  
Martha Wasserman, in her individual  
capacity and as Executrix of the Estate of  
Dale Wasserman, Hellen Darion, in her  
individual capacity and as Executrix of  
the Estate of Joseph Darion, and Alan  
Honig,

*Defendants.*

---

FOR PLAINTIFF-COUNTER DEFENDANT-  
APPELLANT-COUNTER CROSS-APPELLEE:

Robyn Abraham, pro se,  
Beverly Hills, CA.

FOR DEFENDANT-COUNTER PLAINTIFF-  
APPELLEE-COUNTER CROSS-APPELLANT:

Tamar S. Wise, Cozen  
O'Connor, New York,  
NY; H. Robert Fiebach,  
Cozen O'Connor,  
Philadelphia, PA.

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

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,  
ADJUDGED, AND DECREED that the district court's October 16, 2023 judgment  
is AFFIRMED, Cross-Appellant Leigh's cross-appeal is DISMISSED as moot, and  
all pending motions are DENIED as moot.

As relevant to this appeal, Robyn Abraham sued Abby Leigh, as Executrix

of the Estate of Mitch Leigh, the composer of the musical *Man of La Mancha*, seeking damages for breach of a contract Abraham had executed with Mitch Leigh before his death relating to production rights for a revival of the musical. Abby Leigh filed a counterclaim alleging that Abraham breached a fiduciary duty to Mitch Leigh by entering into a business contract with him while serving as his lawyer. During the district court proceedings, the court sanctioned Abraham for submitting false documents by precluding her from using the documents as evidence and awarding fees and costs to Leigh. Ultimately, the district court granted Leigh summary judgment on Abraham's breach of contract claim. The court subsequently awarded Leigh default judgment on her counterclaim due to Abraham's misrepresentations to the court regarding her availability for a hearing. *Abraham v. Leigh*, No. 17-cv-5429, 2023 WL 6811647 (S.D.N.Y. Oct. 16, 2023).

In the lead appeal, Abraham challenges a number of the district court's adverse decisions. In the cross-appeal, Leigh seeks review of the district court order sanctioning Abraham for filing false documents; Leigh contends that the court should have dismissed Abraham's action instead of simply excluding the documents and awarding fees and costs. Additionally, Abraham has filed multiple motions requesting that this Court take judicial notice of certain publicly available documents and seeking to unseal certain documents. Leigh has filed

motions to strike Abraham's briefs, dismiss the appeal, and strike Abraham's second special appendix. We assume the parties' familiarity with the remaining facts, the procedural history, and the issues on appeal.

We first address the lead appeal, 2d Cir. 23-7779, in which Abraham represents herself. Although we generally afford special solicitude to pro se litigants, "a lawyer representing [her]self ordinarily receives no such solicitude at all." *Tracy v. Freshwater*, 623 F.3d 90, 101-02 (2d Cir. 2010). We see no reason to depart from that rule here.

Federal Rule of Appellate Procedure Rule 28(a) requires the appellant's brief to contain, among other things, "a statement of the issues presented for review," "a summary of the argument," and "the argument, which must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Abraham's brief does not present in this form any discernible arguments specifically challenging the legal grounds for the district court's decision awarding Leigh summary judgment on Abraham's contract claim, its grant of default judgment to Leigh on Leigh's breach of fiduciary duty counterclaim, its order assessing sanctions against Abraham, or any other potentially dispositive issue. Instead, she appears to argue generally that we should vacate or reverse *every* order issued by the district court on the

ground that her former counsel and the district court engaged in misconduct that undermines the integrity of the district court's proceedings. Abraham's wide-ranging accusations are not supported by, and in many cases are contradicted by, the record. We thus reject her broad request to revisit all of the district court's rulings.

This conclusion disposes of most, if not all, of Abraham's arguments on appeal. "[W]e need not, and normally will not, decide issues that a party fails to raise in [their] appellate brief." *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998); see also *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) (concluding that "we need not manufacture claims of error" for a self-represented litigant). And while Abraham mentions the district court orders denying her relief in bullet-point form, other than the broad allegations of misconduct by the court and counsel, she makes no argument as to why she should be granted relief on appeal in connection with any specific order. See *Gerstenbluth v. Credit Suisse Securities (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (self-represented litigant "waived any challenge" to the district court's adverse ruling because brief mentioned that ruling only "obliquely and in passing").

The only possible exception is her claim that the district court erred by ordering that a portion of Abraham's settlement with two other defendants be

allocated to her former counsel to offset Abraham's fee obligations. But Abraham herself requested that the court enforce the oral agreement with her former counsel by releasing the contested funds pursuant to the terms of that agreement.

For the above reasons, in the lead appeal, the district court's judgment is **AFFIRMED**. In light of our affirmance of the district court's judgment, Leigh's cross-appeal challenging the district court's sanction order on the basis that it should have dismissed Abraham's claims is moot and is therefore **DISMISSED**.

Finally, Abraham's motion to unseal documents is **DENIED** on the merits, and all other pending motions are **DENIED** as moot because they are not relevant to any dispositive issue. *See Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 357 n.8 (2d Cir. 2020) (denying as moot a motion for judicial notice that addressed facts relevant only to an issue the Court did not reach); *United States v. Bleznak*, 153 F.3d 16, 21 n.2 (2d Cir. 1998) ("Because these [facts] are not relevant to our disposition of this appeal, we deny the [judicial notice] motion as moot.").

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk of Court



# APPENDIX B

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

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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 4<sup>th</sup> day of November, two thousand twenty-five.

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Robyn Abraham,

Plaintiff - Counter Defendant - Appellant-  
Counter Cross-Appellee,

v.

Abby Leigh, as Executrix of the Estate of Mitch Leigh,

Defendant - Counter Plaintiff - Appellee-  
Counter Cross-Appellant,

Abby Leigh in her individual capacity, et al.,

Defendants.

---

**ORDER**

Docket Nos: 23-7779 (Lead)

23-7867 (XAP)

Appellant-Cross-Appellee, Robyn Abraham, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


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# APPENDIX C

S.D.N.Y. – N.Y.C.  
17-cv-5429  
Faila, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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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 15<sup>th</sup> day of July, two thousand twenty-one.

Present:

Debra Ann Livingston,  
*Chief Judge,*  
Denny Chin,  
Joseph F. Bianco,  
*Circuit Judges.*

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Robyn Abraham,

*Plaintiff-Counter-Claimant-  
Appellant,*

v.

20-3320

Abby Leigh, as Executrix of the Estate of Mitch Leigh,  
the Viola Fund, Abby Leigh Ltd and in her individual  
capacity,

*Defendant-Counter-Defendant-  
Appellee,*

Martha Wasserman, as Executrix of the Estate of Dale  
Wasserman and in her individual capacity, et al.,

*Defendants,*

Wiss & Partners, LLP,

*Intervenor.*

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Appellant, through counsel, moves for reconsideration of this Court's February 2021 order

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dismissing her appeal; she files additional motions pro se. Appellee moves for sanctions against Appellant. Upon due consideration, it is hereby ORDERED that the reconsideration motion is DENIED because Appellant has not identified error in our prior decision. See Fed. R. App. P. 40(a)(2); see also *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 256–57 (2d Cir. 1995). Appellant’s remaining motions are DENIED as moot.

It is further ORDERED that the Appellee’s motion for sanctions is DENIED. However, Appellant has filed a number of frivolous and repetitive motions and exhibits in this Court. Appellant is hereby warned that the continued filing of duplicative, vexatious, or clearly meritless appeals, motions, petitions, or other papers may result in the imposition of sanctions, which may include a leave to file sanction requiring Appellant to obtain permission from the Court prior to filing any further submissions in this Court. See *In re Martin-Trigona*, 9 F.3d 226, 229 (2d Cir. 1993); *Sassower v. Sansverie*, 885 F.2d 9, 11 (2d Cir. 1989) (per curiam).

The Clerk’s Office is hereby directed to seal the documents 140, 182, 202, 213, 217, 226, 231, 249, 266, 267, 289, 302, and 306 on this Court’s docket, which contain information that this Court previously ordered sealed.

FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk of Court

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular official seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

# APPENDIX D

S.D.N.Y. – N.Y.C.  
17-cv-5429  
Faila, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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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 18<sup>th</sup> day of February, two thousand twenty-one.

Present:

Debra Ann Livingston,  
*Chief Judge,*  
Denny Chin,  
Joseph F. Bianco,  
*Circuit Judges.*

---

Robyn Abraham,

*Plaintiff-Counter-Claimant-  
Appellant,*

v.

20-3320

Abby Leigh, as Executrix of the Estate of Mitch Leigh,  
the Viola Fund, Abby Leigh Ltd and in her individual  
capacity,

*Defendant-Counter-Defendant-  
Appellee,*

Martha Wasserman, as Executrix of the Estate of Dale  
Wasserman and in her individual capacity, et al.,

*Defendants,*

Wiss & Partners, LLP,

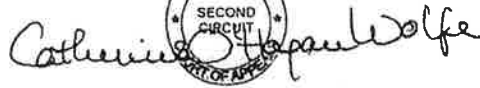

*Intervenor.*

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Appellee, through counsel, moves to dismiss the appeal for lack of jurisdiction. Appellant, pro se, moves for appointment of counsel, to amend the notice of appeal, and for other relief. Upon due consideration, it is hereby ORDERED that the appeal is DISMISSED, in part for lack of jurisdiction, and DISMISSED in remaining part for lack of an arguable basis. This Court has determined that, with the exception of the challenge to an order denying a motion to unseal, it lacks jurisdiction over this appeal because a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291. See *Petrello v. White*, 533 F.3d 110, 113 (2d Cir. 2008). This Court DISMISSES Appellant's appeal as to the order declining to unseal documents because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Appellant's remaining motions are DENIED as moot.

Non-party Wiss & Partners moves to intervene in the proceeding, seal documents, and amend the case caption. It is hereby ORDERED that the motion to intervene and seal documents is GRANTED, and the motion to amend the caption is GRANTED to the extent that Wiss & Partners' designation is changed to intervenor as reflected above. See Fed. R. App. P. 12(a), 25(a)(5); Fed. R. Civ. P. 5.2(d)–(e); *Hernandez-Avila v. Averill*, 725 F.2d 25, 27 n.4 (2d Cir. 1984) (caption may be amended with court permission). The Clerk's Office is hereby directed to change the caption accordingly and to seal the documents filed at 54, 69, 78, and 83 on this Court's docket. See *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (holding that common law presumption against sealing applies only to "judicial documents").

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk of Court

# APPENDIX E



January 24, 2020

VIA ECF

**Michael J. Broadbent**

Direct Phone 215-665-4732

Direct Fax 215-701-2288

mbroadbent@cozen.com

Honorable Katherine Polk Failla  
United States District Judge  
Southern District of New York  
40 Foley Square, Room 2103  
New York, NY 10007

**MEMO ENDORSED**

**Re: Abraham v. Leigh, et al; No. 1:17-cv-05429**  
**Letter Motion to Request Permission to File Under Seal**

Dear Judge Failla:

As the Court is aware, we represent Defendant Abby Leigh, as Executrix of the Estate of Mitch Leigh, in the above-referenced action. We are filing today the Executrix's Motion for Summary Judgment, together with its supporting documents ("MSJ Filing"). The MSJ Filing includes exhibits drawn from material marked as confidential by other parties as well information regarding those exhibits and other confidential information. The Executrix seeks to file such documents under seal, and to redact such information in the Statement of Undisputed Facts and Memorandum of Law filed with the MSJ Filing. Because the confidentiality asserted belongs to other parties, we are not submitting a confidentiality Declaration or citation to case law supporting the redactions and filing under seal.

We thank the Court for its attention to these matters.

Sincerely,

COZEN O'CONNOR

/s/ Michael J. Broadbent

BY: MICHAEL J. BROADBENT

CC: All counsel of record via ECF

Application GRANTED.

Dated: January 24, 2020  
New York, New York

SO ORDERED.

HON. KATHERINE POLK FAILLA  
UNITED STATES DISTRICT JUDGE

LEGAL\44519777\1

# APPENDIX F

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ROBYN ABRAHAM,

Plaintiff/Counterclaim-Defendant,

-v.-

ABBY LEIGH, *Executrix of the Estate of  
Mitch Leigh,*

Defendant/Counterclaim-Plaintiff.

17 Civ. 5429 (KPF)

**OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

On January 23, 2014, Plaintiff Robyn Abraham and Mitch Leigh, composer of the iconic musical *Man of La Mancha* ("MOLM"), affixed their signatures to a two-page contract (the "Talent Agreement") that purported to give Plaintiff the "sole and exclusive legal and business rights" to obtain initial interest in a revival of MOLM from a theatrical stage director, a recognized co-producer, and a well-known actor. Had she succeeded, Plaintiff would have been entitled under the Talent Agreement to the exclusive stage production rights to a 2015 MOLM revival in the United Kingdom. And, indeed, according to Plaintiff, she did satisfy her obligations under the Talent Agreement. When she received nothing in return, Plaintiff brought suit against the three holders of the rights to MOLM: Abby Leigh, in her capacity as Executrix of the Estate of Mitch Leigh; Martha Wasserman, in her capacity as Executrix of the Estate of Dale Wasserman; and Hellen Darion, in her capacity as Executrix of the Estate of Joseph Darion (collectively, the "Rights Holders"), as well as Alan Honig, who had served as an accountant to the authors of MOLM. After several years of

litigation, what remains is Plaintiff's breach of contract claim against Defendant Abby Leigh, in her capacity as Executrix of the Estate of Mitch Leigh.<sup>1</sup> Defendant, in turn, counterclaimed against Plaintiff, asserting that Plaintiff breached a fiduciary duty she owed to Mr. Leigh when she drafted and entered into the Talent Agreement.

Before the Court now is Defendant's motion for summary judgment against Plaintiff's breach of contract claim and in favor of Defendant's breach of fiduciary duty counterclaim. For the reasons that follow, the Court grants Defendant's motion for summary judgment as to Plaintiff's breach of contract claim, and denies the motion as to Defendant's counterclaim.

## **BACKGROUND<sup>2</sup>**

### **A. Factual Background**

*Man of La Mancha* was written by composer Mitch Leigh, book writer Dale Wasserman, and lyricist Joseph Darion (collectively, the "Authors"). (Pl.

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<sup>1</sup> For clarity, the Court uses "Mr. Leigh" to refer to Mitch Leigh and "Defendant" to refer to Abby Leigh.

<sup>2</sup> The facts stated herein are drawn from Defendant's Rule 56.1 Statement of Material Facts Not in Dispute ("Def. 56.1" (Dkt. #430-1)), and from Plaintiff's Rule 56.1(b) Counterstatement of Disputed Material Facts ("Pl. 56.1" (Dkt. #500)), the latter of which comprises both responses to Defendant's assertions of material facts not in dispute and material facts ostensibly in dispute. Plaintiff's compliance with Local Rule 56.1 is discussed more fully *infra*.

For ease of reference, Defendant's Memorandum of Law in Support of Her Motion for Summary Judgment will be referred to as "Def. Br." (Dkt. #430); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment as "Pl. Opp." (Dkt. #499); and Defendant's Memorandum of Law in Further Support of Her Motion for Summary Judgment as "Def. Reply" (Dkt. #474). The Court refers to Plaintiff's operative pleading, the Amended Complaint, as "Am. Compl." (Dkt. #41), and Defendant's Amended Counterclaim as "Am. Countercl." (Dkt. #105). Further, citations to a witness's sworn statements will be referred to using the convention "[Name] Decl."; citations to a witness's deposition testimony will be referred to using the convention "[Name] Dep."; and citations to an expert witness's report will be referred to using the convention "[Name] Rep."

56.1 ¶ 3). The rights to stage or control any production of MOLM are delimited by a Minimum Basic Production Contract (the “MBPC”), which was executed in 1964. (*Id.* at ¶ 2). Pursuant to the MBPC, all decisions concerning the staging or production of a performance of MOLM must be approved by a majority of the Authors. (*Id.* at ¶ 5). See *Wasserman v. Leigh*, No. 92 Civ. 5266 (PNL), 1994 WL 320606 (S.D.N.Y. July 1, 1994). The Authors’ successors in interest continue to be bound by the MBPC. (Pl. 56.1 ¶ 6). By 2014, Mr. Leigh was the only surviving Author of MOLM. (*Id.* at ¶ 9). Mr. Wasserman’s interests were controlled by Martha Wasserman and Mr. Darion’s interests were controlled by Hellen Darion. (*Id.*). Because of Mr. Leigh’s unique position as the sole remaining Author, Hellen Darion frequently, though not always, deferred to him on artistic choices relating to MOLM. (*Id.* at ¶ 10).

On January 6, 2014, Plaintiff, an attorney, met with Mr. Leigh to discuss the staging of a revival production of MOLM in 2015, which would be the 50th anniversary of the original production (the “January 6, 2014 Meeting”). (Pl. 56.1 ¶ 40). After the meeting, Plaintiff proposed sending a one-page agreement memorializing that which had been discussed. (*Id.* at ¶ 43). On January 9, 2014, Plaintiff emailed Mr. Leigh’s assistant a draft one-page agreement (the “January 9, 2014 Draft”). (*Id.* at ¶ 47).<sup>3</sup> In the cover email, Plaintiff suggested that she and Mr. Leigh discuss any comments to the January 9, 2014 Draft as well as her hourly rate, which they had not previously discussed. (*Id.* at ¶ 48; Def. Ex. 37). The January 9, 2014 Draft stated that Plaintiff would identify

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<sup>3</sup> Plaintiff claims that she did not prepare the January 9, 2014 Draft. (Pl. 56.1 ¶ 52).

initial interest in participation in a 2015 MOLM revival from a “leading British theatrical stage director,” a “recognized UK co-producer,” and at least one “well known actor.” (*Id.* at ¶ 49). Plaintiff claimed that she had already received expressions of potential interest from “stars, UK co-producers, and directors.” (*Id.* at ¶ 50).

