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Folder Title:
Personal Data Questionnaire

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. form	re: Personal Data Questionnaire - Sotomayor - draft (17 pages)	02/28/1997	P2, P6/b(6)
002. letter	Sonia Sotomayor to Jonathan Yarowsky; re: Preparation of Forms (2 pages)	02/28/1997	P2, P6/b(6)
003. form	Addendum to Personal Data Questionnaire - draft (24 pages)	ca. 1997	P2

COLLECTION:
Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12689

FOLDER TITLE:
Personal Data Questionnaire

2009-1007-F
jp1523

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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SOTOMAYOR RESPONSE TO
PERSONAL DATA QUESTIONNAIRE
QUESTION 22

Attached is a copy of the complaint in the only pending action against my former law firm, Pavia & Harcourt.

CLINTON LIBRARY PHOTOCOPY

Index No. 30139/91 *Year 19*

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

STANLEY WEST,

Plaintiff,

-against-

PAVIA & HARCOURT, ESQS.,
a New York Partnership,

Defendants.

AMENDED VERIFIED COMPLAINT

LEWIS and FIORE
Attorneys for Plaintiff

225 BROADWAY
NEW YORK, N. Y. 10007-3001
(212) 285-2290

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on* 19

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* 19 *, at* M.

Dated:

LEWIS and FIORE
Attorneys for
225 BROADWAY
NEW YORK, N. Y. 10007-3001

To:

Attorney(s) for

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CLINTON LIBRARY PHOTOCOPY

mail 10/5/92

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X

STANLEY WEST,

Plaintiff,

AMENDED
VERIFIED COMPLAINT

-against-

Index #: 30139/91

PAVIA & HARCOURT, ESQS.,
a New York Partnership,

Defendants.

----------X

Plaintiff, by his attorneys, Lewis & Fiore, complaining of the defendant, does hereby allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff, Stanley West (hereinafter West), is a resident of the State of New York, City of New York, and a former client of the defendant.

2. Defendant is and was for all times mentioned herein, upon information and belief, a New York partnership engaged in the practice of law with offices at 600 Madison Avenue, and is made up of a number of attorneys who are together engaged in the practice of law under the firm name of Pavia & Harcourt.

3. Defendant was the attorney for Marcar Restaurant and Catering Corp. d/b/a L'Hostaria del Bongustaio (hereinafter referred to as Marcar), from January 13, 1983 through and including November of 1988.

4. In 1988, defendant was retained by plaintiff and

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Gennaro Picone (hereinafter referred to as Picone), to represent them in the formation of a new business with the intention of forming a new corporation, acquiring a location to conduct a restaurant business and performing all other necessary legal services to protect the rights of Picone and West.

5. Defendant accepted employment on behalf of West and Picone and was paid for its services and performed a number of services for West and Picone.

6. The defendants drafted and filed a Certificate of Incorporation for the formation of a new business corporation known as Malvasia, Inc.

7. The defendants drafted a shareholders' agreement between West and Picone.

8. The defendants drafted and accepted by-laws for Malvasia, Inc.

9. The defendants served as incorporators of Malvasia, Inc.

10. The defendants prepared a Waiver of Notice of the first meeting of the Board of Directors.

11. The defendants prepared the Minutes of the first meeting of the Board of Directors of Malvasia, Inc.

12. The defendants served as an interim secretary of Malvasia, Inc.

13. The defendants prepared written consent of the Board of Directors, accepting the resignation of one of the defendant's members as secretary and appointing West as secretary of Malvasia, Inc.

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CLINTON LIBRARY PHOTOCOPY

14. The defendants prepared a corporate resolution providing that Picone be the one and only signatory on the corporate bank account, and be authorized to conduct all banking business on behalf of the corporation.

15. The defendants prepared a written consent of the Board of Directors, authorizing Picone, and Picone alone, to negotiate and bind the corporation in all respects, for the purchase of the business of Marcar.

16. The defendants prepared a document indicating unanimous consent of the Board of Directors, for Picone to be the sole signatory on the Corporate bank account and to conduct all corporate business, including the obtaining of loans on behalf of the Corporation.

17. The interests of Picone and West, by virtue of their proposed roles in the Corporation, were, from the outset, different and adverse.

18. Picone was a professional chef who was intended, by the parties, to be a full time employee of the Corporation.

19. West was a novice to the restaurant business who was intended by the parties, to supply the necessary funds to form and operate the Corporation.

20. Defendant knew, or should have known, of the conflicting and diverse interests of West and Picone.

21. Defendants should not have undertaken the tasks of representing both West and Picone.

22. In any event, defendant should have made full disclosure of the actual and potential conflicts between the

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diversity of interest between West and Picone, to West, and should have advised West to retain counsel to represent his interest, as opposed to the interest of Picone.

23. Defendant failed to make disclosures of the actual and potential conflict between the interest of Picone and West, to West, and failed to advise West to seek independent counsel to represent his interest.

24. Defendants were negligent in their representation of West, failed to exercise reasonable care in their representation of West and caused West to suffer damages.

25. Defendants knew, or should have known that their professional judgment in representing both West and Picone would, by the nature of the transaction, be compromised and that they would be incapable of the proper level of independent professional judgment in their representation of West.

26. Defendant represented to West that his rights were protected by virtue of the legal services rendered and the representation rendered by the defendants.

27. West relied upon the representations of the defendant, that his rights were protected by virtue of the legal services provided by the defendants.

28. West reasonably relied upon the representations of the defendant, as described above.

29. In reasonable reliance upon the representations of the defendant, West invested substantial sums of money, by virtue of capital contribution and loans to Malvasia, Inc.

30. Defendant's failure to advise West to retain

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CLINTON LIBRARY PHOTOCOPY

independent counsel to represent his interest, was grossly negligent in that West was in the process of investing substantial sums of money in Malvasia, Inc, so that independent counsel could have been retained at a relatively small cost in comparison to the large sums of money being risked by West.

31. Defendant knowingly and intentionally acting on behalf of the interest of others, failed to advise West to retain independent counsel, failed to represent West's interest in the preparation of legal documents while representing to West that his interests were protected.