On January 10, 2014, Plaintiff sent Mr. Leigh’s assistant an email suggesting that Mr. Leigh was not willing to pay legal fees for her work. (Pl. 56.1 ¶ 52; Def. Ex. 38). Perturbed, Plaintiff asserted that Mr. Leigh “specifically did agree to hire me as his lawyer and solicitor for a period of six (6) months,” and that Mr. Leigh’s comment that he would not pay legal fees was “antithetical to that which he specifically agreed to in [the January 6, 2014] meeting.” (Pl. 56.1 ¶ 52). On January 20, 2014, Plaintiff faxed a revised version of the January 9, 2014 Draft, which version removed references to being paid for fees and costs, but continued to require her to secure interest from a director, a co-producer, and a well-known actor. (*Id.* at ¶ 53).

On January 23, 2014, Mr. Leigh signed the Talent Agreement, which was entitled “Six (6) Month Exclusive Contract Re: London and United Kingdom Musical and Stage Production Rights of Man of La Mancha (‘MOLM’).” (Pl. 56.1 ¶ 58). The Talent Agreement granted Plaintiff:

the sole and exclusive legal and business rights for six (6) months to represent “MOLM” in England and the United Kingdom for the purpose of obtaining initial professional interest by a) a leading British theatrical stage director; b) a recognized US or UK co-producer and c) at least one (1) well known actor (heretofore referenced collectively as “Talent”) interested in the opportunity of starring in the upcoming London West

End stage production of "Man of La. Mancha"; tentatively scheduled for the 2015 50th Anniversary of the original staging of "MOLM".

(*Id.* at ¶¶ 59, 60, 62; Pl. Ex. A). The exclusivity period would begin on February 3, 2014, and conclude on August 2, 2014. (Pl. Ex. A). In addition, the Talent Agreement stated that:

[Plaintiff] and [Mr.] Leigh shall discuss [Plaintiff]'s provision of initial Talent interest and [Mr.] Leigh shall advise [Plaintiff] whether he accepts [Plaintiff]'s provision of initial Talent interest. If [Mr.] Leigh does not accept [Plaintiff]'s provision of initial Talent interest, [Mr.] Leigh shall instruct [Plaintiff] which Talent interest he prefers so meetings with Talent representatives may be coordinated. Upon provision of requested Talent interest by [Mr.] Leigh, [Plaintiff] will request Talent terms, conditions and dates of availability. Upon approval by [Mr.] Leigh of Talent interest [Mr.] Leigh shall promptly and within five (5) business days of provision of Talent confirmation by [Plaintiff], shall, in addition to granting [Plaintiff] [Mr.] Leigh's sole and exclusive London and United Kingdom rights to MOLM pursuant to the terms herein, shall obtain from each of the two MOLM minority rights holders ("Minority Rights Holders") or their representatives, written approval from each of the Minority Rights Holder granting [Plaintiff] her respective sole and exclusive rights to London and United Kingdom theatrical stage and musical rights of "MOLM" on the same terms and conditions provided by Leigh.

(Pl. 56.1 ¶¶ 59, 60, 62; Pl. Ex. A). On January 27, 2014, Plaintiff informed Mr. Leigh that she had spoken with Sir Trevor Nunn, the celebrated West End director, and that he had suggested Old Vic Productions as a possible co-producer for MOLM. (Pl. 56.1 ¶ 65).<sup>4</sup>

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<sup>4</sup> Though cognizant that he was knighted as a Commander of the Most Excellent Order of the British Empire ("CBE") in 2002, the Court will adopt Nunn's preferred honorific of "Mr." See Alexis Soloski, *Trevor Nunn, British Shakespeare Master, Tries Something*

In early March 2014, Mr. Leigh suffered a stroke and died soon thereafter. (Pl. 56.1 ¶ 72). After Mr. Leigh's death, Plaintiff continued to attempt to secure the interest of Mr. Nunn and Old Vic Productions. (*Id.* at ¶¶ 73, 74). Plaintiff had met with Joseph Smith, the executive producer at Old Vic Productions, on multiple occasions in January and February 2014, and continued to correspond with Mr. Smith through May of 2014. (*Id.* at ¶¶ 66, 70, 75; Smith Decl. ¶ 4 (Pl. Ex. K)). Plaintiff met with Mr. Nunn on May 8, 2014, and claims further to have met with him on several prior occasions, as early as February 2014. (Pl. 56.1 ¶ 74).

On July 11, 2014, Plaintiff sent a letter, through her attorneys, to Defendant and her attorneys, announcing that Plaintiff had performed under the Talent Agreement by securing Mr. Nunn as director and Old Vic Productions as UK co-producer for a 2015 revival of MOLM. (Pl. 56.1 ¶ 86; Def. Ex. 52). Attached to the letter was a copy of the Talent Agreement, and a facsimile that purported to be from Mr. Nunn, stating that he "accept[s] in principle your and Mr. Leigh's request to direct the 2015 50th Anniversary Production of *Man of La Mancha* in London, if such a production can be arranged." (Pl. 56.1 ¶ 87; Def. Ex. 52). The letter did not attach any confirmation from Mr. Smith or Old Vic Productions concerning Old Vic Productions' interest in co-producing the 2015 MOLM revival. (Pl. 56.1 ¶ 88).

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*New: Directing Americans*, N.Y. Times, Feb. 22, 2016 ("It might seem that, at 76, Mr. Nunn (who was knighted a decade ago but won't answer to Sir) has done it all.") (last accessed July 8, 2020).

On July 20, 2014, Defendant's counsel responded to Plaintiff's counsel's letter, purporting to speak on behalf of all three Rights Holders. (Pl. 56.1 ¶ 92; Def. Ex. 54). Defendant's counsel stated that neither Ms. Darion nor Ms. Wasserman was aware of the Talent Agreement, but that if Plaintiff wished to prepare a proposal for a 2015 revival of MOLM to be directed by Mr. Nunn, the Rights Holders would be "positively disposed" and would "consider the proposal in good faith." (Pl. 56.1 ¶¶ 92, 98; Def. Ex. 54). Counsel added, however, that Plaintiff would be required to pay the Rights Holders a \$50,000 nonrefundable advance against royalties in order to have such a proposal considered. (Pl. 56.1 ¶ 99; Def. Ex. 54). Plaintiff did not provide a proposal to Defendant or the other Rights Holders. (Pl. 56.1 ¶ 102). Instead, Plaintiff's counsel responded to Defendant's counsel on August 2, 2020 — the final day of the exclusive period under the Talent Agreement — to state that Plaintiff disagreed with the Rights Holders' interpretation of the Talent Agreement; that Plaintiff had fully performed her contractual obligations; and that Plaintiff would respond further in the future. (*Id.* at ¶ 103). On November 20, 2014, Plaintiff filed a claim against the Estate of Mr. Leigh in the amount of \$1,261,388.00. (*Id.* at ¶ 104). Plaintiff eventually abandoned this claim against Mr. Leigh's estate. (*Id.*)

## **B. Procedural Background**

### **1. The Complaint and the Motions to Dismiss**

This litigation has a particularly complicated procedural history, which is detailed here because of its relevance to certain of the parties' arguments. Plaintiff filed this action on July 18, 2017. (Dkt. #1). She then filed the

Amended Complaint on September 15, 2017, after receiving leave to do so from the Court. (Dkt. #40). In an oral decision issued on June 14, 2018, the Court granted in part and denied in part several motions to dismiss the Amended Complaint filed by the defendants then in the case. (Dkt. #65 (order memorializing decision); Dkt. #78 (transcript of decision) ("June 14 2018 Tr.")). As relevant here, the Court denied Defendant's motion to dismiss Plaintiff's breach of contract claim; all other claims against Defendant were dismissed. (Dkt. #65 (order memorializing decision); June 14, 2018 Tr.).

## **2. The Counterclaim and the Motion to Dismiss**

On August 3, 2018, Defendant filed an answer to the Amended Complaint, and asserted a counterclaim against Plaintiff. (Dkt. #86). On October 11, 2018, with the Court's permission, Plaintiff moved to dismiss Defendant's counterclaim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (Dkt. #90, 101). In response, on October 18, 2018, Defendant amended her counterclaim against Plaintiff. (Dkt. #105 ("Am. Countercl.")). The Amended Counterclaim alleges, in relevant part, that: (i) Plaintiff breached a fiduciary duty owed to Mr. Leigh by negotiating and entering into the Talent Agreement; and (ii) in the event Plaintiff were to receive an award of damages from her suit against Defendants, Defendant was entitled to a setoff as a result of Plaintiff's misconduct. (Am. Countercl. ¶¶ 38-53). On October 25, 2018, the Court granted Plaintiff's request that her motion to dismiss apply to Defendant's Amended Counterclaim. (Dkt. #107). Defendant

filed her opposition to the motion to dismiss on November 9, 2018 (Dkt. #111), and Plaintiff filed her reply brief on December 10, 2018 (Dkt. #131).

On March 11, 2019, Plaintiff's original counsel withdrew from the case with the permission of the Court. (Dkt. #213). After Plaintiff retained new counsel, that counsel adopted the prior motion papers. (Dkt. #272). The Court denied Plaintiff's motion to dismiss Defendant's Amended Counterclaim on September 9, 2019. (Dkt. #319). *Abraham v. Leigh*, No. 17 Civ. 5429 (KPF), 2019 WL 4256369 (S.D.N.Y. Sept. 9, 2019) ("*Abraham I*").

### **3. The Motions for Sanctions**

On January 23, 2019, two of the other defendants then in the case, Wasserman and Honig, filed a pre-motion letter seeking leave to file a motion for sanctions against Plaintiff for allegedly perpetrating a fraud on the Court in connection with certain documents produced in discovery. (Dkt. #143). On June 10, 2019, the Court granted Wasserman and Honig leave to file a motion for sanctions against Plaintiff (Dkt. #230), which they did on June 12, 2019 (Dkt. #233-236). On July 17, 2019, Defendant joined in the motion. (Dkt. #263, 264). On August 9, 2019, Plaintiff filed her papers in opposition to the pending motion for sanctions and in opposition to Defendant's joinder of that motion. (Dkt. #273-292). On August 23, 2019, Defendants filed their reply papers. (Dkt. #303-305, 307). On September 5, 2019, the Court scheduled an evidentiary hearing on the sanctions motion for October 7, 2019, though the date was later adjourned. (Dkt. #318, 338).

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On October 4, 2019, in connection with their settlements with Plaintiff, Wasserman and Honig were permitted to withdraw their motion for sanctions against Plaintiff; Defendant continued to adopt their arguments in her motion. (Dkt. #348). On October 15, 2019, Plaintiff's second team of attorneys withdrew from the case with permission of the Court, but were granted leave to represent Plaintiff at the evidentiary hearing. (Dkt. #361, 370).

On October 22, 2019, the Court held an evidentiary hearing, after which it granted in part and denied in part Defendant's motion for sanctions. (Dkt. #371 (order memorializing decision); Dkt. #409 (transcript of decision)). As relevant here, the Court excluded from evidence 33 documents produced by Plaintiff in PDF form only during discovery, which documents Wasserman and Honig had identified as having indicia of being fraudulent. (Dkt. #409 (transcript of decision); Dkt. #234). The Court also ordered that Plaintiff pay Defendant's attorneys' fees and costs incurred as a result of the fraudulent documents. (Dkt. #409 (transcript of decision)). As of February 3, 2020, the parties' briefing concerning Defendant's application for attorneys' fees and costs is fully submitted to the Court. (Dkt. #407, 427, 440).

#### **4. The Motion for Summary Judgment**

Defendant also sought to file a summary judgment motion. On June 10, 2019, the Court entered an Order setting a deadline of November 15, 2019, for the filing of pre-motion letters concerning contemplated summary judgment motions. (Dkt. #230). Defendant filed a pre-motion letter seeking leave to file a motion for summary judgment on October 17, 2019, and an amended pre-

motion letter on November 4, 2019. (Dkt. #364, 394). On November 6, 2019, the Court granted Defendant leave to file a motion for summary judgment. (Dkt. #401). Defendant filed her motion for summary judgment on January 24, 2020. (Dkt. #429-437). On March 11, 2020, the date by which Plaintiff was required to file her opposition papers, Plaintiff emailed her motion papers to the Court and Defendant, and stated that she had been unable to file these documents through the Court's electronic case filing system. (Dkt. #492). The Court accepted Plaintiff's submission, and directed Plaintiff to file those opposition papers on the public docket on or before March 26, 2020. (*Id.*).

On March 26, 2020, Plaintiff requested that the Court grant her leave to file certain unspecified documents in opposition to the motion for summary judgment — including a larger “opposition to motion for summary judgment” — that Plaintiff had not emailed to the Court on March 11, 2020. (Dkt. #477). The Court denied Plaintiff's request, and subsequently directed the Clerk of Court to file on the public docket only those opposition papers that Plaintiff had emailed to the Court on March 11, 2020. (Dkt. #492, 498). Defendant's motion for summary judgment was fully submitted to the Court on March 25, 2020, when she filed her reply papers. (Dkt. #473-475).

On February 25, 2020, Plaintiff requested leave to file a motion for summary judgment. (Dkt. #450). The Court ordered Plaintiff to file a letter on or before March 6, 2020, demonstrating good cause as to why she failed to file a pre-motion submission by the November 15, 2019 deadline. (Dkt. #455). Plaintiff filed a letter in support of her request to file an untimely motion for

summary judgment on March 6, 2020. (Dkt. #459). On March 18, 2020, the Court denied Plaintiff's application to file an untimely motion for summary judgment, finding that Plaintiff had not demonstrated good cause for her failure to abide by the Court's scheduling order and that Plaintiff had not demonstrated that her motion would have a reasonable likelihood of success. (Dkt. #471).

## DISCUSSION

### A. Applicable Law

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

Under Federal Rule of Civil Procedure 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).<sup>5</sup> 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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see also *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). In determining

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<sup>5</sup> The 2010 Amendments to the Federal Rules of Civil Procedure revised the summary judgment standard from a genuine "issue" of material fact to a genuine "dispute" of material fact. See Fed. R. Civ. P. 56, advisory comm. notes (2010 Amendments) (noting that the amendment to "[s]ubdivision (a) ... chang[es] only one word — genuine 'issue' becomes genuine 'dispute.' 'Dispute' better reflects the focus of a summary-judgment determination."). This Court uses the post-amendment standard, but continues to be guided by pre-amendment Supreme Court and Second Circuit precedent that refer to "genuine issues of material fact."

whether there are genuine issues of material fact, courts are “required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.” *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (quotation omitted).

“The moving party bears the initial burden of showing that there is no genuine dispute as to a material fact.” *CILP Assocs., L.P. v. PriceWaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (internal quotation marks and alteration omitted). But where “the burden of proof at trial would fall on the nonmoving party,” the moving party can shift the initial burden by “point[ing] to a lack of evidence to go to the trier of fact on an essential element of the nonmovant’s claim.” *Simsbury-Avon Pres. Soc’y, LLC v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009). If the movant has met its burden, “its opponent must do more than simply show that there is some metaphysical doubt as to the material facts” and, toward that end, “must come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal citations and quotation marks omitted). The nonmoving party may not 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).

In deciding a motion for summary judgment, “a district court generally ‘should not weigh evidence or assess the credibility of witnesses.’” *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 104 (2d Cir. 2011) (quoting

*Hayes v. N.Y.C Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996)). But to that general rule, the Second Circuit has recognized an exception:

in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine whether “the jury could reasonably find for the plaintiff,” and thus whether there are any “genuine” issues of material fact, without making some assessment of the plaintiff’s account.

*Jeffreys*, 426 F.3d at 554 (internal citation omitted) (quoting *Anderson*, 477 U.S. at 252). In this rare setting, a court considering a summary judgment motion may make credibility determinations. *SEC v. Jankovic*, No. 15 Civ. 1248 (KPF), 2017 WL 1067788, at \*8 (S.D.N.Y. Mar. 21, 2017). Even then, the Second Circuit has cautioned that, “[i]f there is a plausible explanation for discrepancies in a party’s testimony, the court considering a summary judgment motion should not disregard the later testimony because of an earlier account that was ambiguous, confusing, or simply incomplete.” *Jeffreys*, 426 F.3d at 555 n.2 (emphasis and citation omitted). Instead, such credibility assessments are to be reserved for “extraordinary cases, where the facts alleged are so contradictory that doubt is cast upon their plausibility.” *Rojas*, 660 F.3d at 106 (citation and quotation marks omitted). A district court “must ask not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented.” *Simpson v. City of New York*, 793 F.3d 259, 265 (2d Cir. 2015).

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## **2. Summary Judgment in Pro Se Cases**

In a *pro se* case, the court must liberally construe the *pro se* party's pleadings "to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). However, where, as here, an attorney represents herself in a proceeding, she is entitled to no special solicitude. *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) ("In addition, the appropriate degree of special solicitude is not identical with regard to all *pro se* litigants.... The ultimate extension of this reasoning is that a lawyer representing himself ordinarily receives no such solicitude at all.").

### **B. Analysis**

Defendant moves for summary judgment against Plaintiff's breach of contract claim, and in favor of her own counterclaim for breach of a fiduciary duty. In support, she argues that there is no genuine dispute of fact that: (i) the Talent Agreement is a non-binding agreement to agree; (ii) Plaintiff failed to perform under the Talent Agreement; (iii) Plaintiff failed to adduce evidence of damages; (iv) the Talent Agreement expired upon Mr. Leigh's death; (v) Plaintiff breached her fiduciary duty to Mr. Leigh by entering into the Talent Agreement, thus invalidating it; and (vi) Defendant did not breach the Talent Agreement. (*See generally* Def. Br.). Plaintiff opposes the motion and counters each of Defendant's arguments. Before the Court may proceed to analyzing the merits of these arguments, however, it must first address certain antecedent issues concerning Plaintiff's opposition papers.

**1. Plaintiff's Briefing and Evidentiary Deficiencies**

As an initial matter, Plaintiff's opposition papers fail to comply with Local Rule 56.1. Under that rule, a movant is required to identify admissible evidence in support of each factual assertion in his or her Rule 56.1 statement. *See* S.D.N.Y. Local Rule 56.1(d) ("Each statement by the movant ... pursuant to Rule 56.1(a) ... must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)."). Conversely, a nonmovant seeking to controvert these factual assertions must also cite to admissible evidence, and where properly supported facts in a Local Rule 56.1 statement are denied with only conclusory assertions, the court will find such facts to be true. *See id.*; *id.* at 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.").

While Plaintiff did furnish the Court with a Rule 56.1 Statement purporting to counter many of the factual assertions contained in Defendant's Rule 56.1 Statement, Plaintiff largely fails to cite to admissible evidence in support of her factual assertions. (*See generally* Pl. 56.1). Many, if not most, of the paragraphs in Plaintiff's Rule 56.1 Statement comprise conclusory assertions with no supporting evidence. (*Id.*). Nevertheless, even where a party offers incomplete compliance with the Local Rules, a court retains discretion "to consider the substance of the plaintiff's arguments." *Wali v. One Source*

Co., 678 F. Supp. 2d 170, 178 (S.D.N.Y. 2009) (citing *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (“[W]hile a court is not required to consider what the parties fail to point out in their Local Rule 56.1 Statements, it may in its discretion opt to conduct an assiduous review of the record even where one of the parties has failed to file such a statement.” (internal quotation marks omitted)). Given Plaintiff’s imperfect compliance with Local Rule 56.1, the Court will rely principally on its own assiduous review of the record.

After reviewing the exhibits that Plaintiff filed with her opposition papers, the Court concludes that much of the material contained therein is inadmissible. For instance, the declarations Plaintiff filed include inadmissible hearsay. Such evidence may not be used to defeat Defendant’s motion for summary judgment. *Selvam v. Experian Info. Sols., Inc.*, 651 F. App’x 29, 31-32 (2d Cir. 2016) (summary order) (holding that “the party opposing summary judgment ‘cannot rely on inadmissible hearsay in opposing a motion for summary judgment[ ] absent a showing that admissible evidence will be available at trial.’” (quoting *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 924 (2d Cir. 1985))).

In addition, certain of Plaintiff’s declarations attempt to offer testimony about events of which the declarant had no direct knowledge, in contravention of Federal Rule of Evidence 602. In his declaration Joseph Smith states that he “learned that Sir Trevor [Nunn] agreed to direct the MOLM London and Broadway Revivals subject to terms,” and, further, that he “learned that Mr. Leigh approved both Old Vic Productions as Co-Executive Producer with Co-

Executive Producer Robyn Abraham, and approved that Sir Trevor [Nunn] would direct both the West End and Broadway MOLM revival.” (Smith Decl. ¶ 8). But Mr. Smith had no firsthand knowledge of these facts, and could have only learned them from others. (See Smith Dep. (Def. Ex. 44) 39:1-3, 79:7-10 (Smith testifying that he never had a meeting with Plaintiff and Mr. Nunn and that he neither met nor corresponded with Mr. Leigh)). This evidence is also insufficient to defeat Defendant’s motion for summary judgment. *DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir. 2012) (“Further, where a party relies on affidavits or deposition testimony to establish facts, the statements ‘must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.’” (quoting Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602)).

Further, Plaintiff has submitted declarations from certain individuals holding themselves out to be experts in the field of stage production or entertainment law, including: Flody Suarez, an “experienced entertainment industry producer” (Suarez Decl. (Pl. Ex. D)); Adam Roebuck, an “investor and producer” in Broadway and London theatrical productions for more than 20 years (Roebuck Decl. (Pl. Ex. E)); and Frederick Mueser, an attorney “who has practiced in entertainment law since 1988” (Mueser Decl. (Pl. Ex. F)). None of these individuals purports to have firsthand knowledge of the drafting of the Talent Agreement or of Plaintiff’s performance of her contractual duties. Instead, Plaintiff appears to rely on their declarations as providing expert testimony on topics ranging from the scope of the Talent Agreement to the

profitability of an MOLM revival. But Plaintiff failed to disclose these declarations during the period for expert discovery. Rule 26(a)(2) of the Federal Rules of Civil Procedure requires parties to disclose the identities of expert witnesses and to produce those experts' reports "at the times and in the sequence directed by the court." Fed. R. Civ. P. 26(a)(2)(D). Pursuant to Rule 37(c)(1), "a party [who] fails to provide information or identify a witness as required by Rule 26(a) ... is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "The purpose of the rule is to prevent the practice of 'sandbagging' an opposing party with new evidence." *Ebewo v. Martinez*, 309 F. Supp. 2d 600, 607 (S.D.N.Y. 2004).

The only justification Plaintiff offers for her failure to disclose any expert witnesses in a timely fashion is that she "provided her [former] counsel [] with names of all experts," and thus that any failures to abide by the Court's deadlines are to be laid at counsel's feet. (Pl. 56.1 ¶¶ 121, 122). But this accusation is unsupported by any evidence and, having been raised for the first time in Plaintiff's opposition papers — nearly five months after Plaintiff's former counsel withdrew from the case — finds little credence. Further, the declarations of Mr. Suarez, Mr. Roebuck, and Mr. Mueser were signed on March 3, 2020, March 10, 2020, and March 5, 2020, respectively (*see* Suarez Decl.; Roebuck Decl.; Mueser Decl.); in other words, they were not signed until nearly five months after the time for expert discovery had concluded. In light of all of this, the Court finds that "their declarations are precisely the type of

‘sandbagging’ that Rule 37(c)(1) is designed to prevent.” *Alexander v. Fidalgo*, No. 10 Civ. 8587 (AJN), 2013 WL 12316346, at \*3 (S.D.N.Y. Apr. 10, 2013). Plaintiff has not established that her failure to disclose the expert reports was substantially justified or harmless. Accordingly, to the extent they provide expert testimony, the declarations of Mr. Suarez, Mr. Roebuck, and Mr. Mueser are excluded from consideration in resolving Defendant’s motion for summary judgment.

Finally, portions of Plaintiff’s own declaration purport to relay information that Plaintiff gleaned from Mr. Leigh. (*See generally* Abraham Decl. (Pl. Ex. 1)). Defendant argues that this testimony must be precluded under New York’s dead man’s statute, which provides in relevant part:

Upon the trial of an action ..., a party or a person interested in the event ... shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person ..., concerning a personal transaction or communication between the witness and the deceased person ..., except where the executor, administrator, survivor, ... or person so deriving title or interest is examined in his own behalf, or the testimony of the ... deceased person is given in evidence, concerning the same transaction or communication.

N.Y. CPLR § 4519 (McKinney 2005). (*See* Def. Br. 11-13).

The Second Circuit has instructed that:

[a]lthough the Federal Rules of Evidence abolished many common-law rules governing witness competency, they expressly provide that state law determines what rules will apply in civil actions governed by state law. *See* Fed. R. Evid. 601. Because state law supplies the rules in diversity-of-citizenship cases, *see Erie Railroad Co. v. Tompkins*, 304 U.S. 64,

78-79 (1938), New York law, including its statute barring the testimony of certain interested witnesses, must be given effect.

*Rosenfeld v. Basquiat*, 78 F.3d 84, 88 (2d Cir. 1996). The dead man's statute applies, under its plain language, "[u]pon the trial of an action," and under New York practice, the statute may not be asserted to exclude evidence used in opposition to a motion for summary judgment. See *Clark v. Meyer*, 188 F. Supp. 2d 416, 420-21 (S.D.N.Y. 2002) (citations omitted). Significantly, however, the evidence submitted on a motion for summary judgment — both in support of and in opposition to the motion — "must set forth facts that would be admissible in evidence if offered at trial. Thus, irrespective of how New York might decide this question, the federal rule requires exclusion of evidence on summary judgment motions which the dead man's statute would exclude at trial." *Pro Bono Invs., Inc. v. Gerry*, No. 03 Civ. 4347 (JGK), 2005 WL 2429777, at \*6 (S.D.N.Y. Sept. 30, 2005) (quoting *Clark*, 188 F. Supp. 2d at 420).

Stated simply, if Plaintiff's testimony would be excluded at trial, it cannot be used to oppose Defendant's motion for summary judgment. Accordingly, to the extent that Plaintiff's declaration offers "knowledge which [she] has gained by the use of [her] senses from the personal presence of the deceased," such knowledge is excluded from consideration in resolving the pending motion.

*Griswold v. Hart*, 205 N.Y. 384, 395 (1912).

**2. The Court Grants Defendant's Motion for Summary Judgment as to Plaintiff's Breach of Contract Claim**

Having determined which portions of Plaintiff's opposition papers may be considered, the Court now turns to the merits of Defendant's motion. Under

New York law, the elements of a claim for breach of contract are “[i] the existence of an agreement, [ii] adequate performance of the contract by the plaintiff, [iii] breach of contract by the defendant, and [iv] damages.” *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996).<sup>6</sup>

Defendant argues that Plaintiff’s breach of contract claim must fail because there is no genuine dispute of material fact that the second, third, and fourth elements of a breach of contract claim are not met. (*See generally* Def. Br.). She also offers several arguments why the Talent Agreement is unenforceable, including that it is a personal services contract; it is an unenforceable agreement to agree; and Plaintiff breached fiduciary duties she owed to Mr. Leigh by entering into the Talent Agreement. (*Id.*). For her part, Plaintiff dedicates some pages of her opposition brief attempting to refute Defendant’s arguments. But Plaintiff’s principal argument is framed in the offensive: Plaintiff claims that Mr. Leigh was in violation of Talent Agreement from the moment he signed it, because he had previously contracted to give the production rights to MOLM to other producers. (Pl. Opp. 6-8).

The chronology of Plaintiff’s dealings with Mr. Leigh is thus important to the resolution of this motion; the Court must consider not only whether the Talent Agreement was breached, but which party breached the Agreement first. As such, the Court begins by addressing the validity of the Contract, and then

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<sup>6</sup> New York law governs the instant dispute pursuant to the choice of law provisions of the Talent Agreement. (Pl. Ex. A). Additionally, both parties have relied upon New York law in their briefing. *See Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 175 (2d Cir. 2000) (“Since no party has challenged the choice of New York [ ] law, all are deemed to have consented to its application.” (citations omitted)).

examines each alleged breach in sequence, before analyzing Defendant's other arguments for summary judgment.

**a. The Talent Agreement Is a Valid, Enforceable Contract**

Neither party disputes that the Talent Agreement was signed by Mr. Leigh and Plaintiff. Defendant argues that the Talent Agreement is nevertheless unenforceable, because it was not an agreement, and was instead a "preliminary agreement in advance of a formalized production agreement." (Def. Br. 20). Defendant has introduced the expert testimony of a Broadway producer and an entertainment lawyer to support her argument that the Talent Agreement lacks certain provisions that are customarily included in a production agreement, and that it is not uncommon for parties to enter into preliminary agreements in advance of production agreements. (*Id.*; Dkt. #432 ("Breglio Report"); Dkt. #434 ("Kladitis Report")).

In its earlier decision denying Defendant's motion to dismiss Plaintiff's breach of contract claim, the Court found that the Talent Agreement was not merely an unenforceable, preliminary agreement to agree. (June 14, 2018 Tr. 10:16-14:14). The Court analyzed each of the five factors that *Teachers Insurance & Annuity Association of America v. Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987), and *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989), identified as being useful "to determine whether a preliminary manifestation of assent was a binding preliminary agreement." (June 14, 2018 Tr. 10:16-14:14). But the Court's conclusion is best summarized by its finding that Defendant "offer[ed] no compelling reason why

this contract must be a complete production contract in order to be enforceable.... Mr. Leigh could have put in language that the Agreement was not binding, but that is not what happened.” (*Id.* at 12:2-19).

In issuing that decision, the Court left open the possibility that Defendant could establish through expert testimony that the Talent Agreement was nothing more than a preliminary agreement to agree. (June 14, 2018 Tr. 13:6-13). But now, having reviewed the expert testimony on the point, the Court concludes that Defendant has not met that burden. The Court accepts that the Talent Agreement may have been unusual in the industry, and that a second, more detailed production agreement would have been required to iron out the specifics of the parties’ arrangement (should Plaintiff have performed her contractual obligations). But this does not suggest that the Talent Agreement is itself unenforceable. *See Tribune*, 670 F. Supp. at 498 (“The parties can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement.”).

“The best evidence of what the parties intended ‘is what they say in their writing.’” *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 122 (2d Cir. 2014) (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002)). Here, the parties plainly wrote that, upon Plaintiff’s performance, Mr. Leigh would not only grant his rights, but would ensure that the other two Rights Holders granted their rights, to Plaintiff to produce an MOLM revival. (Pl.

Ex. A). The Talent Agreement did not require that a full production agreement be entered into before any rights would be conferred. Thus, the Court finds that the Talent Agreement was a valid and enforceable contract.

**b. No Reasonable Jury Could Find That Mr. Leigh Violated the Talent Agreement by Entering into Competing Production Agreements with Other Producers**

The Talent Agreement includes a paragraph requiring Mr. Leigh to “suspend ... any and all present and potential 3rd party transactions and/or contracts regarding any and all London and/or UK MOLM productions of any kind ... and to fully protect [Plaintiff] against any and all potential 3rd party interference of the MOLM rights granted pursuant to this agreement.” (Pl. Ex. A). Plaintiff argues that Mr. Leigh was in violation of this paragraph from the moment he signed the Talent Agreement because, unbeknownst to Plaintiff, Mr. Leigh had already entered into at least one other contract with another producer, giving that producer rights to produce MOLM. (Pl. Opp. 7-8; Abraham Decl. ¶¶ 20, 22, 24). Plaintiff claims that, had she known that Mr. Leigh had already signed a competing production agreement with another producer, she would never have signed the Talent Agreement. (Abraham Decl. ¶¶ 37, 38). If true, Plaintiff’s allegations suggest that Mr. Leigh breached the Talent Agreement right from the start.

Upon closer examination, however, the Court concludes that Plaintiff’s allegations lack evidentiary support. Plaintiff cites to only a single piece of evidence to support her argument: the February 24, 2020 declaration of Alan Honig. (Honig Decl.). In her declaration, Plaintiff claims that Mr. Honig

testified that, prior to entering into the Talent Agreement with Plaintiff, Mr. Leigh had entered into a production agreement with producer Manny Kladitis for the same MOLM production rights during the same time period. (Abraham Decl. ¶ 20).<sup>7</sup> But Plaintiff misrepresents Mr. Honig's testimony: Mr. Honig did testify that a draft production agreement between Mr. Leigh and Mr. Kladitis existed in January 2014. (Honig Decl. ¶¶ 4-6). But Mr. Honig never claimed that the agreement was signed — in fact, he testified that he did not know what happened with the draft production agreement. (*Id.*).

Mr. Honig's declaration is clarified by his deposition testimony of January 14, 2019. (*See* Honig Dep. (Def. Ex. 3)). There, in speaking about the draft agreement with Mr. Kladitis, Mr. Honig testified that “[t]here was a contract to do the production of *Man of La Mancha* in the United States, that if my recollection is correct, that Manny Kladitis was I think going to be the producer.” (*Id.* at 143:24-144:3). But when asked whether the contract was signed, Mr. Honig said, “[n]o, I don't think it was a signed contract,” and recalled that “[t]here was no contract in effect” when the Talent Agreement was signed. (*Id.* at 144:4-10; *see also id.* at 156:5-9 (“Q. At this time Manny had no contract to work on a first class production in New York. Isn't that right?

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<sup>7</sup> Plaintiff also alludes to the possibility of a third production agreement with producer Fred Zollo. (Pl. Opp. 7-8). But Plaintiff does not claim that any production agreement with Mr. Zollo was actually entered into, and no record evidence exists to suggest that such a production agreement existed.

A. You say Manny had no contract to work on. Right. He didn't have a contract. No.")).<sup>8</sup>

Any doubt as to whether Mr. Leigh had entered into a production agreement with Mr. Kladitis is resolved by Mr. Kladitis's own deposition testimony. (Kladitis Dep. (Dkt. #475-2)). There, Mr. Kladitis stated that the production agreement for his involvement in an MOLM production was, in fact, never signed. (*Id.* at 57:19-21). Given the absence of evidence that Mr. Leigh entered into *any* production agreement that competed with the Talent Agreement, including with Mr. Kladitis, there can be no genuine dispute as to this issue. No reasonable jury could find that Mr. Leigh violated the Talent Agreement by entering into a competing production agreement.<sup>9</sup>

**c. Plaintiff Failed to Perform Her Contractual Obligations**

The Court next turns to Defendant's argument that Plaintiff did not herself perform under the Talent Agreement. (Def. Br. 10-20). On this point, the parties fundamentally disagree over what the Talent Agreement obligated Plaintiff to do. Defendant argues that Plaintiff was required to: (i) obtain professional interest in an MOLM revival from a British theatrical stage

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<sup>8</sup> The Court notes that the draft contract between Mr. Leigh and Mr. Kladitis concerned production rights to an MOLM revival in the United States. (Honig Dep. 143:24-144:3). Even if such a contract had been executed, it does not appear that it would have violated the Talent Agreement, which gave Plaintiff exclusive rights regarding an MOLM revival in the United Kingdom only. (Pl. Ex. A).

<sup>9</sup> Plaintiff's request for leave to file an untimely motion for summary judgment makes clear that she believed she was entitled to summary judgment in favor of her breach of contract claim because Mr. Honig's declaration established that Mr. Leigh had violated the Talent Agreement by entering into one or more production agreements with other parties. (Dkt. #452, 459). For the reasons stated herein, Plaintiff's interpretation of Mr. Honig's declaration was inaccurate. Thus, Plaintiff's proposed motion for summary judgment would have failed on the merits, had it been timely filed.

director, a recognized co-producer from the United States or the United Kingdom, and a well-known actor (together, the “Talent”); (ii) request terms, conditions, and dates of availability from the Talent; and (iii) obtain those terms, conditions, and dates of availability so they could be relayed to Mr. Leigh. (Def. Br. 15-20). Plaintiff’s summary judgment briefing does not present a clear theory as to what she was required to do, but in her opposition papers to Defendant’s earlier motion to dismiss, Plaintiff had argued that she was merely required to obtain interest from the Talent and request “terms, conditions, and dates of availability,” but not to obtain or negotiate any such terms. (Dkt. #60 at 16-17).