32. Defendant represented Malvasia, Inc. and Picone against West in a legal action known as Stanley West v. Malvasia, Inc. and Gennaro Picone, in the Supreme Court of New York County.

33. As a result of the foregoing, West has suffered damages in the amount of $700,000.00.

AS AND FOR A SECOND CAUSE OF ACTION

34. Plaintiff repeats each and every one of the above allegations with the same force and effect as if restated in full here.

35. The defendants performed the above described acts intentionally, for the benefit of another and against the interest of West.

36. As a result of the foregoing, Plaintiff has suffered special damages, in that his entire investment of $700,000.00 in the business venture has been lost to him because the business has closed and is no longer functioning.

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CLINTON LIBRARY PHOTOCOPY

AS AND FOR A THIRD CAUSE OF ACTION

37. Plaintiff repeats and realizes each and every allegation contained in the above paragraphs as if restated in full here.

38. As outlined above, defendant made negligent misrepresentations to West.

39. As a result of the foregoing, plaintiff has been damaged in the sum of $700,000.00.

WHEREFORE, it is respectfully requested that plaintiff be granted judgment for damages in the amount of $700,000.00 upon the first, second and third causes of action.

DATED: New York, New York
August 24, 1992

LEWIS & FIORE, ESQS.
Attorneys for Plaintiff
Office and P.O. Address:
225 Broadway, Suite 3300
New York, New York 10007
(212) 285-2290

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CLINTON LIBRARY PHOTOCOPY

INDIVIDUAL VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF ~~KINGS~~ New York)

STANLEY WEST, being duly sworn, deposes and says: deponent is the plaintiff in the within action; deponent has read the foregoing Amended Verified Complaint and knows the contents thereof; the same is true to deponent's own knowledge, except to those matters therein stated to the alleged upon information and belief, and as to those matters deponent believes it to be true.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

STANLEY WEST

Sworn to before
me this 18 day
of Sept , 1992.

Violet Faith Squires
NOTARY PUBLIC

VIOLET SQUIRES
COMMISSIONER OF DEEDS
CITY OF NEW YORK - No. 1-652
CERTIFICATE FILED IN NEW YORK COUNTY
COMMISSION EXPIRES 10-1-93

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Jody Harris, being sworn says: I am not a party to the action, am over 18 years of age and reside at 225 Broadway, Suite 3300, New York, New York 10007.

On October 2, 1992, I served a true copy of the Amended Verified Complaint by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

D'Amato & Lynch
70 Pine Street
New York, New York 10270

JODY J. HARRIS

Sworn to before me this
2nd day of October, 1992.

Notary Public

CHARLES G. FIORE
Notary Public, State of New York
No. 24-4700443
Qualified in Kings County
Commission Expires May 31, 1993

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CLINTON LIBRARY PHOTOCOPY

SOTOMAYOR RESPONSE TO PERSONAL DATA QUESTIONNAIRE QUESTION 26

CLINTON LIBRARY PHOTOCOPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASTLE ROCK ENTERTAINMENT,

Plaintiff,

-against-

95 Civ. 0775 (SS)

CAROL PUBLISHING GROUP, INC., and BETH B. GOLUB,

Defendants.

Appearances:

DAVIS, SCOTT, WEBER & EDWARDS, P.C.
100 Park Avenue
New York, New York 10017
212/685-8000

David Dunn, Esq.
Emily Granrud, Esq.
Attorneys for Plaintiff

BELDOCK, LEVINE & HOFFMAN, LLP
99 Park Avenue
New York, New York 10016
212/490-0400

Melvin L. Wulf, Esq.
Daniel M. Krummer, Esq.
Attorneys for Defendant Carol Publishing Group, Inc.

CLINTON LIBRARY PHOTOCOPY

OPINION AND ORDER

Plaintiff brings this action alleging copyright infringement and unfair competition flowing from defendants' publication of *The Seinfeld Aptitude Test* ("SAT"), a book of trivia concerning *Seinfeld*, a popular television comedy program "about absolutely nothing." (Golub Dep. Ex. 3, cover). Though this seemingly invites the conclusion that this opinion is not about anything, plaintiff's claims raise a variety of difficult and interesting questions concerning the proper scope of copyright protection as it extends to popular television programming. For the reasons to be discussed, I grant plaintiff's motion for summary judgment on the issue of copyright infringement, finding that defendants have appropriated original material from *Seinfeld* without making "fair use" of the program. I deny plaintiff's motion for summary judgment with respect to its claim of unfair competition, however, because there are material issues in dispute concerning this claim.

BACKGROUND

Plaintiff, Castle Rock Entertainment ("Castle Rock"), produced and now owns the copyrights to each episode of the highly successful television series *Seinfeld*, a comedy program featuring four characters confronting life's "daily, petty annoyances." (Shostak Dep. Ex. 3).[1] Defendants are the author, Beth Golub, and publisher, Carol

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[1] The parties have provided deposition excerpts as attachments to the affidavits submitted by David Dunn and Melvin Wulf in further support of or opposition to the motion for summary judgment.

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Publishing Group, Inc. ("Carol"), of SAT, a book of trivia questions "based on the *Seinfeld* show." (Golub Dep. at 95). According to a view shared by the book's author, Beth Golub, and her editor at Carol Publishing, SAT represents a "natural outgrowth" of *Seinfeld*. (Golub Dep. Ex. 5 at 000606; Shostak Dep. Ex. 3). Indeed, "[SAT], like the *Seinfeld* show, is devoted to the trifling, picayune and petty annoyances encountered by the show's characters on a daily basis." (Golub Dep. Ex. 5 at 00606). In other words, defendants designed SAT to "capture *Seinfeld's* flavor in quiz book fashion." (Golub Dep. Ex. 5 at 000606).

In a proposal she submitted to Carol Publishing, Golub explained that she gathered the information tested in SAT by "watching and reviewing" *Seinfeld* episodes. (Golub Dep. Ex. 5 at 000606). During her deposition, Golub provided a more detailed account of her methods: she took notes from programs at the time they were aired on television, and she subsequently reviewed videotapes of several of the episodes, some of which she recorded and others that friends provided. (Golub Dep. at 20-21). Plaintiff reasons that Ms. Golub's proposal -- with its "watching and reviewing" language -- left Carol Publishing with constructive knowledge of Golub's practice of videotaping. Carol Publishing's representatives have denied, however, any actual knowledge that Golub reviewed *Seinfeld* episodes on tape. (Schragis Dep. at 91; Shostak Dep. at 62-64).