As the Court determined in resolving Defendant’s motion to dismiss, the Talent Agreement “did not require Plaintiff to iron out every detail of the Talent’s terms or have them formally signed on to the revival. Nor did the Plaintiff have to negotiate any Talent terms or conditions, she simply had to request them.” (June 14, 2018 Tr. 16:17-21). In the absence of a compelling argument from Defendant to deviate from its prior interpretation of the Talent Agreement, the Court will hew to it.<sup>10</sup> Plaintiff was required to obtain interest

<sup>10</sup> Citing to the Court’s prior statement that the Talent Agreement is not the “clearest contract” (June 14, 2018 Tr. 3:25-4:1), Defendant invokes the doctrine of *contra proferentem* to argue that any ambiguity in the contract should be construed against Plaintiff, because she was the drafter of the contract. (Def. Br. 18-20 (citing *McCarthy v. Am. Int’l Group, Inc.*, 283 F.3d 121, 124 (2d Cir. 2002) (“New York follows the well-established *contra proferentem* principle which requires that ‘equivocal contract provisions are generally to be construed against the drafter.’”))). But the doctrine of *contra proferentem* is not applicable here, because the contract is not ambiguous as to whether Plaintiff was required to obtain and negotiate terms, conditions, and dates of availability from the Talent.

Further, a genuine dispute of material fact exists concerning who drafted the Talent Agreement. To be sure, certain evidence suggests that Plaintiff was the drafter. (See Def. 56.1 ¶¶ 47, 44, 55, 56). But this evidence, though compelling, is not definitive; it

from the Talent and to request their terms, conditions, and dates of availability, but she was not required to obtain or negotiate those terms. As it happens, the Court finds that Plaintiff failed to perform even these more limited tasks.

**i. Plaintiff Failed to Obtain Interest and to Request Terms, Conditions, and Dates of Availability from a Well-Known Actor**

The text of the Talent Agreement unambiguously required Plaintiff to obtain professional interest and request terms, conditions, and dates of availability from a well-known actor in addition to a director and a co-producer. (Pl. Ex. A). In opposing Defendant's motion to dismiss, Plaintiff had claimed that she was not in fact required to obtain interest from an actor, citing to an email that Plaintiff had received from Mr. Leigh's assistant in which Mr. Leigh supposedly stated that, if Plaintiff could obtain Mr. Nunn's confirmation to direct MOLM in writing, Mr. Leigh would agree to defer all casting decisions to Mr. Nunn. (Dkt. #60 at 7 (citing Am. Compl. ¶ 74 and Ex. 9)). The Court determined that Plaintiff had plausibly alleged that this email operated as a modification of the contract language and that, through the email, Mr. Leigh had deferred all casting decisions to Mr. Nunn, thus relieving Plaintiff of the

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establishes that Plaintiff sent Mr. Leigh drafts of the Talent Agreement, but the extent to which Mr. Leigh participated in the drafting of the first agreement and the editing of subsequent iterations is not obvious. (*See id.*). For her part, Plaintiff has consistently testified that it was Mr. Leigh who drafted the Talent Agreement. (Abraham Decl. ¶ 9). And while New York's dead man's statute would preclude Plaintiff from testifying concerning whether Mr. Leigh dictated and/or drafted the Talent Agreement, it would not prevent her from testifying that she herself did not draft it. In light of the general presumption against weighing credibility of a witness at the motion for summary judgment stage, the Court finds that Plaintiff's testimony on this point is sufficient to establish a genuine dispute as to whether Plaintiff drafted the Talent Agreement.

obligation to find an interested, well-known actor. (June 14, 2018 Tr. 16:21-17:13).

In opposing Defendant's motion for summary judgment, Plaintiff does *not* argue that she was relieved of the obligation to find a well-known actor with interest in performing in an MOLM revival. In a similar vein, the email from Mr. Leigh's assistant, purporting to modify the terms of the Talent Agreement, is not amongst Plaintiff's exhibits. (*See generally* Pl. Opp.; Pl. 56.1; Pl. Ex.). Nor could Plaintiff have relied upon that email; it was one of the 33 documents that the Court excluded as evidence when it granted Defendant's motion for sanctions, in light of the fact that the documents had indicia of fraudulent provenance. (*See* Dkt. #371 (order memorializing decision); Dkt. #409 (transcript of decision); Dkt. #234). In short, the only piece of evidence suggesting that Plaintiff was not required to obtain interest from a well-known actor may not be relied upon in resolving this motion.

Absent that, the Court is left with only the Talent Agreement itself, which Plaintiff agrees is the "best evidence of M[r.] Leigh's intent[.]" (Pl. 56.1 ¶¶ 5, 6). The Talent Agreement plainly required Plaintiff to obtain interest from a director, a co-producer, and a well-known actor, and to request terms, conditions, and dates of availability from all three. (Pl. Ex. A; Pl. 56.1 ¶¶ 49, 60). But while Plaintiff has argued that she obtained interest from a director, Mr. Nunn, and a co-producer, Old Vic Productions, she fails to argue that she obtained interest from or requested terms, conditions, and dates of availability from an actor. (*See generally* Pl. Opp.; Pl. 56.1). More to the point, no evidence

exists to suggest that Plaintiff fulfilled this contractual obligation. (Def. Br. 14; Def. Reply 10). This alone establishes as a matter of law that Plaintiff did not fully perform under the Talent Agreement. Her breach of contract claim must fail. *See Harsco Corp.*, 91 F.3d at 348 (holding that “adequate performance of the contract by the plaintiff” is an element of a breach of contract claim).

**ii. Plaintiff Failed to Request Terms, Conditions, and Dates of Availability from a Director or a Co-Producer**

Additionally, Plaintiff has failed to introduce evidence that she fully performed with regard to the two other categories of “Talent” addressed in the Talent Agreement: “a leading British theatrical director” and “a recognized US or UK co-producer.” (Pl. Ex. A; Def. Br. 10-14). The record does suggest that Plaintiff was able to obtain initial interest from Old Vic Productions, a production company based in London, in co-producing a 2015 MOLM revival. (Smith Decl. ¶¶ 11, 12). And Plaintiff has introduced a document that appears to be a facsimile from Mr. Nunn stating that he would agree in principle to directing a 2015 MOLM revival. (Pl. Ex. C). Putting aside authentication issues, which might well preclude the facsimile from being admitted into evidence at trial, the Court accepts the document as being sufficient to create a genuine dispute as to whether Plaintiff obtained Mr. Nunn’s initial interest in the revival.

Even so, there is no evidence that, having obtained initial interest from Mr. Nunn and Old Vic Productions, Plaintiff took the next, crucial step of requesting their terms, conditions, and dates of availability. Mr. Smith, the

sole witness identified by Plaintiff as having knowledge of her interactions with Old Vic Productions, testified that he and Plaintiff never discussed terms or conditions of Old Vic Production's involvement in an MOLM revival. (Smith Dep. 33:9-11 ("I mean, we — just to be clear, we never got to the place where we discussed specific terms."); *id.* at 34:4-11 ("Q: Did you discuss any — did you discuss any of the financial needs that would be required for this production? A: Not in any detail at all. I may have said revivals of musicals cost between a range of X to Y million, or some such, but definitely there was no exchange of what our services would cost, what the production would cost, and all those things."); *id.* at 77:10-17 ("Q: Did Ms. Abraham ask you for the terms and conditions under which Old Vic Productions would be involved as a co-producer? A: The ones I just outlined? Q: Yes? A: Or a scope of the ones I just outlined? Q: Yes? A: No.")).<sup>11</sup> Nor is there any testimony from Plaintiff or Mr. Smith that he was asked to provide Old Vic Production's dates of availability for co-producing a 2015 revival.<sup>12</sup>

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<sup>11</sup> Mr. Smith did testify that he believed he would have told Plaintiff that Old Vic Production's interest in co-producing an MOLM revival would have been conditioned on it acting as producer and general manager — that Old Vic Productions would be in charge of the key decisions as well as the day-to-day management of the show. (Smith Dep. 41:11-43:7). Even assuming that Mr. Smith did convey that information to Plaintiff, this alone would not satisfy Plaintiff's obligation to request Old Vic Productions' terms, conditions, and dates of availability.

<sup>12</sup> In response to Defendant's argument that Plaintiff failed to request terms, conditions, or dates of availability from Old Vic Productions, Plaintiff claims that "Defendants precluded any discussion regarding deal points with Mr. Smith, the Executive Producer of The Old Vic, because Defendants breached Plaintiff's Exclusive Agreement and refused to transfer the necessary MOLM rights to Plaintiff." (Pl. 56.1 ¶ 71). Not so. The Talent Agreement required Plaintiff to request terms, conditions, and dates of availability *before* the production rights would transfer to Plaintiff. (Pl. Ex. A). Plaintiff's argument that Defendant's failure to transfer the rights prevented her from performing under the Talent Agreement imagines a catch-22 where none exists. What is more, Plaintiff fails to provide a cite to support this paragraph of her Rule 56.1

With regards to Mr. Nunn, the only evidence available would suggest that Plaintiff and Mr. Nunn met on at least one occasion, and that Mr. Nunn “accept[ed] in principle” the offer to serve as director of a 2015 MOLM revival. (Pl. Ex. C; Def. Ex. 48, 49). There is no evidence to suggest that Plaintiff requested Mr. Nunn’s terms, conditions, or dates of availability. (Def. Br. 14-15; Def. 56.1 ¶ 80).<sup>13</sup>

Defendant has satisfied her burden of establishing that there is no evidence upon which a reasonable jury could find that Plaintiff fully performed under the Talent Agreement. Thus, Defendant’s motion for summary judgment against Plaintiff’s breach of contract claim is granted. *See Simsbury-Avon Pres. Soc’y, LLC*, 575 F.3d at 204.

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Statement. The Court presumes that Plaintiff is thinking of Mr. Smith’s Declaration, where he testified that Plaintiff could not have “engaged in Revival Production term discussions given [the] MOLM rightsholders[’] refusal to transfer the necessary MOLM rights.” (Smith Decl. ¶ 14). But, as the Court has already held, the Talent Agreement did not require Plaintiff to negotiate terms and conditions with Old Vic Productions to perform under the Talent Agreement. She was merely required to request Old Vic Productions’ terms, conditions, and dates of availability. Mr. Smith does not suggest that Plaintiff would have been incapable of making such a preliminary request.

<sup>13</sup> Plaintiff argues that the dearth of evidence as to Mr. Nunn was caused by Defendant’s failure to serve Mr. Nunn with notice of his scheduled deposition in London in accordance with English law. (Pl. 56.1 ¶¶ 80, 81). As support, Plaintiff cites to a declaration provided by her English attorney, Victoria Simon-Shore. (*Id.*). But Plaintiff overstates Ms. Simon-Shore’s testimony; Ms. Simon-Shore stated that there was a question whether service had been effective, not that service had in fact been defective. (Simon-Shore Decl. (Ex. J) ¶ 4). Even if the service had been defective, the Court has already addressed this issue, and determined that any fault for the lack of a deposition of Mr. Nunn lies with Plaintiff. Mr. Nunn offered to appear for a deposition the day after his deposition had been scheduled, and all parties, including Plaintiff’s counsel, were available at that time. (Pl. 56.1 ¶¶ 82, 83). Nevertheless, Plaintiff refused to let the deposition go forward without offering any justification for this choice. (*Id.* at ¶ 83). When the parties brought this issue to the Court’s attention, the Court found that Plaintiff had refused a reasonable accommodation that would have allowed her to depose Mr. Nunn with minimal additional cost to the parties. (Dkt. #389, 394). In light of this, the Court refused Plaintiff’s request to extend fact discovery to allow for a further rescheduling of Mr. Nunn’s deposition. (Dkt. #389, 394).

**d. Plaintiff Failed to Adduce Sufficient Evidence of Expectation Damages**

Even if Plaintiff had fully performed under the Talent Agreement, Defendant argues that her breach of contract claim would fail because Plaintiff failed to establish that she suffered damages. (Def. Br. 6-9). Defendant's briefing on this point focuses on the \$250,000,000.00 in lost profits Plaintiff claims she suffered as a result of Defendant's alleged breach. (*Id.*; Def. Ex. 19).

Lost profits are general damages when "the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109 (2d Cir. 2007). On the other hand, lost profits are categorized as consequential damages when the "non-breaching party suffers loss of profits on collateral business arrangements." *Id.* Here Plaintiff's alleged lost profits are consequential damages; she claims she was deprived of money that she might have earned from staging the MOLM revival, a collateral business arrangement, but the Talent Agreement itself did not guarantee that any money would be paid.<sup>14</sup> "To recover lost profits [as consequential] damages for breach of contract under New York law, a plaintiff must make three showings: [i] the

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<sup>14</sup> Plaintiff does not argue whether her lost profits damages are consequential or general damages, and the Court accordingly understands that she has conceded this point. (See generally Pl. Opp.). But even if Plaintiff's lost profits were general damages, she would still be required to prove the existence of lost profits with reasonable certainty. See *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007) ("[General] damages, however, must be not merely speculative, possible, and imaginary, but they must be *reasonably certain* and such only as actually follow or may follow from the breach of the contract. 'Certainty,' as it pertains to general damages, refers to the *fact* of damage, not the amount." (internal citations omitted)). As explained herein, Plaintiff has failed to establish the existence of lost profits with reasonable certainty. Thus, her claim for lost profits damages would fail, regardless of whether construed as a claim for general or consequential damages.

damages were caused by the breach; [ii] the damages are provable with reasonable certainty; and [iii] the damages were within the contemplation of the parties at the time of contract.” *Atias v. Sedrish*, 133 F. App’x 759, 760 (2d Cir. 2005) (summary order). “In addition to proving that the *existence* of damages is reasonably certain ... a party claiming consequential damages must also prove the *amount* of damage with ‘reasonable certainty.’” *Tractebel Energy Mktg., Inc.*, 487 F.3d at 110-11 (quoting *Kenford Co., Inc. v. Cty. of Erie*, 67 N.Y.2d 257, 261 (1986)).

The Court finds that Plaintiff has failed to establish the existence of damages with reasonable certainty. As Defendant’s experts aptly attest, theater productions are inherently risky ventures; Broadway and West End shows lose money more often than they turn a profit. (See Breglio Report at 9; Kladitis Report at 5; Stark Report (Dkt. #435) at 9). Even more to the point, the experts testified that two recent revivals of MOLM lost money. (Stark Report at 10-11; Kladitis Report at 5).

Plaintiff’s only attempt to establish that a 2015 MOLM revival would have been profitable is to argue that Mr. Nunn was a very successful director, and had produced a number of profitable theatrical shows. (Abraham Decl. ¶¶ 6-8). Plaintiff claimed that she expected an MOLM revival to be as successful as Mr. Nunn’s productions of *Les Miserables*, *Cats*, and *Starlight Express*, which she claims earned billions of U.K. pounds. (*Id.*).

As an initial matter, Plaintiff’s argument is premised on an assumption that Mr. Nunn would have directed the MOLM revival, had it been produced.

But Mr. Nunn had only agreed “in principle” to direct the revival (Def. Ex. 48, 49); that Plaintiff and Mr. Nunn would have been able to agree to terms and conditions and enter into a binding contract for him to direct the revival requires a leap of logic that Plaintiff does not attempt to support. But even if Mr. Nunn had directed the revival, Defendant has introduced evidence that some of the shows Mr. Nunn has directed were financial failures. (Stark Report at 12; Def. Reply 6-7). Plaintiff has failed to introduce evidence that would make the existence of lost profit damages any more than speculative, let alone evidence that would establish the existence of damages with reasonable certainty. *See Schonfeld v. Hilliard*, 218 F.3d 164, 174 (2d Cir. 2000) (“Subject as they are to the changing whims and artistic tastes of the general public, claims for profits lost in unsuccessful entertainment ventures have received a chilly reception in the New York courts.” (citing *Kenford Co.*, 67 N.Y.2d at 262)).

Even if Plaintiff had established with reasonable certainty that she would have suffered some lost profits as a result of the purported breach, no evidence exists that would permit a factfinder to calculate with any certainty just how great the damages were. Plaintiff’s estimation that she would have earned \$200,000,000.00 for a long-term run of an MOLM revival is based upon the revenue she claims — without substantiation — that certain of Mr. Nunn’s other productions generated. (Abraham Decl. ¶ 8). This unadorned speculation cannot pass for reasonable certainty. In light of this, the Court concludes that Plaintiff’s claim for lost profits must fail: “Projections of future profits based upon ‘a multitude of assumptions’ that require ‘speculation and

conjecture' and few known factors do not provide the requisite certainty.”

*Schonfeld*, 218 F.3d at 172 (quoting *Kenford Co.*, 67 N.Y.2d at 262).

But while Defendant argues (and the Court agrees) that Plaintiff's claim for punitive damages and attorneys' fees and costs must also fail (Def. Br. 6 n.3),<sup>15</sup> Defendant does not address Plaintiff's claim for reliance damages. “Under New York law, when expectation damages defy precise calculation, reliance damages are the appropriate remedy.” See *Nature's Plus Nordic A/S v. Nat. Organics, Inc.*, 98 F. Supp. 3d 600, 610 (E.D.N.Y. 2015) (“*Nature's Plus I*”), *aff'd*, 646 F. App'x 25 (2d Cir. 2016) (summary order) (“*Nature's Plus II*”) (quotation omitted); see also *Farash v. Sykes Datatronics, Inc.*, 59 N.Y.2d 500, 504-05 (1983). “Reliance damages ... are intended to ‘place plaintiffs in the same position as they were prior to the execution of the contract[.]’” *Summit Props. Int'l, LLC v. Ladies Prof'l Golf Ass'n*, No. 07 Civ. 10407 (LBS), 2010 WL 4983179, at \*5 (S.D.N.Y. Dec. 6, 2010) (quoting *V.S. Int'l, S.A. v. Boyden World*

<sup>15</sup> Plaintiff's initial disclosures stated that she intended to seek punitive damages and various types of attorneys' fees and litigation costs in amounts “to be determined” at a later date. But, “under New York law, punitive damages are recoverable in a breach of contract action where the “conduct constituting, accompanying, or associated with the breach of contract” is (i) actionable as an independent tort, (ii) sufficiently egregious, and (iii) “part of a pattern of similar conduct directed at the public generally.” *Icebox-Scoops, Inc. v. Finanz St. Honore, B.V.*, 715 F. App'x 54, 56 (2d Cir. 2017) (summary order) (quoting *Rocanova v. Equitable Life Assur. Soc'y of the U.S.*, 83 N.Y.2d 603, 613 (1994)). Plaintiff has made no effort to argue that her breach of contract claim would fall within this exception to the rule against punitive damages. The alleged breach of contract was not actionable as an independent tort, especially egregious, or part of a pattern of conduct directed at the public. Thus, punitive damages are unavailable. Further, “[i]n New York, the prevailing litigant ordinarily cannot collect ... attorneys' fees from its unsuccessful opponents.... Attorneys' fees are treated as incidents of litigation, rather than damages.... The exception is when an award is authorized by agreement between the parties or by statute or court rule.” *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 584 (2018) (quoting *Congel v. Malfitano*, 31 N.Y.3d 272, 290-91 (2018)). Plaintiff's breach of contract claim does not fall within this exception, so she may not recover attorneys' fees or costs.

*Corp.*, 862 F. Supp. 1188, 1198 (S.D.N.Y. 1994)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1981) (damages for “reliance interest” put promisee “in as good a position as he would he would have been in had the contract not been made”). Reliance damages allow a plaintiff to recover “his expenses of preparation and of part performance, as well as other foreseeable expenses incurred in reliance upon the contract.” *Bausch & Lomb, Inc. v. Bressler*, 977 F.2d 720, 729 (2d Cir. 1992).

Under New York law, “a plaintiff may recover ‘damages based on [her] reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.’” *World of Boxing, LLC v. King*, 634 F. App’x 1, 3 (2d Cir. 2015) (summary order) (quoting *St. Lawrence Factory Stores v. Ogdensburg Bridge & Port Auth.*, 13 N.Y.3d 204, 208, (2009)). “[R]eliance damages are recoverable provided they are proximate in effect, and are not speculative or uncertain in character and were fairly within the contemplation of the parties when the [contract] was made, or might have been foreseen as a consequence of a breach of its covenants.” *Nature’s Plus I*, 98 F. Supp. 3d at 610 (internal quotation omitted).

In her initial disclosures, Plaintiff claimed that she was entitled to \$1,261,388 in “[e]xpenses, fees, and other costs related to Plaintiff’s efforts to obtain and secure performance under the [Talent Agreement].” (Def. Ex. 19). A careful review of the record discloses that Plaintiff has failed to substantiate

this dollar amount outside of her declaration, in which she testifies that she stayed in London at the Savoy Hotel while meeting with potential Talent trying to perform under the Talent Agreement, and expended more than one hundred thousand dollars in doing so. (Abraham Decl. ¶ 16).<sup>16</sup>

There exists at least a genuine dispute of material fact concerning whether, when they signed the Talent Agreement, Mr. Leigh and Plaintiff contemplated that Plaintiff would expend money flying to London and staying at a hotel there. The Talent Agreement itself provides that “[u]pon mutual execution of this Agreement ... Abraham agrees to promptly fly to London and contact leading British directors and international actors.” (Pl. Ex. A). Thus, money Plaintiff spent flying to London, staying in London, and meeting with actors and directors might plausibly fall within the category of reliance damages.

However, the Court notes that Plaintiff’s evidence that she suffered any such reliance damages is limited to her own testimony; she failed to produce any documentation to prove the amount of money she expended in staying at the Savoy Hotel, or in otherwise attempting to perform under the Talent Agreement. The lack of such evidence would certainly undermine the

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<sup>16</sup> Plaintiff also claims that she spent more than \$100,000 in traveling for and participating in this litigation. (Abraham Decl. ¶ 17). These expenses were not fairly within the contemplation of the parties at the time they entered into the Talent Agreement, and thus they are not recoverable as reliance damages.

Finally, Plaintiff claims that she was ordered to pay “more than \$100,000” in additional attorneys’ fees and costs. (Abraham Decl. ¶ 18). The Court cannot discern whether Plaintiff is speaking to a settlement agreement that she entered into with her former attorneys, which required Plaintiff to pay fees owed to them, or the Court’s entry of a sanctions order against Plaintiff, requiring her to pay attorneys’ fees and costs to Defendant. Neither event is recoverable by Plaintiff as damages.

persuasiveness of Plaintiff's claim to more than \$100,000 in reliance damages. "However, regardless of the weight of the reliance claim, it does present a triable issue of fact." *Clarke v. Trustees of Columbia Univ. of City of N.Y.*, No. 95 Civ. 10627 (PKL), 1996 WL 609271, at \*8 (S.D.N.Y. Oct. 23, 1996). Plaintiff would have firsthand knowledge of money she spent in attempting to perform. If Plaintiff were to prevail on her breach of contract claim — and for the reasons outlined above, she could not — and a factfinder found her to be credible — a determination that the Court cannot make at this stage in the proceedings, see *Rojas*, 660 F.3d at 104 — the jury could award her damages based upon her testimony alone. See *Nature's Plus II*, 646 F. App'x at 29 (holding that, even with conflicting evidence on the point, "the jury reasonably could have concluded that, by awarding [plaintiff] its requested out-of-pocket expenses, it was restoring [plaintiff] to the position it was in before the contract was formed").

In light of this, the Court concludes that, were Plaintiff's breach of contract claim to survive to trial, summary judgment would be granted against Plaintiff on all forms of damages she seeks except reliance damages.

**e. The Talent Agreement Was Not a Personal Services Contract**

Having discussed Defendant's arguments regarding the formation of and performance under the Talent Agreement, the Court now considers several of her subsidiary arguments. To begin, Defendant argues that the Talent Agreement was a contract for personal services that expired on Mr. Leigh's death. The general rule in New York, as in other jurisdictions, is that "in the

absence of express words, ... the parties to a contract intend to bind, not only themselves, but their personal representatives.” *Buccini v. Paterno Const. Co.*, 253 N.Y. 256, 259 (1930) (Cardozo, C.J.); accord *Minevitch v. Puleo*, 193 N.Y.S.2d 833, 836 (1st Dep’t 1959). But “[t]his general rule does not apply to ‘personal services’ contracts,” *Artists Rights Enf’t Corp. v. Estate of King (“King I”)*, 370 F. Supp. 3d 371, 381-82 (S.D.N.Y. 2019) (citing *Minevitch*, 193 N.Y.S.2d at 836), the central feature of which is that the contract primarily entails the skill and labor of a particular individual, see, e.g., *Steinbeck v. Steinbeck Heritage Found.*, 400 F. App’x 572, 579 (2d Cir. 2010) (summary order) (citing *Buccini*, 253 N.Y. at 257-58). “In determining whether a contract is one for personal services, courts consider many factors, including: ‘[t]he importance of trust and confidence in the relation between the parties, the difficulty of judging the quality of the performance rendered and the length of time required for performance.’” *Artists Rights Enf’t Corp. v. Estate of King (“King I”)*, 224 F. Supp. 3d 231, 236 (S.D.N.Y. 2016) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. b (1981)). This inquiry can be “intensely fact oriented.” *Zink Commc’ns v. Elliott*, No. 90 Civ. 4297 (CSH), 1990 WL 176382, at \*17 (S.D.N.Y. Nov. 2, 1990).

Defendant argues that the Talent Agreement is a personal services contract because it provided that, upon Plaintiff’s performance, Mr. Leigh would obtain from the other Rights Holders, Ms. Wasserman and Ms. Darion, their written approval to grant Plaintiff sole and exclusive production rights to a 2015 MOLM revival in the United Kingdom. (Def. Br. 26-27; Pl. Ex. A).

Approval from at least one of these Rights Holders would be necessary to grant Plaintiff the production rights, due to the MBPC's majority-approval requirement. (Pl. 56.1 ¶ 5). From this, Defendant argues that only Mr. Leigh could obtain written approval from the other Rights Holders, and more specifically, that Mr. Leigh's relationship with Hellen Darion would enable him to obtain her approval. (Def. Br. 26-27). In support, Defendant relies upon testimony from Mr. Honig that Ms. Darion tended to defer to Mr. Leigh on artistic issues, because he was the last surviving Author, and that she frequently shared his opinions regarding matters pertaining to MOLM. (Pl. 56.1 ¶ 10).<sup>17</sup>

Ultimately, the Court is unconvinced by Defendant's argument. "The personal-services exception to the general rule that contracts survive death is based on the notion of impossibility — that it is impossible to effectuate the parties' intent where the performance contemplated is particular to the individuals involved." *King II*, 370 F. Supp. 3d at 381-82 (citing *Lacy v. Getman*, 119 N.Y. 109, 115-16 (1890), and Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 77:72 (4th ed. 2004)). While Mr. Leigh may have been best

<sup>17</sup> Plaintiff does not address Defendant's argument that the Talent Agreement is a personal services contract, except to claim that Mr. Leigh did not need to convince Ms. Darion to approve a production agreement, because Mr. Leigh held a power of attorney over Ms. Darion's MOLM rights. (Def. 56.1 ¶ 10). But the only evidence that Mr. Leigh held a power of attorney for Ms. Darion's rights comes from Plaintiff's declaration, in which she testifies that Mr. Leigh told her he held two thirds of the rights to MOLM and that Mr. Leigh "showed [her] his power of attorney of the rights of Hellen Darion." (Abraham Decl. ¶ 2). This testimony is inadmissible under the New York's dead man's statute, because it conveys "knowledge which [Plaintiff, an interested party,] has gained by the use of [her] senses from the personal presence of the deceased." *Griswold v. Hart*, 205 N.Y. 384, 395 (1912). All other evidence suggests that there was never a power of attorney from Ms. Darion to Mr. Leigh. (Def. 56.1 ¶ 8).

situated to convince the other Rights Holders to grant Plaintiff the rights to produce an MOLM revival, it is not beyond the realm of possibility that the Rights Holders could grant their rights without Mr. Leigh's recommendation. Indeed, correspondence exchanged after Mr. Leigh's passing suggested that the Rights Holders were "positively disposed" to a proposal from Plaintiff for an MOLM revival directed by Mr. Nunn. (Def. Ex. 54).

Further, the personal-services exception is an "implied condition" to every personal services contract, exempting it from the default rule that a contract survives the death of the signatories. *Buccini*, 253 N.Y. at 256, 258. In the Talent Agreement, however, the rule prolonging the life of a contract beyond the lives of its signatories does not merely apply by default, but rather is incorporated into the Agreement: "The Agreement ... will be binding upon [Mr.] Leigh and [Plaintiff], and their respective successors, employees, heirs and assigns. (Pl. Ex. A). Thus, to the extent that the personal-services exception might have controlled by implication, it was explicitly superseded by the terms of the Talent Agreement. See *Morgan Art Found. Ltd. v. Brannan*, No. 18 Civ. 8231 (AT) (BCM), 2020 WL 469982, at \*14 (S.D.N.Y. Jan. 28, 2020) (finding that a contract that was expressly binding upon the parties' successors and assigns was "inconsistent with [a] personal services theory"); *Citibank, N.A. v. Nyland (CF8) Ltd.*, 692 F. Supp. 1488, 1491 (S.D.N.Y. 1987) (holding that management agreement at issue was "a personal service contract" which "is in no way binding upon successors or assigns"), *aff'd*, 878 F.2d 620 (2d Cir.

1989).<sup>18</sup> As multiple courts in this District and in New York State have found, parties may expressly provide for assignability of personal services. *Preferred Oncology Networks of Am., Inc. v. Bottino*, No. 96 Civ. 1898 (BDP), 1997 WL 305253, at \*2-3 (S.D.N.Y. May 28, 1997) (collecting cases). For these reasons, the Court concludes that the Talent Agreement was not a personal services contract, and did not expire upon Mr. Leigh's death.

**f. A Genuine Dispute of Material Fact Exists as to Whether Plaintiff Was Mr. Leigh's Attorney When He Signed the Talent Agreement**

Defendant's final argument for summary judgment as to Plaintiff's breach of contract claim<sup>19</sup> doubles as an argument in favor of her own counterclaim: Plaintiff breached a fiduciary duty owed to Mr. Leigh. To

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<sup>18</sup> Defendant argues that the provision of the Talent Agreement making it binding upon the parties' heirs is not dispositive as to whether the Agreement was a personal services contract. (Def. Br. 27 n.10). To support this argument, Defendant states that "Mr. Leigh could not have relied on this clause to compel Plaintiff's [heirs] to meet with prospective Talent or act as a co-producer for MOLM." (*Id.*). The Court does not disagree that it is unlikely that either party would be granted the remedy of specific performance upon a breach. But this does not speak to whether the Talent Agreement is a contract for personal services; indeed, specific performance is not an available remedy for the breach of a personal services contract even where both parties to the contract survive. See *Marriott International, Inc. v. Eden Roc, LLLP*, 962 N.Y.S.2d 111, 112 (1st Dep't 2013) (discretion inherent in personal service contract prohibited enforcement through specific performance); *Alexander Interactive, Inc. v. Adorama, Inc.*, No. 12 Civ. 6608 (PKC) (JCF), 2014 WL 113728, at \*4 (S.D.N.Y. Jan. 13, 2014) (same).

<sup>19</sup> Defendant presents one other argument that this Court summarily rejects: She claims that she could not have breached the Talent Agreement because on July 20, 2014, after Mr. Leigh had died and Plaintiff had come forward to claim that she had fully performed and to demand that the Talent Agreement be honored, the Rights Holders offered Plaintiff the "opportunity to come forward with a production agreement which would include Sir Trevor as director and a request for terms and conditions, but she failed to do so." (Def. Br. 22). But the Rights Holders' offer to allow Plaintiff to make a proposal for an MOLM revival production was contingent upon Plaintiff paying a \$50,000 nonrefundable advance against royalties. (Pl. 56.1 ¶ 99; Def. Ex. 54). If Plaintiff had fully performed, the Rights Holders would have been justified in requiring her to prove that performance. But, in requiring Plaintiff to pay \$50,000 before any rights would be transferred to her, Defendant insisted on a term that was not present in the Talent Agreement. Accordingly, the Rights Holders' July 20, 2014 offer could not have constituted performance of the Talent Agreement.

establish a *prima facie* case of breach of fiduciary duty in New York, a plaintiff must allege “(i) a duty; (ii) a knowing breach of that duty; and (iii) damages resulting therefrom.” *Johnson v. Nextel Commc’ns, Inc.*, 660 F.3d 131, 138 (2d Cir. 2011). Defendant’s theory is that Plaintiff was serving as Mr. Leigh’s attorney at the time they entered into the Talent Agreement, that her entry into the Talent Agreement breached her fiduciary duty as Mr. Leigh’s attorney, and that she should thus be precluded from enforcing the Agreement. (Def. Br. 28-35). Defendant’s arguments hinge on Plaintiff having acted as Mr. Leigh’s attorney when the Talent Agreement was drafted and signed. For the reasons that follow, the Court finds that a genuine dispute exists as to that material fact, precluding the entry of summary judgment in Defendant’s favor as to her counterclaim.

The Court has already recited the relevant law on this topic in its September 9, 2019 Opinion, *Abraham I*, 2019 WL 4256369, at \*4, and so will offer only a brief overview here. “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 quotations omitted). Attorney-client relationships are “sufficiently rooted in trust and confidence to trigger” fiduciary duties. *World Wrestling Entm’t, Inc. v. Jakks Pacific, Inc.*, 530 F. Supp. 2d 486, 503 (S.D.N.Y. 2007) (quoting *Ross v. FSG PrivatAir Inc.*, No. 03 Civ. 7292 (NRB), 2004 WL 1837366, at \*5 (S.D.N.Y. Aug. 17, 2004)). In fact, “a fiduciary duty arises when a lawyer deals with

persons who, although not strictly [the lawyer's] clients, [the lawyer] has or should have reason to believe rely on [the lawyer]." *Koppel v. 4987 Corp.*, No. 96 Civ. 7570 (HB), 2001 WL 47000, at \*11 (S.D.N.Y. Jan. 19, 2001) (quoting *Croce v. Kurnit*, 565 F. Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984)). Thus, "a court must look to the words and actions of the parties to ascertain the existence of a [fiduciary] relationship." *Moran v. Hurst*, 822 N.Y.S.2d 564, 566 (2d Dep't 2006) (citing *Tropp v. Lumer*, 806 N.Y.S.2d 599, 600 (2d Dep't 2005)).

The record contains substantial evidence suggesting that Plaintiff was Mr. Leigh's attorney at the time they entered into the Talent Agreement. Defendant points to documentary evidence in the form of communications between and among Plaintiff, Mr. Leigh, and Mr. Leigh's staff in the days following the January 6, 2014 Meeting. (Def. Br. 28-29). In those communications, Plaintiff claimed to Mr. Leigh that he had hired her as his attorney during the January 6, 2014 Meeting. In one email, sent on January 9, 2014, Plaintiff wrote: "Since we did not discuss fees or costs during our January 6 meeting, we can address this as a discussion point for final comments in the Agreement." (Def. Ex. 37). Plaintiff also included her hourly rate. (*Id.*). It appears that Mr. Leigh's staff responded to this email by claiming that Mr. Leigh would not pay Plaintiff legal fees, causing Plaintiff to write on January 10, 2014 that "[Mr. Leigh] specifically did agree to hire [Plaintiff] as his lawyer and solicitor for a period of six (6) months." (*See* Pl. 56.1 ¶ 52; Def. Ex. 38).

Plaintiff also stated that Mr. Leigh “advised [he] would hire [Plaintiff] on [his] behalf for 6 months as [his] attorney/solicitor to secure [his] list of initial UK and US talent interest.” (See Pl. 56.1 ¶ 52; Def. Ex. 38, 39). Plaintiff frequently signed emails by identifying herself as “counsel” and “Esq.” (Pl. 56.1 ¶ 51). Defendant also introduced an expert report from a professor of legal ethics and responsibility, who opined that, based upon his review of the record, Plaintiff served as Mr. Leigh’s counsel. (Dkt. #433 (“Fox Report”)).

Ultimately, however, the Court finds just enough evidence suggesting that Plaintiff was not Mr. Leigh’s attorney at the time they entered the Talent Agreement to create a genuine dispute of material fact. Most crucially, there is Plaintiff’s declaration, where she testifies that she did not serve as Mr. Leigh’s attorney. (Abraham Decl. ¶ 40).<sup>20</sup> Of course, Plaintiff’s testimony on this topic is undermined by her own contemporaneous declarations that she had been hired as Plaintiff’s attorney. (Pl. 56.1 ¶ 51). But other, albeit limited, bits of the documentary record support Plaintiff’s testimony. In one fax sent from Plaintiff to Mr. Leigh on January 10, 2014, Plaintiff stated that she was “optimistic that if authorized to proceed as [Mr. Leigh’s] London exclusive counsel, she could deliver” the desired results. But in the same exhibit, Plaintiff goes on to claim that “during the meeting ... [Mr. Leigh] advised

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<sup>20</sup> The Court finds less persuasive Plaintiff’s testimony that no retainer agreement exists. As the Court has already noted, “an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee.” *Abraham I*, 2019 WL 4256369, at \*6 (quoting *Moran v. Hurst*, 822 N.Y.S.2d 564, 566 (2d Dep’t 2006)).