By defendant's count, SAT includes 643 trivia questions about the events and characters depicted in the *Seinfeld* show. The questions are presented in three forms: 211 are multiple choice; 93 are matching; and the remainder are simple questions. The

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book draws from 84 of the 86 *Seinfeld* episodes that had been broadcast as of the time that SAT was published in October 1994. The number of questions devoted to each episode ranges from a low of one to a high of 20. Every answer in the book arises from an episode of the show, though defendant Golub created incorrect answers as choices to the multiple choice questions. (Golub Dep. at 36, 94-95). Actual dialogue from the program is quoted in 41 of the book's questions. Though the parties cannot agree on the percentage of the show's overall dialogue excerpted in SAT, they offer figures -- based upon the script most often referenced in the book, "The Cigar Store Indian" -- ranging from a low of approximately 3.6 % (defendants' calculation) to a high of approximately 5.6 % (plaintiff's calculation).

The name "Seinfeld" appears on the front and back covers of SAT in larger print than any other word, in a typeface which, according to plaintiff, mimics the registered *Seinfeld* logo. (Golub Dep. Ex. 3). During editing, defendants increased the size of the name "Seinfeld" appearing on the back cover. (Shostak Dep. at 107-08). SAT also includes, both on its front cover and in several of its pages, pictures of the principal actors who appear in the *Seinfeld* series. On the back cover, as defendants note, a disclaimer appears indicating that SAT "has not been approved or licensed by any entity involved in creating or producing *Seinfeld*." (Golub Ex. 3, back cover). This language is in smaller print than is any other text in the book, but it is surrounded by a border and printed on a shaded background. Defendants contend that their decision to reduce the print size of this disclaimer, while at the same time surrounding it by a border and placing

CLINTON LIBRARY PHOTOCOPY

it upon a shaded background, represented an effort to highlight the disclaimer. Plaintiff contends that this decision was a blatant effort by defendants to reduce the prominence of the only indication provided that SAT was produced without plaintiff's cooperation or approval.

Because of its concern with preserving the show's reputation for quality, plaintiff has been highly selective in marketing products associated with *Seinfeld.* (Wittenberg Aff. ¶¶'s 14, 15). Plaintiff has rejected numerous proposals from publishers seeking approval for a variety of projects related to the show. (Wittenberg Aff. ¶ 23). Plaintiff has licensed the production of a single *Seinfeld* book, *The Entertainment Weekly Seinfeld Companion,* and only after threatening litigation in connection with the book's initial unauthorized release. (Wittenberg Aff. ¶ 25). Also, plaintiff has licensed the production of a CD-ROM product which includes discussions of *Seinfeld* episodes, and which might ultimately include a trivia bank. Plaintiff now alleges that it plans to pursue a more aggressive marketing strategy in the future, a strategy which will include the "publication of books related to Seinfeld." (Wittenberg Aff. ¶ 21). The creative team responsible for *Seinfeld* would have to be assured creative control over any such projects, however. (Id. at ¶ 23; Wittenberg Dep. at 52). Because that creative team, consisting of Jerry Seinfeld and his partner, Larry David, does not now wish to be distracted from the program, it appears that there has been little, if any, progress in developing such books or products. (Id.).

There is no evidence that the publication of SAT has diminished interest in

CLINTON LIBRARY PHOTOCOPY

Seinfeld, or that the profitability of the *Seinfeld* logo "has been reduced in any way at all." (Wittenberg Dep. at 110). In fact, the show's audience has grown since SAT was first published. (Id. at 109). The television network that broadcasts episodes of Seinfeld has distributed copies of SAT in connection with promotions for the program. (Aronson Dep. at 26). Even the executive producer of Seinfeld, George Shapiro, benignly characterizes SAT as "a fun little book." (Shapiro Dep. at 33). Nevertheless, it is a book which plaintiff believes "free-rides" on the success of *Seinfeld*, and plaintiff therefore seeks to bar its continued publication.

Plaintiff now moves for summary judgment on its claims of copyright infringement and unfair competition, arguing that SAT is either an unauthorized reproduction, or derivative version, of *Seinfeld*.[2] Defendants cross-move for summary judgment, claiming that SAT is not substantially similar to *Seinfeld*, and that, in any event, the book is protected as "fair use" under the Copyright Act. For the reasons that follow, the Court finds for plaintiff with respect to its claims under the Copyright Act, but is unable to grant either party summary judgment on plaintiff's common law claim of unfair competition.

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[2] Plaintiff is not now seeking judgment on its claim that defendants violated section 43(a) of the Lanham Act, 15 U.S.C. 1125(a) (1988).

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DISCUSSION

Summary judgment is required when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The moving party has the initial burden of 'informing the district court of the basis for its motion' and identifying the matter 'it believes demonstrate[s] the absence of a genuine issue of material fact.'" Liebovitz v. Paramount Pictures Corp., 1996 WL 733015, * 3 (S.D.N.Y. Dec. 18, 1996) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the movant satisfies its initial burden, the nonmoving party must identify "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In assessing the parties' competing claims, the Court must resolve any factual ambiguities in favor of the nonmovant. See McNeil v. Aguilos, 831 F. Supp. 1079, 1082 (S.D.N.Y. 1993). It is within this framework that the Court must finally determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

I. Prima Facie Copyright Liability

The Copyright Act grants a copyright holder a variety of rights, including the exclusive rights to "reproduce the copyrighted work" and "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106. To succeed on a claim that these rights have been infringed, a plaintiff must demonstrate two elements: "(1) ownership of a

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valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Telephone Serv., Inc., 499 U.S. 340, 361 (1991) (citations omitted); see also Arica Institute, Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992). Defendants do not dispute that plaintiff is the owner of a valid copyright in the individual *Seinfeld* episodes and scripts. The question of infringement therefore turns upon whether SAT is an impermissible copy of *Seinfeld*.