[Plaintiff that he] would hire [her] on [his] behalf for 6 months as [his] attorney/solicitor.” (Def. Ex. 39).

Further, the emails between Plaintiff and Mr. Leigh’s staff following the January 6, 2014 Meeting suggest that a dispute arose regarding Mr. Leigh’s willingness to pay Plaintiff legal fees. (Def. Ex. 37, 38). Following that dispute, Plaintiff did not renew her request to insert language concerning the fees to which she would be entitled into the Talent Agreement. (Pl. 56.1 ¶ 53). From this, a reasonable factfinder might infer that, despite Plaintiff’s protestations that she had already been hired to act as his attorney, Mr. Leigh declined to finalize this arrangement and did not understand Plaintiff to be operating as his attorney when he entered into the Talent Agreement.

Other alterations to successive drafts of the Talent Agreement arguably bolster such an inference. While in early drafts of the Agreement Plaintiff’s signature line read “Robyn Abraham, Esq., Counsel” (Def. Ex. 37), later drafts — circulated after the parties’ fee dispute — list only Plaintiff’s name, without a reference to her serving as an attorney (Def. Ex. 41; Pl. Ex. A). And no portion of the Talent Agreement explicitly refers to Plaintiff providing any legal services to Mr. Leigh. Defendant claims that the Talent Agreement’s grant of “legal and business rights for six (6) months to represent ‘MOLM’ in England and the United Kingdom for the purpose of obtaining initial professional interest” obligated Plaintiff to represent MOLM in her capacity as an attorney or

“British Solicitor.” (Def. Br. 29-30; Pl. Ex. A).<sup>21</sup> But obtaining “initial professional interest” does not, on its face, require the practice of law. The Court finds that a more natural reading of this clause would have it confer upon Plaintiff the lawful rights to represent MOLM in ascertaining initial talent.

In short, the Court has no difficulty finding that a reasonable jury could determine that Plaintiff led Mr. Leigh to believe that she was acting as his attorney when they entered into the Talent Agreement. But, though by a slimmer margin, a reasonable jury might also find that Plaintiff’s efforts to represent Mr. Leigh were thwarted, and that Mr. Leigh understood that any potential attorney-client relationship had died on the vine before the Talent Agreement was signed. In light of this genuine dispute, a breach of fiduciary duty cannot serve as an independent reason to grant summary judgment against Plaintiff’s breach of contract claim, and summary judgment must be denied as to Defendant’s counterclaim.

### **CONCLUSION**

For the reasons set forth above, Defendant’s motion for summary judgment on Plaintiff’s breach of contract claim is GRANTED. Defendant’s motion for summary judgment in favor of her own counterclaim for breach of a fiduciary duty is DENIED.

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<sup>21</sup> The Court notes that Plaintiff identified herself as a “British solicitor” in the Talent Agreement (Pl. Ex. A), but has since testified that she does not hold a “British Law Practicing Certificate” and thus cannot work as a solicitor. (Abraham Decl. ¶¶ 34, 35).

The Clerk of Court is directed to terminate the motion at docket entry 429. Defendant is hereby ORDERED to file a letter proposing next steps concerning her counterclaim on or before **July 29, 2020**.

SO ORDERED.

Dated: July 8, 2020  
New York, New York



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KATHERINE POLK FAILLA  
United States District Judge

# APPENDIX G

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ROBYN ABRAHAM,

Plaintiff,

-v.-

ABBY LEIGH, *et al.*,

Defendants.

17 Civ. 5429 (KPF)

**OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

Plaintiff Robyn Abraham recently filed three motions in this case. The motions request different forms of relief — reconsideration of the Court’s prior decision granting the Leigh Defendants’ motion for summary judgment (*see* Dkt. #511-514), the unsealing of certain documents and the reinstatement of certain stricken materials to the record (*see* Dkt. #506-510), and this Court’s recusal from this case (*see* Dkt. #516-521; *see also* Dkt. #526-533).<sup>1</sup> However, the arguments overlap to a significant extent, as does the factual support Plaintiff proffers for each motion. For this reason, the motions are addressed together in this Opinion, and they are denied for the reasons set forth herein.

**BACKGROUND**

As the docket attests, this case has substantial factual and procedural histories. That said, certain of Plaintiff’s factual assertions in support of the

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<sup>1</sup> On August 4, 2020, Plaintiff filed a Notice of Filing Supplement to Plaintiff’s Motions, a document styled as a brief, and several volumes of exhibits. (Dkt. #526-533). The next day, the Court accepted the filing, outlined certain deficiencies in it, and noted that the materials were being filed under seal because they disclosed “irrelevant, salacious, or personally sensitive material.” (Dkt. #533). For the reasons set forth *infra*, the Court continues to maintain those documents under seal.

instant motions are contradicted, in whole or in part, by the record in this case, and thus require clarification and/or contextualization by this Court.

**A. Extraneous Material Not Considered by the Court**

Preliminarily, the Court observes that Plaintiff has introduced a surfeit of extraneous information into the record. The problem is not merely one of duplication, although Plaintiff has submitted the same exhibits multiple times in connection with these motions. (See Dkt. #533 (order addressing duplication)).<sup>2</sup> Rather, Plaintiff has introduced extensive information and allegations into the record concerning her personal history and those of her child, her former husband, and one of her former counsel. If true — and the record does not permit the Court to resolve the point — these allegations are deeply disturbing. The fact remains, however, that these allegations are irrelevant, factually and legally, to the issues in dispute. Whatever evils may have befallen Plaintiff and her child decades ago, they offer no insight as to whether Plaintiff satisfied her obligations under the Talent Agreement.<sup>3</sup>

Worse yet, Plaintiff has repeatedly attempted to file on the public docket deeply personal information regarding prior counsel, which information is

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<sup>2</sup> For ease of reference, the Court will cite once to Plaintiff's submissions in sourcing her arguments, even if the argument is contained in multiple submissions.

<sup>3</sup> Plaintiff argues that counsel to Martha Wasserman and Alan Honig injected "125 pages of more than 20 year old completely unrelated" materials on these sensitive issues. (Dkt. #512 at 13). Counsel did introduce this material in the context of responding to the motion to withdraw filed by Plaintiff's first counsel, in a list of discovery deficiencies that needed immediate redress. Notably, however, all of this material was filed under seal. (See Dkt. #199). It is Plaintiff who keeps raising the issues in her public filings, while omitting mention of the fact that other courts have discredited certain key allegations in prior legal proceedings. (See *id.*).

similarly irrelevant to the legal issues in dispute. It is not entirely clear to the Court whether these efforts are the product of simple mean-spiritedness, or whether they reflect a strategy to dissuade counsel from invoking their rights under a settlement agreement involving both sides. Whatever the purpose of Plaintiff's disclosures, they have no place in this litigation, and they are unbecoming to someone with Plaintiff's legal training and ostensible personal history.

**B. Plaintiff's Proffered Factual and Record Disputes**

**1. The "Long Con" Theory**

Plaintiff's current motions are predicated on allegations of concerted action between and among Defendants and others, including Plaintiff's two prior sets of attorneys. As it happens, however, certain allegations are not borne out by the record. Proceeding in chronological order, Plaintiff begins by suggesting that the instant litigation is the product of an elaborate scheme to defraud Plaintiff that was perpetrated by Defendants over a period of years: "Having been advised that Defendants would lose this case on summary judgment if Plaintiff were to file in London, Defendants devised a scheme to change jurisdiction of this case from London to New York and require Plaintiff to return from the UK to the US." (Dkt. #512 at 11). The scheme, according to Plaintiff, included the following elements:

- i. Defendants would file a series of "Red Herring Cases" in this District, in order to dupe Plaintiff's first counsel, Arnold & Porter LLP, into filing Plaintiff's case in this District;
- ii. Arnold & Porter would file Plaintiff's case in this District;

- iii. Defendants would dismiss the earlier-filed cases without fees, costs, or damages; and
- iv. Defendants would then band together through a mutual defense agreement to file numerous motions “pursuant to their stated objective of harassing [counsel] to withdraw from Plaintiff’s representation.”

(*Id.* at 11-13).

The factual premises of Plaintiff’s theory are demonstrably false. It is true that the heirs of *Man of La Mancha*’s composers filed mirror-image lawsuits against each other in 2016, but those lawsuits did not speak to Plaintiff’s claims. *See Leigh v. Darion*, No. 16 Civ. 7896 (KPF) (commenced October 10, 2016; terminated November 17, 2017); *Darion v. Leigh*, No. 16 Civ. 8026 (KPF) (commenced October 13, 2016; terminated November 17, 2017). Moreover, the dockets make clear that each of the suits progressed for more than a year, with significant Court conferences and motion practice, before settlement was achieved. It may well be the case that, after being served with Plaintiff’s complaint, the MOLM heirs found it preferable to join forces and defend against a common enemy, but that is a far cry from the long-term deception imagined by Plaintiff. In any event, as the Leigh Defendants note (*see* Dkt. #534 at 8), Plaintiff’s prior counsel had no obligation to file her complaint in this District; counsel chose to do so, and counsel chose to seek to have this case related to the earlier cases before this Court (*see* Dkt. #3).

Plaintiff is also wrong in claiming that her prior counsel was “harass[ed] ... to withdraw from Plaintiff’s representation.” (Dkt. #512 at 13; *see also id.* at 14 (“Following Defendants’ relentless Tag Team vexatious

litigation, Plaintiff's Arnold and Porter counsel withdrew in March 2019.")). As an aside, the notion that a firm as large as Arnold & Porter could be harassed into withdrawal by any opposing counsel beggars belief. But the firm also made clear in its motion to withdraw that

Arnold & Porter seeks leave to withdraw on grounds of fundamental and irreconcilable conflict with its client, Plaintiff Robyn Abraham. These conflicts have significantly eroded the attorney-client relationship and Arnold & Porter has determined that it can no longer effectively continue its representation of Ms. Abraham.

(Dkt. #188 at 2). These reasons were amplified during discussions in the robing room with counsel in Plaintiff's presence. (See Minute Entry of March 11, 2019; Dkt. #217 (transcript) at 83-84). Put simply, it was Plaintiff, and not opposing counsel, who precipitated Arnold & Porter's withdrawal from the case.

## **2. The Claims of Evidence Tampering**

Similar problems beset Plaintiff's theory that after she rejected what she believed to be an unreasonably low settlement offer, Defendants concocted false claims of evidence tampering. (See Dkt. #512 at 13-14). As Plaintiff must remember, the parties engaged in substantial briefing on this issue (*see, e.g.*, Dkt. #144 (Honig and Wasserman pre-motion submission regarding Plaintiff), 154 (Abraham pre-motion submission regarding Leigh), 157 (Abraham pre-motion submission regarding Wasserman), 233-236 (motion papers for Honig and Wasserman), 264 (Leigh Defendants' motion for joinder), 273-292 (Abraham opposition papers), 303-305 (Honig and Wasserman reply papers), 307 (Leigh Defendants' reply papers)), culminating in a lengthy oral argument

held on October 22, 2020. At the conclusion of the argument, the Court found in relevant part:

[T]here are emails that exist in two versions. For the most part, I've got examples in native format and then I've got a contrary version in a PDF format.... The issue that I have had, the issue that I've tried to come to terms with in this hearing is that there has to be an explanation for why it is these things exist in two formats. I don't want people's ruminations. I don't want maybe this and maybe that. I do not want attorney *ipse dixit*. I want answers.

\* \* \*

[T]oday I was focusing on the theories that have been offered to me to explain why, in many cases, I have two documents with the same time stamp and different words on it.

So here, I'm going through the theories with you now. There is the GoDaddy theory. This was the original theory. It was the only theory that I was given at the beginning of this case. And what has been shown to me today is that there is some conflict, but nothing dispositive, for the plaintiff at least. There are these phantom outages that affect certain documents, and [Plaintiff's expert witness] Mr. Daniel doesn't really make the point that Ms. [Kerwick] made about frequent, unexplained, only-kept-for-two-weeks outages. So I don't find this to be a sufficient rebuttal of the defendants' argument that GoDaddy is not an explanation for these variances.

So then there's the broken computer explanation. Ms. [Kerwick] today very, very thoughtfully indicated that this was an instance of Ms. Abraham accepting responsibility, but, to my mind, only to a degree. I didn't [know] until today that there were two computers. No one has gotten the technician to admit to having the same problems with both computers being out of commission or being unable to be used. So I find this as well unsuccessful and unsatisfying as an explanation for what happened with those emails.

In Ms. [Kerwick]'s briefing, there was the third explanation, which was idiosyncratic email practices. I find this to be actually, and with no disrespect, less plausible than the GoDaddy and the broken computer theories because it does not explain the counterparty edits.

\* \* \*

So, now, dovetailing with that theory is a theory that, in fact, it was the defense witnesses or someone who was recalling and deleting emails. Now, I concede that there were defense witnesses who testified about deleting emails, but even that does not explain the recall component or how it is that I have two different versions, oftentimes with the same time stamp but with different text.

*The strongest argument for the defendants is that I have a bunch of exhibits that I can't explain other than by finding that somebody modified them; that they were altered. And ultimately, I conclude that they were altered by Ms. Abraham.*

Today I noted that counsel was very careful, plaintiff's counsel, in how she phrased her arguments on this point. That it was Ms. Abraham's position, that Ms. Abraham would go to her grave believing, and everything was done in terms of Ms. Abraham's beliefs. So I went straight to the source, and I asked Ms. Abraham as plainly as I could. *She answered, and I do not believe her, and I believe that she perjured herself before me today.* And that echoed something that Mr. Broadbent said to me when he referred to certain of these theories or certain of these presentations as unapologetic. They are. At some point in this process, Ms. Abraham should just admit that these documents are doctored and walk away from it, but even now before me she doubles and triples and quadruples down. That's what I'm left with. I'm left with the fact that these things are fabricated and that I believe that she fabricated them.

(Dkt. #409 at 64-70 (emphases added)). As sanctions for Plaintiff's document fabrication and perjury, the Court excluded the 33 challenged documents

(which existed in PDF form only),<sup>4</sup> imposed on Plaintiff the fees and costs incurred by the Leigh Defendants in addressing this issue, and left open the possibility of an adverse instruction at trial. (*Id.* at 70-72).

Plaintiff repeatedly states in her motion papers that she “did not tamper with any evidence in this case nor in any other case or matter.” (Dkt. #512 at 14). The Court has found otherwise after exhaustive investigation and argument; it will not alter that finding here.<sup>5</sup>

### 3. The “Grooming” Allegations

Plaintiff’s third theory of concerted action is perhaps the most troubling. Plaintiff claims that her second team of attorneys — comprising the Washington, D.C. firm of Wiss & Partners LLP along with local counsel Colleen Kerwick — “target[ed],” “falsely befriend[ed],” and, indeed, “groom[ed]” Plaintiff in order to dupe her into hiring them. (Dkt. #512 at 14; *see also id.* at 15 n.5 (claiming that Wiss “weaponized her casual relationship with Plaintiff to blackmail, extort and criminally threaten Plaintiff in this case”)). Once Plaintiff secured their services, “[k]nowing that there was a potential settlement with the Akerman clients in play, thus began Ms. Kerwick’s and Ms. Wiss’s

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<sup>4</sup> While Plaintiff now decries the exclusion of those documents, she previously foreswore use of them in an attempt to forestall resolution of the sanctions motion. (*See* Dkt. #311).

<sup>5</sup> Plaintiff also claims fraud in Defendant Leigh’s filing of a counterclaim against Plaintiff alleging breach of fiduciary duty. (*See* Dkt. #512 at 13). To the extent that Plaintiff is claiming undue delay because the claim was filed more than a year after the case was filed, that delay was occasioned by the filing and resolution of an antecedent motion to dismiss. To the extent that Plaintiff challenges the counterclaim on the merits, the Court observes that the claim was not resolved during summary judgment practice, and will instead be resolved at trial. (*See* Dkt. #505 at 44-49).

documented Tag Team blackmail, extortion and gaslighting campaign coordinated with and on behalf of Defendants in this case.” (*Id.* at 15). According to Plaintiff, problems began with Kerwick’s notices of appearance in the case, and then grew to include self-interested amendments to Plaintiff’s settlement agreement with Defendants Wasserman and Honig, who were represented by the law firm Akerman LLP. When Plaintiff protested the changes to the agreement, Kerwick supposedly “threatened Plaintiff that she would contact Plaintiff’s former husband and his powerful Brooklyn family to dismiss this case and ‘worse.’” (*Id.* at 16). In addition, Kerwick and Wiss (i) “threatened Plaintiff that they would jointly present false testimony against Plaintiff in the strategically coordinated Defendant’s Motion for Sanctions,” and (ii) “threatened to criminally harm Plaintiff on behalf of Defense Counsel Cozen and their client.” (*Id.* at 17). Were these allegations true, they would be deeply troubling, implicating as they do both ethical improprieties and criminal activity. Here, again, however, the principal factual assertions are demonstrably false, and thus the proffered conspiracy is troubling for an entirely different reason.<sup>6</sup>

To begin, the notion that Wiss and Kerwick somehow conspired with counsel for the Leigh Defendants to harm Plaintiff is preposterous. (*See, e.g.*, Dkt. #507 at 16 (“Kerwick’s De Facto Representation on behalf of Defense

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<sup>6</sup> The Court’s use of the limiting adjective “principal” is deliberate. It may be that Wiss & Partners and/or Kerwick did not adequately document the attorney-client relationship once formed; that is an issue as to which the Court lacks sufficient information to reach a conclusion. The Court is confident, however, that an attorney-client relationship was formed.