A. Copying

"[A] plaintiff must first show that his [or her] work was actually copied . . . [and] then must show that the copying amounts to an 'improper' or 'unlawful' appropriation." Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139-40 (2d Cir. 1992) (citations omitted); see also 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01[B], at 13-19 (1996) ("First, there is the factual question whether the defendant, in creating its work, used the plaintiff's material as a model, template, or even inspiration."). Ordinarily, there is no direct evidence of actual copying, and the Court is called upon to "infer [such copying] upon a showing that defendant had access to the copyrighted work, and that the allegedly infringing material bears a substantial similarity to the copyrightable elements of plaintiff's work." Arica, 970 F.2d at 1072; see also Twin Peaks Productions, Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1372 (2d Cir. 1993) ("The plaintiff may establish copying either by direct evidence or by showing that the defendant had access to the plaintiff's work and that the two works are substantially

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similar."). In this case, this inquiry is not necessary in order for the Court to make its initial determination that SAT in fact copied from *Seinfeld*.

Defendants make "no secret" of the fact that SAT is based upon *Seinfeld*. (Golub Dep. at 95). SAT is expressly devoted to testing elements from the program. Every correct answer to each of the 643 questions posed in the book reflects information derived directly from *Seinfeld* episodes. (Id. at 36). Moreover, many of the questions posed in SAT, upwards of forty, actually quote dialogue, verbatim, from the show. Such statistics should come as no surprise; a trivia book about *Seinfeld* would make little sense if it tested matters not included in the program, or if it attributed dialogue to characters which they never spoke. Simply put, there can be no real dispute that, as a factual matter, SAT copies information and dialogue from *Seinfeld*.[3]

The determination that SAT serves as is its own direct evidence of copying does not remove substantial similarity from the infringement equation. See Twin Peaks, 996 F.2d 1366. In Twin Peaks, the defendant published a book which was primarily devoted to digesting episodes of another popular television program, *Twin Peaks*. Addressing the concept of "fragmented literal similarity," the Court determined that 89

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[3] Plaintiff argues that defendant Golub's practice of videotaping episodes of *Seinfeld* as an intermediate step in the creation of SAT constitutes prima facie infringement regardless of the content of the show ultimately reflected in the book. (Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment at 5-7). Because the Court finds that SAT copies *Seinfeld*, it is not necessary to reach this question. In any event, while defendant Golub certainly copied *Seinfeld* by taping the program, the record reveals no evidence requiring the conclusion that defendant Carol was involved in, or had constructive knowledge of, Golub's practice.

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lines of dialogue copied from the show rendered the book "substantially similar" to the program. Id. at 1372. Because the book digested entire episodes, the Court found that there was "comprehensive nonliteral similarity" between the two works, as well. Id. Of course, the Second Circuit could have found copying, as a factual matter, without searching for substantial similarity; with 89 lines of dialogue quoted in the allegedly infringing book, it was inescapable that some copying had taken place. It is apparent, then, that the Second Circuit applied a substantial similarity test devoted to finding more than mere copying; it applied a test meant to determine whether the copying which had taken place was significant as a matter of law.

"The presence of a 'substantial similarity' requirement in both prongs of the analysis -- actual copying and whether the copying constitutes an improper appropriation -- creates the potential for unnecessary confusion, especially because a plaintiff need not prove substantial similarity in every case in order to prove actual copying." Laureyssens, 964 F.2d at 140; see also 3 Nimmer § 13.01[B], at 13-11 to 13-12 (distinguishing probative similarity from substantial similarity). Where there is no direct evidence of copying, as a factual matter, a substantial similarity between the two works creates an inference of such copying. Where there are sufficient similarities to permit such an inference, or where there is direct evidence of actual copying, the question becomes whether there is substantial similarity as a matter of law. At this stage, substantial similarity becomes a function of whether defendant copied "elements of the work that were original." Feist, 499 U.S. at 361; Laureyssens, 964 F.2d at 140 (upon finding direct

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proof of actual copying, Court's "central concern" became whether there was "unlawful appropriation of protected material."). For those reasons already explained, the first of these inquiries is unnecessary in the present case; by its very nature, SAT copies at least some material from *Seinfeld*. The legally significant question therefore becomes whether the copying which took place rendered the two works substantially similar as a matter of law -- i.e., whether SAT copied "elements of [*Seinfeld*] that were original." Id.

B. Original Elements of *Seinfeld*

"The *sine qua non* of copyright is originality." Feist, 499 U.S. at 345. Indeed, it is for this reason that "[n]ot all copying . . . is copyright infringement," but only the copying of the original elements of a protected work. Id. at 361. Addressing this point, defendants invoke a fact/expression distinction that has proven decisive in numerous infringement cases. See, e.g., Feist, 499 U.S. 341 (finding no infringement where defendant produced a multi-county phone directory, in part, by obtaining names and phone numbers from plaintiff's single-county directory); Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (finding infringement where defendant published magazine article which did not merely include facts revealed by President Ford in his as yet unpublished memoirs, but which excerpted the President's expression of those facts); Worth v. Selchow & Richter Co., 827 F.2d 569 (9th Cir. 1987) (finding no infringement where defendant incorporated facts chronicled in plaintiff's reference books into a trivia game), cert. denied, 485 U.S. 977 (1988). Specifically, defendants argue that

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SAT does not copy plaintiff's protected expression, but merely quizzes readers as to the show's underlying facts and ideas.

Consideration of the logic underlying the fact/expression distinction reveals a fundamental flaw in defendants' reasoning. The fact/expression dichotomy has been developed in a series of cases concerning the publication of nonfiction works and factual compilations. See, e.g., Feist, 499 U.S. 341 (compilation); Harper & Row, 471 U.S. 539 (nonfiction history). The facts reported in such works "do not owe their origin to an act of authorship." Feist, 499 U.S. at 347. Accordingly, courts have adopted an approach "permitting free communication of [these] facts while still protecting an author's expression." Harper & Row, 471 U.S. at 556 (quoting, with approval, lower court's decision, reported at 723 F.2d 195, 203 (2d Cir. 1983)). Specifically, protection extends only to the original manner in which the copyright holder expresses or compiles the facts that are reported, and not to the facts themselves. See, e.g., Harper & Row, 471 U.S. 539; Feist, 499 U.S. 340. This is an appropriate resolution of the tension between facts and expression because the facts of a nonfiction work simply "do not contain the requisite originality and creativity required as the '*sine qua non* of copyright.'" Arica, 970 F.2d at 1074 (citing Feist, 499 U.S. at 345).