Counsel Cozen O'Connor (their client Mrs. Leigh) and Marcia Wiss, fully contrary to Plaintiff's interests, continue[s] to present date.")). Kerwick came into the case at *Plaintiff's* instigation; Plaintiff included an *amicus* submission from Kerwick (on behalf of the Families Civil Liberties Union) discussing her need for counsel in this matter when Arnold & Porter moved to withdraw from the case. (Dkt. #203-1). And it was precisely because Plaintiff leveled accusations of collusion between and among Kerwick, Wiss, and defense counsel that her attorneys moved to withdraw from the case. (Dkt. #382 at 6 (Kerwick: "I felt when it came to a point that we were not in sync that I needed to alert the Court to the fact that I feel challenged in my continued representation of her, which has got nothing to do with the case. There have been certain concerns that I might be conspiring with the law firm of Cozen O'Connor, and there were certain concerns that I was conspiring to do her out of fees.")). Indeed, in sharp contrast to her current contentions, Plaintiff exclaimed during the October 7, 2019 hearing on Wiss's and Kerwick's motion, "I do not want Colleen [Kerwick] to withdraw. I think she's an excellent attorney, and I do not understand the relationship that she has with Ms. Wiss." (*Id.* at 24).<sup>7</sup>

<sup>7</sup> Two other points in this regard merit brief mention. *First*, the argument that Wiss and Kerwick were somehow in cahoots with counsel for the Leigh Defendants, Cozen O'Connor, is logically flawed, inasmuch as the proffered evidence of collusion concerns Wiss's and Kerwick's conduct with respect to settlement negotiations with the Akerman firm, with which negotiations Cozen O'Connor was not involved. *Second*, and equally flawed, is Plaintiff's claim that Wiss and Kerwick "threatened Plaintiff that they would jointly present false testimony against Plaintiff in the strategically coordinated Defendant's Motion for Sanctions which was scheduled by Cozen Defense Counsel in October 2019." (Dkt. #507 at 16). The sanctions motion at issue concerned Plaintiff's fabrication of documents, which fabrication occurred well before Wiss and Kerwick were

The Court was also able to review, in real time, the Kerwick/Wiss submissions that were filed in this case on Plaintiff's behalf, and to observe Kerwick's arguments on Plaintiff's behalf at court conferences. It was clear to the Court that counsel's focus remained at all times on Plaintiff's best interests. (*See, e.g.*, Dkt. #273-292 (submission in opposition to sanctions motion), 311 (letter motion disclaiming intent to use challenged documents), 315 (request for discovery), 327 (letter motion to reopen certificate of default), 461 (opposing request by Plaintiff to unseal all documents in the case, which counsel did not believe would be "in Plaintiff's best interest"))).

The Court also rejects Plaintiff's oft-invoked refrain that Wiss & Partners was never her counsel. (*See, e.g.*, Dkt. #512 at 16 n.7 ("Wiss has no signed retention agreement with Plaintiff, is not a New York attorney, is not a litigator, is not authorized to practice before the New York Southern District and filed no pleadings in this case.")). During the October 7, 2019 conference, the Court met privately in the robing room (with defense counsel's consent) with Plaintiff, representatives of Wiss & Partners, and Kerwick; it heard from all sides, reviewed the relevant documents, and though it did not need to decide the issue at the outset, it subsequently concluded that Plaintiff had, in fact, established an attorney-client relationship with both the Wiss firm and Kerwick. (*See* Dkt. #382 at 22, 27-28, 125-28; *see also* Dkt. #372 at 17 ("Ms. Abraham, you have to stop using that descriptive when you speak of Wiss &

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retained as counsel. The Court strains to think of what relevant testimony, false or otherwise, Wiss or Kerwick could have provided on the issues at hand.

Partners. You are wasting time on this call telling me that they are not, and have never been, your attorney.”)).

And the notion that Plaintiff was somehow browbeaten by Wiss and Kerwick cannot be accepted by anyone with firsthand observations of the relationship. Again to remind Plaintiff of what happened on October 7, 2019, the Court was prepared to let the settlement agreement with Defendants Honig and Wasserman fall apart because of Plaintiff’s inability to resolve her issues with Wiss and Kerwick. Plaintiff, citing her extensive experience as a transactional lawyer, announced that she would try to broker a settlement with her attorneys, which — after nearly an hour in the Court’s jury room — she ultimately succeeded in doing. (Dkt. #382 at 128 (“I thank the three of you for working it out in a very thoughtful, mature way. I appreciate that very much. I think it was Ms. Abraham’s suggestion that you do so, so I give her credit for that.”); Dkt. #372 at 5-6 (discussing settlement reached in jury room)). And though there were bumps in the road during the three weeks following the settlement, the parties ultimately agreed to the terms negotiated on October 7, 2019. (Dkt. #379 (Court order memorializing settlement terms)).

It may well be the case that Plaintiff made certain decisions about her representation because of time constraints, or because she had difficulty in securing other counsel to represent her. Those pressures inhere, however, in any litigation. The Court stands by its observation of Plaintiff from the October 7 hearing: “You talk about being forced to do something, but it is you who has tried repeatedly to force Ms. Kerwick and Ms. Wiss to do things on pain of all

sorts of things, including ethics complaints.” (Dkt. #372 at 25; *see also* Dkt. #401 (Court order discussing application by Plaintiff to have Kerwick ordered to remain on the case as *pro bono* counsel)). And having reviewed several email exchanges between Plaintiff and counsel and having observed all parties firsthand, the Court rejects out of hand any argument that Wiss or Kerwick improperly “threatened Plaintiff with physical, legal, financial and professional harm.” (Dkt. #512 at 11).

### **C. The Summary Judgment Opposition**

In her motions, Plaintiff advances a timeline concerning her efforts to file an opposition to the Leigh Defendants’ motion for summary judgment. (*See, e.g.*, Dkt. #512 at 18-19). Here, too, the record disproves the most significant of Plaintiff’s claims.

Plaintiff begins by asserting that in March 2019, this District “suspended Plaintiff’s PACER/ECF filing account” (Dkt. #512 at 18), and then catalogues certain “unusual events” regarding her account (*id.* at 19). For avoidance of doubt, the Court states that it had no role in the events that led to Plaintiff’s notification in March 2020 that her account was inactive; the Court understands the notification to have resulted from a delinquency in payments, but makes clear that it was not the result of any Court order. Moreover, the notice Plaintiff received, which she includes with her motion papers (Dkt. #519 at 5), expressly recites: “You may continue to log in and perform other activities (e.g., *e-file*, request filing privileges), but you will not have PACER search privileges.” (*Id.* (emphasis added)). In other words, when Plaintiff advised the

Court on March 11, 2020, of her inability to file her summary judgment papers, she either misperceived or misstated the notice she had received. (See Dkt. #465).

From this point forward, the Leigh Defendants present a timeline that hews more closely to the record. (Dkt. #534 at 4-6). The Court accepted Plaintiff's opposition papers by email, and on March 18, 2020, it permitted Plaintiff to e-file "those papers that she emailed to the Court and Leigh Defendants on March 11, 2020." (Dkt. #470). In the meantime, the Leigh Defendants filed their reply submissions on March 25, 2020, pursuant to the Court's earlier scheduling order. (Dkt. #474-475). The next day, March 26, 2020, Plaintiff moved for reconsideration of the Court's order that allowed her to file those documents that had been emailed to the Court and the Leigh Defendants on March 11, 2020. (Dkt. #477; *see also* Dkt. #478 (Leigh Defendants' opposition)). Before the Court could respond, on March 27, 2020, Plaintiff sought to file briefing and exhibits that differed from what she had filed on March 11, 2020. (Dkt. #481-489). The Court rejected her attempts, construing them as an impermissible sur-reply, and ordered Plaintiff "to file on the public docket as her submissions in opposition to the pending motion for summary judgment only those documents that she emailed to the Court and Leigh Defendants on March 11, 2020." (Dkt. #492). When Plaintiff did not, the Court struck the impermissible filings and ordered the Clerk of Court to docket the materials that had been emailed to the Court on March 11, 2020. (See Dkt. #498 (order), 499-500 (Plaintiff's filings of March 11, 2020, which the Court

ordered the Clerk of Court to docket)). Less than a week later, Plaintiff renewed several requests, including a request that the Court permit her “to file all missing Opposition To Summary Judgment documents, including but not limited to depositions precluded from filing previously.” (Dkt. #496). The Court denied her request by Order dated April 6, 2020. (Dkt. #498).<sup>8</sup>

## DISCUSSION

### A. The Court Denies Plaintiff’s Motion for Reconsideration

#### 1. Applicable Law

A party may obtain relief on a motion for reconsideration “only when the [party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (quotation omitted); accord *Virgin Atl. Airways, Ltd. v. Nat’l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992). “The standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Conversely, a motion for

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<sup>8</sup> In its Order of April 6, 2020, the Court precluded Plaintiff “from filing further submissions of any type until the earlier of a further order of the Court in this regard, or the Court’s resolution of Defendants’ pending motion for summary judgment.” (Dkt. #498). To forestall any future claims of hair-splitting, the Court acknowledges that its order had the effect of suspending Plaintiff’s filing privileges for the three-month period that preceded issuance of the summary judgment decision.

reconsideration is “not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a ‘second bite at the apple[.]’” *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)); *see also Stone v. Theatrical Inv. Corp.*, 80 F. Supp. 3d 505, 506 (S.D.N.Y. 2015) (observing that a motion for reconsideration “is neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have been previously advanced” (internal quotations and citations omitted)).

## 2. Analysis

To a degree, Plaintiff’s motions for reconsideration and for unsealing overlap; among other commonalities, both motions challenge the sealing of certain documents in the case and both challenge the striking of certain documents from the record. (*Compare* Dkt. #507, *with* Dkt. #512). But because the Court and the parties (including Plaintiff) had equal access to all of the summary judgment materials, including those filed under seal, the Court construes Plaintiff’s motion for reconsideration to focus on those materials that were not considered by the Court in rendering its decision, i.e., those ordered stricken from the record.

The Court will not revisit its decision to strike docket entries 481 through 489 from the record. As detailed above, Plaintiff advised the Court of her difficulties with ECF on March 11, 2020, and submitted her opposition papers by email that same day. The next day, Plaintiff sought additional time to file

her opposition papers, noting, “[a]s of this morning, Plaintiff presently is precluded from filing via ECF.” (Dkt. #465). The Court granted the request for an extension (*id.*), but did not understand Plaintiff to be seeking to file something different than or additional to what had been emailed to the Court and the Leigh Defendants. Of note, the Court granted Plaintiff until March 20, 2020, to file her papers by ECF, and then extended that deadline until March 27, 2020, based in part on Plaintiff’s representations that no prejudice to the Leigh Defendants would arise from those extensions. And yet the Leigh Defendants’ reply brief, which of necessity would respond to Plaintiff’s opposition materials, was due on March 25, 2020. Precisely for this reason, the Court made clear in its March 18, 2020 endorsement that “Plaintiff may only file those papers that she emailed to the Court and Leigh Defendants on March 11, 2020.” (Dkt. #470).

Nearly one week later — and one day after the Leigh Defendants had filed their reply submission — Plaintiff expressed her intent to file materials additional to those emailed on March 11, 2020, and for the first time mentioned her intent to file deposition transcripts. (Dkt. #477). Given the obvious prejudice to the Leigh Defendants, as well as the lack of prior notice to the Court, the Court denied the request. (Dkt. #492). Even then, as the Leigh Defendants note (*see* Dkt. #534 at 6), the Court reviewed the relevant deposition transcripts in reaching its decision because the parties cited to those transcripts in their motion papers (*see, e.g.*, Dkt. #505 at 18, 26-27, 32 (references to deposition transcripts)).

To the extent that Plaintiff is asking the Court to reconsider its October 22, 2019 decision striking certain exhibits because of fraudulent provenance (*see* Dkt. #512 at 13-14), the Court denies that request as well. After extensive briefing and oral argument, the Court found that Plaintiff had altered or fabricated 33 documents and then perjured herself regarding those documents, and it excluded those documents from evidence. (Dkt. #371, 409). Plaintiff has introduced no evidence or argument to cause the Court to rethink its decisions in this regard.

In sum, Plaintiff has not identified any evidence that the Court should have, but failed to, consider in resolving the Leigh Defendants' summary judgment motion. Plaintiff has likewise identified no basis in law or in fact for the Court to reconsider its Opinion and Order of July 8, 2020. Her motion for reconsideration is thus denied.

**B. The Court Denies Plaintiff's Motion to Unseal**

**1. Relevant Facts**

Separate and apart from her requests for reinstatement of stricken documents, Plaintiff moves to "unseal all documents in this case," claiming violations of her (as distinguished from the public's) rights of access to the courts, of due process, and under the First Amendment. (*See, e.g.*, Dkt. #507). Plaintiff's motion is curious, inasmuch as Plaintiff has had access to all of the materials considered by the Court in this case. It also betrays a misunderstanding of the procedural history of the case, specifically as it pertains to the issue of sealing.

In September 2018, Plaintiff's then-counsel, Arnold & Porter, submitted a Stipulated Protective Order Regarding Confidential Material (the "Protective Order") on behalf of all parties for the Court's consideration; the Court endorsed the Protective Order on September 7, 2018. (Dkt. #95, 97). Thereafter, each of the parties invoked the Protective Order in asking the Court to seal or permit redaction of various filings with the Court. (*See, e.g.*, Dkt. #133, 140, 146, 153, 164, 170, 196, 231, 252, 256, 294, 295, 296). Based on its review of Plaintiff's motion and of Plaintiff's prior requests for sealing (*see, e.g.*, Dkt. #457, 479), the Court does not understand the sealed filings that predate summary judgment practice to be the source of Plaintiff's concern. More recently, the Leigh Defendants invoked the Protective Order to request sealing of certain exhibits submitted with their summary judgment motion. (Dkt. #436). The Court understands that Plaintiff does object to the sealing that the Court permitted in January 2020 (Dkt. #438), but notes that Plaintiff has at times argued mistakenly that no Protective Order exists (*see, e.g.*, Dkt. #507 at 2 ("The Sealing of This Civil Breach of Contract Documents Without Examination or Protective Order Is Violative of Plaintiff's Access to Courts, Rights of Due Process and First Amendment Rights"))).

Sealing requests of a different type emerged beginning in the fall of 2019, contemporaneously with Plaintiff's settlement with Defendants Honig and Wasserman and the dissolution of her relationship with Kerwick and Wiss. Counsel for Honig and Wasserman — who had been the impetus for the sanctions motion against Plaintiff for document fabrication — asked the Court

to expunge certain documents regarding that motion from the record, which request the Court declined because the documents had been filed under seal. (Dkt. #348). Plaintiff and her then-counsel next sought to seal a series of documents relating to the settlement of claims between and among Plaintiff, Kerwick, and Wiss, and between and among Plaintiff, Honig, and Wasserman, arguing in relevant part:

It is respectfully requested that ECF Doc # 395, 397, 398, 399 be sealed. Notwithstanding the presumption of access under both the common law and the first amendment, the countervailing factors include that the contested documents are subject to a confidentiality agreement with Defendant Wasserman and Defendant Honig; a non-disparagement agreement with Defendant Wasserman and Defendant Honig and a court ordered peace bond in favor of Wiss & Partners and the undersigned.

(Dkt. #400; *see also* Dkt. #411 (Plaintiff's *pro se* motion to seal documents related to the settlement)). The Court resolved the application by making docket entries 395 and 398 viewable to the Court and parties only. (Dkt. #401).

As relations soured between Plaintiff and her second team of attorneys, the tone of her submissions changed, with a disturbing uptick in irrelevant assertions and *ad hominem* attacks by Plaintiff on Defendants and on her own counsel. The Court responded by sealing certain of Plaintiff's submissions (and the responses thereto), while publicly disclosing as much as it considered appropriate in its orders. (*See, e.g.*, Dkt. #401 (Court order sealing, but referring to, submissions by Plaintiff in support of application to have Kerwick ordered to remain as *pro bono* counsel), 418 ("It is noteworthy to the Court that

despite repeated remonstrations from the Court — including a finding of perjury — Plaintiff continues to include misleading, and at times false, statements in her submissions. The Court has no need to detail all such statements in this Order, but it notes that Plaintiff has repeatedly mischaracterized the conduct of the Leigh Defendants, the procedural history of this case, and the content of the Court’s Orders in her submissions to the Court.”)). The Court’s warnings to Plaintiff regarding tone went unheeded; additionally, the Court became aware of potential violations by Plaintiff of her October 2019 settlement agreement. Because of the nature of the allegations, the invective levied by Plaintiff at her prior counsel, and the overall irrelevance of Plaintiff’s dispute with her counsel to the issues before it, the Court designated the materials as *ex parte*, and allowed them to be viewable to Plaintiff and her former counsel only. (*See, e.g.*, Dkt. #454, 494, 495). What is more, the Court permitted Kerwick and the Akerman firm to remain on the docket over Plaintiff’s objection. (*See, e.g.*, Dkt. #462 (order denying request to unseal all sealed filings from July 2019 to the present and explaining why the Court (i) permitted Kerwick and Akerman to continue to receive ECF notifications, and (ii) permitted Kerwick to communicate information regarding Plaintiff’s conduct under the settlement agreement to Plaintiff and the Court by email)).

## **2. Applicable Law**

Courts have recognized a long-established “general presumption in favor of public access to judicial documents.” *Collado v. City of New York*, 193 F.

Supp. 3d 286, 288 (S.D.N.Y. 2016). The Second Circuit has defined “judicial documents” as documents filed with a court that are “relevant to the performance of the judicial function and useful in the judicial process.”

*Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (internal quotation marks omitted) (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)). The presumption of access is “based on the need for federal courts to have a measure of accountability and for the public to have confidence in the administration of justice.” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

As a sister court in this District ably explained:

The Second Circuit recently summarized the three steps that the Court must follow to determine whether the presumption of public access attaches to a particular document and bars disclosure. *Mirlis v. Greer*, 952 F.3d 51, 59 (2d Cir. 2020). First, the Court determines whether the document is a “judicial document” — “one that has been placed before the court by the parties and that is relevant to the performance of the judicial function and useful in the judicial process.” *Id.* (internal quotation marks omitted). Second, the Court “proceeds to ‘determine the weight of the presumption of access to that document.’” *Id.* (quoting *United States v. Erie Cty.*, 763 F.3d 235, 239, 241 (2d Cir. 2014)). “The weight to be accorded is ‘governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.’” *Id.* (quoting [*Amodeo*, 71 F.3d at 1049]). “Finally, the court must identify all of the factors that legitimately counsel against disclosure of the judicial document, and balance those factors against the weight properly accorded the presumption of access.” *Id.*

*Theallet v. H&M Hennes & Mauritz, L.P.*, No. 20 Civ. 2212 (GHW), 2020 WL 4194898, at \*2 (S.D.N.Y. July 20, 2020); see also *Lugosch*, 435 F.3d at 120

“Documents may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” (internal quotation marks omitted) (quoting *In re Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987)).