By contending that they are not reproducing original expression from *Seinfeld*, but only "uncopyrightable facts about the *Seinfeld* show," plaintiffs are staking their claim upon a false premise. (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment at 7). SAT does not pose "factual"

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questions about the *Seinfeld* show; it does not ask who acts in the program, who directs or produces the show, how many seasons it has run, etc. Instead, SAT poses questions about the events depicted during episodes of the *Seinfeld* show. The facts depicted in a *Seinfeld* episode, however, are quite unlike the facts depicted in a biography, historical text, or compilation. *Seinfeld* is fiction; both the "facts" in the various *Seinfeld* episodes, and the expression of those facts, are plaintiff's creation. Thus, while defendants' book does not report plot developments and digest programs, as in Twin Peaks, SAT is devoted to questions concerning creative components of *Seinfeld*. In other words, by copying "facts" that plaintiff invented, SAT "appropriate[s] [plaintiff's] original contributions." Harper & Row, 471 U.S. at 548. Thus, to find in defendant's favor merely by rote application of the rule against affording copyright protection to facts would be to divorce that rule from its underlying rationale. Simply put, and of most direct concern under the Copyright Act, defendants have appropriated original elements of plaintiff's work.

Though treating the issue in a very different context, the most recent Second Circuit decision concerning the fact/expression dichotomy provides additional support for this Court's conclusion. See National Basketball Association v. Motorola, Inc., 1997 WL 34001 (2d Cir. Jan. 30, 1997) (hereinafter "NBA"). In NBA, the National Basketball Association claimed that defendant infringed their valid copyright in televised professional basketball games by reporting the scores of those games, during play, to purchasers of their electronic pagers. In finding for defendants, the Court drew a distinction very illuminating for present purposes: the Court noted that, "[u]nlike movies,

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plays, *television programs*, or operas, athletic events have no underlying script." Id. at * 4 (emphasis added). On this basis, the Court concluded that the facts of a game (e.g., the score, the foul situation, the time remaining, etc.) could not be protected by the Copyright Act; only those aspects of a broadcast that are under the NBA's creative control merited such protection (e.g., camera angles, commentary, graphics, etc.). The present case, of course, presents the opposite situation; this case involves facts copied from a "television program" with an "underlying script." Unlike the facts of a professional basketball game (or the facts compiled in a phone directory or biography), the facts revealed during an episode of *Seinfeld* are created by the show's writers. Thus, by reporting "facts" from each episode -- whether by transmitting them on a pager, or by including them as the answers to a set of trivia questions -- defendants have appropriated "original components" of plaintiff's protected work.

C. Willfulness

Though it is not essential to a finding of liability under the Copyright Act, the question of whether a defendant's infringement was willful does have a significant bearing upon the potential damages to be awarded in connection with the violation. See 17 U.S.C. § 504(c)(2). "[A] court need not find that an infringer acted maliciously to find willful infringement." Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc., 807 F.2d 1110, 1115 (2d Cir. 1986). "The standard is simply whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded the possibility."

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Twin Peaks, 996 F.2d at 1382.

The parties have not briefed the question of damages, and the Court is hesitant to make a finding of willfulness outside the context of the damages question which it implicates. Nevertheless, the record provides clear evidence, at a minimum, of defendants' reckless disregard for the possibility that their conduct amounted to copyright infringement. See Twin Peaks, 996 F.2d at 1382. First, defendants were on notice that *Seinfeld* is a protected work: each televised episode commences with a copyright notice. (Wittenburg Aff. ¶ 10). Also, all the defendants are sophisticated with respect to such matters. Defendant Golub is an attorney. Mr. Shragis, Carol's publisher, testified that his company has had experience with the copyright laws, and that he is familiar with the requirements of those laws. (Schragis Dep. at 17, 73-74, 93, 107-09). Finally, Carol continued to publish and distribute SAT after receiving actual notice from plaintiff demanding that Carol cease and desist publication. (Schragis Dep. at 17-19). In other words, defendants continued in their infringement even "after receiving a specific warning." See Twin Peaks, 996 F.2d at 1382.

II. Fair Use

As the preceding discussion demonstrates, plaintiff has established a prima facie case of infringement by showing that SAT appropriates original elements from *Seinfeld*. Defendants argue, however, that, even if SAT is an unauthorized copy of *Seinfeld* -- as the Court has found it to be -- the book is protected by the "fair use"

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doctrine. As set out in the Copyright Act:

> the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include ---
>
> > (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> > (2) the nature of the copyrighted work;
> > (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> > (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. "[T]he applicability of the fair use defense is ordinarily a factual question for the jury to determine." Roy Export Co. Establishment v. Columbia Broadcasting System, Inc., 503 F. Supp. 1137, 1143 (S.D.N.Y. 1980), aff'd, 672 F.2d 1095 (2d Cir.), cert. denied, 459 U.S. 826 (1982); see also Harper & Row, 471 U.S. at 560 ("Fair use is a mixed question of law and fact."); Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1258 (2d Cir. 1986) ("Because the fair use question is so highly dependent on the particular facts of each case, courts . . . have usually found it appropriate to allow the issue to proceed to trial."), cert. denied, 481 U.S. 1059 (1987). However, where the district court has "facts sufficient to evaluate each of the statutory factors," it may conclude as a matter of law that the challenged use is not a protected fair use. Harper & Row, 471 U.S. at 560; see also Leibovitz, 1996 WL 733015, * 4 (citing several cases for the proposition "that a rejection of the fair use defense and a subsequent finding in favor of a copyright plaintiff . . . may be appropriate at summary judgment.").