### **3. Analysis**

As suggested by the preceding procedural review, the Court will not, on this record, unseal any document, or portion of a document, that it sealed pursuant to requests from the parties under the Protective Order. For one thing, Plaintiff is unclear in her argument; at times, she references the public right of access, but more often than not, she claims personal violations of her right of access to the courts, her due process rights, and her First Amendment rights. Furthermore, to the extent that Plaintiff is seeking reversal of a designation of confidentiality that was made by her, her prior counsel, and/or any of her adversaries and then accepted by the Court, there is a process established in the Protective Order that she has not followed. (See Dkt. #97).

The Court understands, however, that Plaintiff is more interested in disclosing to the public those sealed docket entries that pertain to her settlement with Defendants Honig and Wasserman, her settlement with Kerwick and Wiss, and her ongoing disputes with Kerwick and Wiss. The Court will not permit that to happen. As indicated throughout this Opinion, after obtaining what she sought in these two settlements, Plaintiff resorted to disseminating in her public filings on ECF (i) patent falsehoods about Defendants and about all counsel involved in this case and (ii) irrelevant, but

intensely personal, information about her second team of attorneys.

Admonitions from the Court did nothing to stem Plaintiff's vitriol, and the Court was accordingly forced to use its sealing authority. The Court's docket is not a place for calumny or score-settling, nor will the Court abet Plaintiff in any attempts to violate the settlement agreements she reached in this case or to shade the record for other proceedings in other fora. Her motion for unsealing is therefore denied. *See generally Banco Santander (Brasil), S.A. v. Am. Airlines, Inc.*, No. 20 Civ. 3098 (RPK), 2020 WL 4926271, at \*3 (E.D.N.Y. Aug. 21, 2020) (collecting cases for the proposition that the presumption of access to judicial documents is lessened where the information in question is irrelevant to the issues in dispute).

**C. The Court Denies Plaintiff's Motion for Recusal**

**1. Applicable Law**

Plaintiff's final motion is one for recusal. Section 455(a) of Title 28 provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Subsection (b) of this statute, in relevant part, requires a judge to recuse herself "[w]here [s]he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* § 455(b)(1). Section 144 of Title 28 further provides that a judge shall not proceed in a matter in which he

or she “has a personal bias or prejudice either against [the plaintiff] or in favor of any adverse party.” 28 U.S.C. § 144.

Section 455 “sets out an objective standard for recusal, creating the so-called ‘appearance of justice’ rule.” *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 428 (2d Cir. 1988) (internal citation omitted); *see also ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 107 (2d Cir. 2012) (“This provision is to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance.” (quoting *Liteky v. United States*, 510 U.S. 540, 548 (1994))). Under that test, a court asks: “Would a reasonable person, knowing all the facts, conclude that the trial judge’s impartiality could reasonably be questioned? Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?” *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000) (quoting *Diamondstone v. Macaluso*, 148 F.3d 113, 120–21 (2d Cir. 1998)).

“The [Second Circuit] has cautioned that ... the grounds asserted in a recusal motion must be scrutinized with care, and judges should not recuse themselves solely because a party claims an appearance of partiality.” *Barnett v. United States*, No. 11 Civ. 2376 (LAP), 2012 WL 1003594, at \*1 (S.D.N.Y. Mar. 26, 2012) (internal quotation marks omitted) (quoting *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001)). More fundamentally, where the standards governing disqualification are *not* met, “disqualification is not optional; rather, it is prohibited.” *In re Aguinda*, 241 F.3d at 201; *see also In re Drexel Burnham*

*Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) (“A judge is as much obliged not to recuse [herself] when it is not called for as [s]he is obliged to when it is.”). Were it otherwise, recusal motions would become a tool for “judge-shopping” and “impeding the administration of justice.” *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983). And Section 455 “is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice.” *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993).

Finally, “[r]ulings adverse to a party are not regarded in and of themselves as evidence of such bias or prejudice as would require recusal.” *Bishop v. United States*, No. 04 Civ. 3633 (CSH), 2004 WL 1497690, at \*1 (S.D.N.Y. July 1, 2004). As the Supreme Court has observed:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See United States v. Grinnell Corp.*, 384 U.S. [563, 583 (1966)], 86 S. Ct., at 1710. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of

favoritism or antagonism as to make fair judgment impossible.

*Liteky*, 510 U.S. at 555; accord *Doe v. E. Lyme Bd. of Educ.*, 962 F.3d 649, 666 n.21 (2d Cir. 2020).

## 2. Analysis

Citing due process, court access, and First Amendment claims, Plaintiff advances the following factual bases for the Court's recusal:

- i. The Court erred in sealing and striking materials from Plaintiff's opposition submission to the Leigh Defendants' summary judgment motion.
- ii. The Court erred and retaliated against Plaintiff in repeatedly suspending her PACER/ECF filing rights.
- iii. The Court erred in permitting Colleen Kerwick to remain on the docket and file submissions, including sealed and *ex parte* submissions, while suspending Plaintiff's filing rights.
- iv. The Court erred in granting the Leigh Defendants' motion for summary judgment after striking her opposition submission.
- v. The Court erred in sealing certain documents submitted with the parties' summary judgment motions without making the requisite findings or the existence of a protective order.

(See generally Dkt. #517).

Certain of Plaintiff's factual premises are false. For example, the Court was not involved in the initial suspension of Plaintiff's ECF privileges (which, as noted, does not appear to have extended to her filing privileges), and only precluded Plaintiff from filing for a brief period beginning in April of this year after her submissions grew more repetitive and misleading. (Dkt. #498 at 2

“Given the number and the tenor of Plaintiff’s submissions in recent weeks — and their diminishing fidelity to the record in this case — the Court is convinced that more drastic steps are necessary to prevent Plaintiff from clogging the Court’s docket with irrelevant, if not false, information and unduly burdening Defendants.”); *see also* Dkt. #490 (Leigh Defendants’ request to shorten the 21-day safe harbor period under Fed. R. Civ. P. 11)). And the Court has explained in the two preceding sections the legal justifications for its decisions to strike certain documents and to seal or restrict access to others.

More fundamentally, as *Liteky* made clear, Plaintiff’s redress for any or all of these claims is to raise them on appeal. Whether considered individually or in the aggregate, Plaintiff’s claims evince neither favoritism toward her adversaries nor antagonism toward her. And that is because there is none. Plaintiff has repeatedly noted that this is a simple breach of contract action. (*See, e.g.*, Dkt. #512 at 2). At the same time, Plaintiff has sought to transmogrify this case into something far more sinister, by littering the record with false claims and scurrilous allegations. The Court strives to achieve fairness for all participants in the process, both litigants and their counsel. Its desire to preserve the integrity of its docket is not favoritism, nor is its insistence that Plaintiff abide by the Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Local Civil Rules of the Southern District of New York, and the Individual Practices of this Court. The Court is obligated not to recuse itself in this case, and it will not.

**CONCLUSION**

For the reasons set forth in the remainder of this Opinion, Plaintiff's motion for reconsideration is DENIED; Plaintiff's motion to unseal is DENIED; and Plaintiff's motion for recusal is DENIED. The Clerk of Court is directed to terminate the motion at docket entry 506.

SO ORDERED.

Dated: August 28, 2020  
New York, New York



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KATHERINE POLK FAILLA  
United States District Judge

# APPENDIX H

UNITED STATES DISTRICT COURT

for the

Southern District of New York

ROBYN ABRAHAM )

Plaintiff )

v. )

ABBY LEIGH et al )

Defendant )

Case No. 17-cv-5429 (KPF)

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Plaintiff Robyn Abraham, for general pre-trial purposes (without waiving the Courts order at Doc#260).

Date: July 19, 2019

*Colleen N. Kerwick*  
Attorney's signature

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# APPENDIX I

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

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ROBYN ABRAHAM,

Plaintiff,

Appellate Case No. 20-3320

SDNY Case No. 17-cv-5429 (KPF)

-v.-

ABBY LEIGH, as Executrix of the

Estate of Mitch Leigh, et al.

Defendants.  
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**MOTION TO DISMISS APPEAL**  
**FROM SOME ORDERS ON MOTIONS TO SEAL**

Appellee, Wiss & Partners LLP  
By: Colleen Ni Chairmhaic

**TABLE OF CITATIONS**

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Wiss & Partners LLP, former counsel for Plaintiff-Appellant Robyn Abraham, moves to dismiss Ms. Abraham's Appeal from the Orders of the Southern District of New York ("SDNY"), sealing submissions made by Ms. Abraham containing harassing allegations against her former counsel, and sensitive materials protected by law, including exhibits of a personal nature erased and expunged by statute and references to a confidential administrative proceeding. The specific submissions former counsel moved to seal were made by Ms. Abraham after we withdrew from the case effective October 29, 2019.<sup>1</sup> These repetitive filings, and other similar submissions sealed *sua sponte* by the Honorable Judge Failla, were sealed as irrelevant, salacious, or personally sensitive material. It has also been noted by the SDNY Court, which is intimately familiar with the dispute, that Ms. Abraham's filings about former counsel are irrelevant and contain sensitive and possibly false information (*See* SDNY Case Dkt. # 583).

Former Counsel does not take a position on Ms. Abraham's Appeal from Orders to seal submissions made prior to October 29, 2019, which involve requests to seal by Ms. Abraham and requests to seal by counsel for the settling Defendants.

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<sup>1</sup>These filings also abused the immunity from defamation afforded to court pleadings to launch personal campaigns against former counsel for no legitimate purpose. Ms. Abraham's filings also violate a so-called peace clause for which she accepted valuable consideration (*the enforcement of which was ordered by the SDNY October 29, 2019. See SDNY Dkt. # 379*).

## FACTUAL BACKGROUND

Former Counsel moved to withdraw from representing Ms. Abraham in the SDNY case, which is the subject of this Appeal, after we achieved a settlement in Ms. Abraham's favor against Defendant Honig and Defendant Wasserman (*See* SDNY Case Dkt. # 358). The motion to withdraw was granted on October 15, 2019 (*See* SDNY Case Dkt. # 361).

Ms. Abraham then moved to cause former counsel to continue the representation for the limited purpose of an oral argument on October 22, 2019, of a motion to dismiss brought by SDNY Defendant Leigh and two depositions on October 28, 2019 (*See* SDNY Case Dkt. # 369). We consented. Ms. Abraham's case survived that dispositive motion by Defendant Leigh and our representation concluded on October 29, 2019 (*See* SDNY Case Dkt. # 379). On November 5, 2019, Ms. Abraham moved to reinstate the undersigned former counsel as her counsel. We objected. Ms. Abraham's motion was denied. Ms. Abraham proceeded to represent herself. During the course of Ms. Abraham's exclusive self-representation, Defendant Leigh's Motion for Summary Judgment was granted. *Former Counsel did not represent Ms. Abraham for the Motion for Summary Judgment which is the subject of Ms. Abraham's Appeal.*

Ms. Abraham has disparaged attorneys of former counsel's firm in numerous motions and related filings in this case, both at the SDNY level and in this appeal since we withdrew as her counsel. Some of Ms. Abraham's statements are false, others are misleading, and most are unsupported by any evidence. Judge Failla held that "[Ms. Abraham] raises a number of extraordinary allegations against [former counsels]— some without evidentiary support and others demonstrably false" (Dkt #504) and that "[Ms. Abraham] continues to include misleading and at times false statements in her submissions... Here, again, however, the principal factual assertions are demonstrably false and thus the proffered conspiracy is troubling for an entirely different reason" (Dkt #583).

While Ms. Abraham's repetitive allegations struck the theme that attorneys in the firm committed criminal extortion, blackmail and coercion, the truth is that the firm just sought to have its rightful attorneys' fees paid and Ms. Abraham did not want to pay attorneys' fees<sup>2</sup> to former counsels. Additionally, Ms. Abraham has made false allegations that the firm's attorneys threatened to provide false testimony against her in this case on behalf of Defendants and their counsel and

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<sup>2</sup> At Ms. Abraham's request, the ancillary matter of the fee dispute came before the District Court in the SDNY case.

allegedly contacted allegedly powerful members of Ms. Abraham's ex-husband's family to do Ms. Abraham harm. We did not.

When former counsels successfully moved to seal these filings replete with statutorily confidential matters and records (in addition to untruthful allegations), Ms. Abraham refiled them on the public docket with increasing attenuation from the relevant issues in the SDNY case, the record and the truth. This culminated in a Court Order of Judge Failla, dated October 21, 2020, providing that *“(f)rom this point forward, [Ms. Abraham] shall not file any submission in this case regarding [former counsels] and/or [Ms. Abraham’s] relationship with them, absent leave of Court”* and *“the Court categorically rejects [Ms. Abraham’s] suggestion that her pending appeal to the United States Court of Appeals for the Second Circuit requires her to place any additional information regarding her issues with [former] counsel on the docket of this case”* (See SDNY Case Dkt. # 583).

Notwithstanding that Order of the SDNY Court, Ms. Abraham proceeded with her filings about former counsel on the public docket before this Court of Appeals, in which she mentioned former counsels no less than fifty (50) times in one pleading alone and again attached statutorily dismissed and erased records and again referenced a confidential administrative proceeding. On November 13, 2020,

Ms. Abraham amended her Notice of Appeal. Former counsels moved to clarify that Ms. Abraham's filings about former counsels remained irrelevant to her Amended Appeal (*See* SDNY Case Dkt. # 601). On November 16, 2020, the Honorable Judge Failla held that "*The Court reiterates that the most sensitive material that [Ms. Abraham] has filed regarding [former counsels] and/or [Ms. Abraham's] relationship with them, would be irrelevant to any of her claims on appeal*" (*See* SDNY Case Dkt. # 602).

### **ARGUMENT IN SUPPORT**

Ms. Abraham attaches records in the SDNY case which have been dismissed, erased and expunged by statute and also references a confidential administrative proceeding. This is akin to placing someone's social security number or medical records in a public pleading, which is statutorily prohibited.

The SDNY Court has supervisory power over its own records and files and access to the public has been denied where court files might have become a vehicle for improper purposes. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978); *Brown v. Maxwell*, 929 F.3d 41 (2<sup>nd</sup> Cir., 2019). Sealing is normally granted where public access to the documents

would result in harm to a compelling interest of a movant, particularly when the movant is not itself a litigant, and there is no alternative to sealing that can adequately protect the threatened interest. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499 (2nd Dept., 2007).

The common law right of inspection has bowed before the power of a court to ensure that its records are not used to gratify private spite or promote public scandal. *Nixon*, 98 S. Ct. 1306; *see also Brown v. Maxwell*, 929 F.3d 41 (2<sup>nd</sup> Cir., 2019); *Brown*, 929 F.3d 41. Among other things, Ms. Abraham elected to be noticed on October 8, 2020, as a purported witness in an upcoming child custody case on December 17, 2020, for the undersigned's wealthy ex-husband, in which Ms. Abraham could be expected to authenticate historic dismissed, erased and expunged records under cover of this action.

It is noteworthy that Ms. Abraham defeated the SDNY sealing Orders by refileing the statutorily erased and expunged records and again referencing a confidential administrative proceeding on the public docket of this Court of Appeals for no legitimate purpose. In addition, Ms. Abraham did not serve us with her filings before the Court of Appeals for the Second Circuit, although we were the movant on the some of the orders to seal in Ms. Abraham's notices on appeal.

These are dated November 6, 2019 (*See* SDNY Case Dkt. # 401); February 27, 2020 (*See* SDNY Case Dkt. # 454) as supported on March 11, 2020 (*See* SDNY Case Dkt. # 462); June 26, 2020 (*See* SDNY Case Dkt. # 502); October 14, 2020 (*See* SDNY Case Dkt. # 571; 572); October 19, 2020 (*See* SDNY Case Dkt. # 580); October 26, 2020 (*See* SDNY Case Dkt. # 585); November 9, 2020 (*See* SDNY Case Dkt. # 589). We also support the Orders dated July 8, 2020 (*See* SDNY Case Dkt. # 503); August 5, 2020 (*See* SDNY Case Dkt. # 533) as supported on August 28, 2020 (*See* SDNY Case Dkt. # 538); September 24, 2020 (*See* SDNY Case Dkt. # 545); September 29, 2020 (*See* SDNY Case Dkt. # 553); November 17, 2020 (*See* SDNY Case Dkt. # 604); and November 24, 2020 (*See* SDNY Case Dkt. # 612; 613), which sealed *sua sponte* documents containing irrelevant and scurrilous allegations against former counsel.

Former counsels take no position on Orders on motions to seal filed in the SDNY case prior to October 29, 2019 or Orders affecting the merits of the case by Ms. Abraham, only those containing sensitive, irrelevant and false information regarding former counsels.

**RELIEF SOUGHT**

Former counsels respectfully moves to dismiss Ms. Abraham's Notice of Appeal with respect to the Honorable Judge Failla's sealing Orders, which seal statutorily and/or officially confidential matters.

We also request to keep sealed at the Court of Appeal level that which the District Court has sealed at the trial court level, which includes the filings in this court at the 2<sup>nd</sup> Cir. Dkt. # 54, 69, 78, and 83 and future references to the undersigned former counsels.

Dated December 15, 2020.

*Colleen Ni Chairmhaic*

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## CERTIFICATE OF COMPLIANCE

This Motion to Dismiss is 1816 words. It is double spaced. The font is Times New Roman size 14. The margins are one inch on all four sides. As a Record on Appeal has not yet been filed, the references are made to the Orders of the Honorable Judge Failla being appealed according to the Amended Notice of Appeal. The relevant portions of the Record are annexed under seal.

Dated December 15, 2020

*Colleen Ni Chairmhaic*

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Appellees on some Motions to Seal

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