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A. Purpose And Character Of The Use

"The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, __, 114 S.Ct. 1164, 1171 (1994). Though it may be "extravagant" to characterize SAT as a work of criticism or comment, the Court "must be alert to the risk of permitting subjective judgments about quality to tilt the scales on which the fair use balance is made." Twin Peaks, 996 F.2d at 1374. Surely a text testing one's knowledge of Joyce's *Ulysses*, or Shakespeare's *Hamlet*, would qualify as "criticism, comment, scholarship, or research," or such. The same must be said, then, of a text testing one's knowledge of Castlerock's *Seinfeld*. Id. ("A comment is as eligible for fair use protection when it concerns 'Masterpiece Theater' and appears in the New York Review of Books as when it concerns 'As the World Turns' and appears in Soap Opera Digest."). Thus, the Court is satisfied that SAT "serves one or more of the non-exclusive purposes that section 107 identifies as examples of purposes for which a protected fair use may be made." Id.

As the Supreme Court recently explained, the "central purpose" of the Court's inquiry into the character and purpose of an allegedly infringing work must be to determine whether that work is "transformative." Campbell, 114 S.Ct. at 1171; see also Twin Peaks, 996 F.2d at 1375. Put differently, the analysis properly focuses upon whether "the new work merely 'supersedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with

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new expression, meaning, or message." Campbell, 114 S.Ct. at 1171 (citations omitted). Though plaintiff insists that SAT is not at all creative, the Court concludes otherwise. Given the absence of any case law addressing the copyright status of a work completely devoted to posing trivia questions about the fictional elements of another work, it is clear that SAT is itself an "original creation." By testing *Seinfeld* devotees on their facility at recalling seemingly random plot elements from various of the show's episodes, defendants have "added something new" to *Seinfeld*, and have created a work of a "different character" from the program. It may even be said that defendants have identified a rather creative and original way in which to capitalize upon the development of a "T.V. culture" in our society; a culture in which the distinction between fiction and fact is of declining consequence, and in which people are as concerned with the details of the former as the latter.

The Court's finding that SAT is a transformative work, though important, is not dispositive in defendant's favor. Indeed, it is a basic axiom of copyright law that the unauthorized production of derivative works can give rise to a successful claim of infringement. See 1 Nimmer § 3.06, at 3-34.4; see also Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990) (rejecting fair use claim raised by defendant charged with unauthorized creation of a derivative work), aff'd 960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934 (1991). And a derivative work, by definition, transforms an original. See 17 U.S.C. § 101 (defining a "derivative work" as one which is "based upon," but which "recast[s], transform[s], or adapt[s]," an original); see also Durham Industries, Inc. v.

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Tomy Corp., 630 F.2d 905 (2d Cir. 1980) (explaining that in order to be classified as a derivative, a work must contain some "substantial, not merely trivial, originality"). Thus, to hold that the transformative nature of a work automatically shields it from a successful claim would be to reject an unassailable proposition -- i.e., that the unauthorized production of a derivative can support a claim for infringement. The question of whether a work is transformative must therefore be most decisive when answered in the negative. If a work is not transformative, "fair use should perhaps be rejected without further inquiry into the other factors."[4] Campbell, 114 S.Ct. at 1116. Where, as here, a work is transformative, the crux of the fair use analysis remains: the Court must proceed with a careful consideration of the remaining three factors, while merely granting defendants an advantage at the outset.

Defendants' initial advantage must be tempered, if only slightly, by the fact that their creation and publication of SAT was a commercial endeavor. The Copyright Act "plainly assigns a higher value to a use that serves 'nonprofit educational purposes' than to one of a 'commercial nature.'" Twin Peaks, 996 F.2d at 1374. This factor must not be unduly emphasized, however. As the Supreme Court reasoned in Campbell, "[i]f

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[4] Though a useful generalization, this statement should not be elevated to the status of a rule applicable in all situations. For instance, the Supreme Court has held that the practice of video taping programs for subsequent private viewing represents a fair use, but did not suggest that such video taping is "transformative." See Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984). Even without this factor, the Court was satisfied that the creation of a tape designated solely for noncommercial, private enjoyment, represents a fair use under the Copyright Act.

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. . . commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . since these activities 'are generally conducted for profit in this country.'" Campbell, 114 S.Ct. at 1174 (citations omitted); see also Robinson v. Random House, Inc., 877 F. Supp. 830, 840 (S.D.N.Y. 1995) ("because nearly all authors hope to make a profit with their work, courts should be wary of placing too much emphasis on the commercial nature in a fair use determination."). Thus, the commercial nature of SAT reduces -- but does not nearly eliminate -- the significance properly ascribed to the transformative quality of defendants' work.

B. Nature Of The Copyrighted Work

"This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." Campbell, 114 S.Ct. at 1175. As already discussed, originality is the core concern of copyright protection. See Feist, 499 U.S. at 345. If the second factor of the fair use test "favors anything," then, "it must favor a creative and fictional work, no matter how successful." Twin Peaks, 996 F.2d at 1376; see also Stewart v. Abend, 495 U.S. 207, 237 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works."). *Seinfeld* is a highly successful fictional and creative work. As defendants concede in their opposition papers, plaintiff thereby has a decisive advantage with respect to the second factor of the fair use analysis. (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for

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Partial Summary Judgment at 14-15).

C. Substantiality Of The Portion Used

In addressing this factor, the parties engage in an almost academic deconstruction of *Seinfeld*, with their analysis ultimately devolving into an exercise in counting the number of words extracted from particular scripts and episodes. Adapting competing methodologies, and failing to agree upon correct word counts, the parties arrive at different measures of the extent of copying that took place. For instance, plaintiff estimates that SAT copies 5.6 % of the *Seinfeld* episode most often referenced in the book; defendants concede only 3.6 %. Accepting defendants' calculations, as is in accord with the appropriate presumptions for summary judgment purposes, the 3.6 % figure does little to advance defendants' cause.

Though the Court recognizes that a quantitative approach to addressing the substantiality question has a place in the analysis, it is clear that even small amounts of material extracted from an original work can suffice to counter a claim of fair use. Twin Peaks, 996 F.2d at 1372 (finding infringement where defendant excerpted a total of 89 lines of dialogue from several episodes of a protected television program); Harper & Row, 471 U.S. at 564-65 (finding infringement where defendant excerpted approximately 400 words of a full length book); Roy, 503 F. Supp. 1137 (upholding jury verdict finding infringement where defendant broadcast a series of film clips from six full-length films by Charlie Chaplin). In other words, the substantiality factor "has both a quantitative and a qualitative element to it." Wright v. Warner Books, 953 F.2d 731, 738

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(2d Cir. 1991). If a challenged work appropriates what amounts to "the heart" of an original work, even if only in a few words, then such an appropriation is substantial for purposes of the fair use inquiry. See Harper & Row, 471 U.S. at 565.

The Court's determination that SAT is substantially similar to *Seinfeld* "so as to be prima facie infringing should suffice for a determination that the third fair use factor favors the plaintiff." Twin Peaks, 996 F.2d at 1377. Indeed, whether under the rubric of prima facie copying or the fair use defense, it is inescapable that SAT appropriates essential elements of *Seinfeld*, and that *Seinfeld* is essential to SAT. Beginning with the significance that the appropriated material has in relation to the *Seinfeld* show, a brief review of SAT confirms that the book invokes all of the show's main characters, and many of the show's most humorous plot elements. Perhaps more to the point, SAT seizes upon the notion which lies at the very heart of *Seinfeld* -- that there is humor in the mundane, seemingly trivial, aspects of every day life. Indeed, by inviting its readers to recall literally 643 bits of information from various *Seinfeld* episodes, SAT "follow[s] the basic premise of the *Seinfeld* show by focusing on minutiae in the day-to-day lives of the show's characters." (Shostak Dep. Ex. 2 at 000604). As defendants boasted before the onset of this litigation, SAT succeeds at "capturing [*Seinfeld's*] flavor in quiz book fashion." (Golub Dep. Ex. 5 at 00606).

The "amount and substantiality" fair use factor is addressed primarily to the very matter considered by the Court in the preceding paragraph, i.e., "the volume and substantiality of the work used with reference to the copyrighted work, not to the

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allegedly infringing work as a whole." 17 U.S.C. § 107(3). The Second Circuit, however, has deemed it useful also to consider "the amount and substantiality of the protected passages in relation to the work accused of infringement." Wright, 953 F.2d at 739. Not only does SAT draw upon significant elements of the *Seinfeld* program, but SAT introduces relatively little additional material into the mix. Though the book transforms the program by employing a trivia game format, that trivia game relates exclusively to events as they are depicted in the *Seinfeld* program. Simply put, without *Seinfeld*, there can be no SAT. See Salinger v. Random House, 811 F.2d 90, 99 (2d Cir.) (finding that quantitatively modest excerpting from plaintiff's personal letters was substantial where those excerpts, "[t]o a large extent, [made defendant's] book worth reading."), cert. denied, 484 U.S. 890 (1987); see also Addison-Wesley Publishing Co. v. Brown, 223 F. Supp. 219, 223-24 (E.D.N.Y. 1963) (stressing that defendant's book, a manual consisting of the answers to a set of physics problems included in plaintiff's college course book, had "no independent viability."); Midway Mfg. Co. Arctic Int'l, Inc., 1981 WL 1390, * 9 (N.D. Ill. 1981) ("[If] defendant's device would only have value because of plaintiff's particular copyrighted audio visual image, then plainly defendant's device would only have value because of plaintiff's particular copyrighted audio visual work. Defendant, thus, by selling its device reaps the benefits of plaintiff's artistic endeavor."). In sum, defendants have identified and appropriated the most important elements of *Seinfeld*, and have made them the most important elements of SAT.

Previously, the Court emphasized that its finding that SAT is transformative

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of *Seinfeld* cannot be dispositive for defendants, because such a holding would discredit the proposition that the unauthorized production of a derivative work can be infringing. On similar logic, the Court's finding that SAT incorporates a substantial amount from *Seinfeld* cannot be dispositive in plaintiff's favor. Because a finding of substantial similarity is a prerequisite to a prima facie claim of infringement, such a finding cannot negate the possibility of fair use. Otherwise, the fair use provision of the Copyright Act would amount to little more than a false promise of a viable defense; there would be no real chance that a prima facie case of infringement could ever be negated by a showing of fair use. The first three factors of the fair use analysis, then, suggest a somewhat unsatisfying result; plaintiff has an advantage, but one that is hardly compelling or dispositive.

D. Effect On Potential Market

The effect on the market for the copyrighted work is "undoubtedly the single most important element of fair use."[5] Harper & Row, 471 U.S. at 566; see also

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[5] The Second Circuit has recently suggested that, by "conspicuously omit[ting] this phrasing" in a recent discussion of the fair use standard, the Supreme Court has placed the "effect on potential markets" factor on an equal footing with the remaining three fair use considerations. American Geophysical Union v. Texaco Inc., 60 F.3d 913, 926 (2d Cir. 1994) (citing Campbell, 114 S.Ct. at 1171). Given the vigor with which the Supreme Court has emphasized this factor in the past, this Court hesitates in adapting the Second Circuit's dicta. In any event, because neither party has any considerable advantage through the Court's consideration of the first three fair use factors, the effect on the potential markets -- however important it is relative to the remaining factors -- will be determinative in this case.

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Robinson, 877 F. Supp. at 842. For purposes of this inquiry, "harm to both the original and derivative works must be considered." Robinson, 877 F. Supp. at 842. As for the original work, defendants stress that SAT has not and cannot be expected to reduce interest in *Seinfeld*. The Court agrees; SAT compliments *Seinfeld*. The book is only of value to a regular viewer of the program. Moreover, though plaintiff proclaims plans to enter derivative markets with books about *Seinfeld*, there is little suggestion -- and certainly not enough to remove all material doubt -- that such projects are anything more than a remote possibility. See Wright, 953 F.2d at 739 ("Plaintiff offered no evidence that the project will go forward."). Indeed, if past practice provides any indication, plaintiff will be slow to develop any such works for fear of compromising *Seinfeld's* reputation for quality.

This does not end the analysis, however; "the proper inquiry concerns the 'potential market' for the copyrighted work." Salinger, 811 F.2d at 99. More broadly, the inquiry must extend even to the potential market for as yet nonexistent derivative works. Campbell, 510 U.S. at 1178 (accepting defendant's position that rap music parody of the song, Pretty Woman, would not detract from sales of the original, but remanding for determination as to whether parody would effect the market for hypothetical non-parody "rap derivatives" of Pretty Woman.). In other words, the Court must consider not only whether SAT detracts from interest in *Seinfeld*, or even whether SAT occupies markets that plaintiff intends to enter; the analysis is whether SAT occupies derivative markets that plaintiff may potentially enter. Id.; see also Rogers, 751 F. Supp. at 480 ("I do not

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think the case turns upon Rogers' past conduct or present intention as much as it does upon the existence of a recognized market for new versions or new uses of the photograph, which unauthorized use clearly undermines."). At first blush, this seems to create an impossible standard for a defendant to satisfy; any time there is a successful infringing work (i.e., one likely to provoke a law suit), it necessarily means that defendants are filling a "potential" market that would otherwise be available for plaintiff's taking. See 3 Nimmer § 13.05[A][4], at 13-187. Properly understood, however, the "potential markets" standard erects no such barrier to a finding of fair use.

The term "potential markets" does not properly encompass all conceivable markets for an original and its derivatives. "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." Campbell, 114 S.Ct. at 1178. The examples of parody and criticism should serve to clarify and illustrate this proposition. By the very nature of such endeavors, persons other than the copyright holder are undoubtedly better equipped, and more likely, to fill these particular market and intellectual niches. See Campbell, 114 S.Ct. at 1178 ("there is no protectable derivative market for criticism."); New Era Publications, Int'l v. Carol Publishing Group, 904 F.2d 152, 160 (2d Cir.) ("a critical biography serves a different function than does an authorized, favorable biography, and thus injury to the potential market for the favorable biography by the publication of the unfavorable biography does not affect application of factor four."), cert. denied, 498 U.S. 921 (1990); Leibovitz, 1996 WL 733015, at * 13 ("although derivative markets are an

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appropriate consideration in a fair use analysis, there is no protectable derivative market for criticism."). Here, the Court sees no reason that the market for derivative game versions of *Seinfeld* is a market that should be reserved for persons other than plaintiff. A *Seinfeld* trivia game is not critical of the program, nor does it parody the program; if anything, SAT pays homage to *Seinfeld*. The market for such works is one that should properly be left to plaintiff's exclusive control.

The Court's resolution of the "potential markets" inquiry is not effected by the prospect that plaintiff will choose to leave this particular derivative market unsatisfied. See Salinger, 811 F.2d at 99 ("the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime."). The Court is persuaded that there is a meaningful difference, for purposes of the Copyright Act, between a copyright holder's failure to occupy a particular market as a matter of choice, and a failure to occupy such a market as a matter of neglect. Id. In a manner of speaking, plaintiff has exercised its control over derivative markets for *Seinfeld* products, if only by its decision to refrain from inundating those markets. Indeed, artists express themselves not merely by deciding what to create from their original work, but by deciding what not to create as well. Cf. Harper & Row, 471 U.S. at 559 ("freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'") (citations omitted). It would therefor not serve the ends of the Copyright Act -- *i.e.*, to advance the arts -- if artists were denied their monopoly over derivative versions of their creative works merely

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because they made the artistic decision not to saturate those markets with variations of their original. Where nothing in the nature of criticism or parody is at issue, this creative choice must be respected.

E. Aggregate Fair Use Assessment

Though there are numerous competing considerations which make this decision a difficult one, the Court is persuaded that, on balance, SAT does not represent a fair use of *Seinfeld*. Only one of the four statutory factors favors defendant, and then, only by a generous understanding of what it means for a work to be "transformative." Plaintiff prevails with respect to each of the remaining three factors: *Seinfeld* is a work of fiction, and such works are accorded special status in copyright law; SAT draws upon "essential" elements of *Seinfeld*, and it draws upon little else; and, most importantly, SAT occupies a market for derivatives which plaintiff -- whatever it decides -- must properly be left to control. In short, SAT does not make fair use of *Seinfeld*, and plaintiff must accordingly be granted summary judgment on its claim of copyright infringement. See Wright, 953 F.2d at 740 ("a party need not 'shut-out' her opponent on the four factor tally to prevail.").

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III. Common Law Unfair Competition

In order to succeed on a claim of common law unfair competition under New York law, plaintiff must establish the bad faith misappropriation of its labor and expenditure resulting in the likelihood of confusion as to the source of the product. See Kraft General Foods v. Allied Old English, Inc., 831 F. Supp. 123, 135 (S.D.N.Y. 1993); Shaw v. Time-Life Records, 38 N.Y.2d 201, 206, 379 N.Y.S.2d 390, 395 (1975). "Thus, some showing of bad faith is crucial to the claim." Brown v. Quiniou, 744 F. Supp. 463, 473 (S.D.N.Y. 1990). The Court must also determine "whether persons exercising 'reasonable intelligence -- and discrimination' would be taken in by the similarity" between the two products. Shaw, 38 N.Y.2d at 206 (citations omitted). In other words, plaintiff must prove a likelihood of confusion among members of the general public as to the source of defendants' work. See Charles Of The Ritz Group, Ltd. v. Quality King Distributors, Inc., 832 F.2d 1317, 1321 (2d Cir. 1987); Weight Watchers International, Inc. v. Stouffer Corp., 744 F. Supp. 1259, 1283 (S.D.N.Y. 1990).

"Likelihood of confusion is usually measured by applying the test formulated by Judge Friendly in Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d at 495." See Weight Watcher, 744 F. Supp. at 1269; see also Twin Peaks, 996 F.2d at 1379 (remanding to the district court for a "full" examination of the Polaroid factors in connection with plaintiff's claim of trademark infringement). Specifically, the Court must balance the following factors:

the strength of [the owner's] mark, the degree of similarity between the two

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> marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.[6]

Polaroid, 287 F.2d at 495. Despite the stature of the "venerable Polaroid factors," the parties have not addressed, or even identified, most of these considerations in their discussion of consumer confusion. See Twin Peaks, 996 F.2d at 1379.

The matters that the parties have focused upon simply are not so compelling as to merit summary judgment. Plaintiff begins by arguing that defendants have created confusion as to the sponsorship of SAT by including the name "Seinfeld" in the book's title, and by referring to the *Seinfeld* show in promotional materials. (Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment at 23-24). As defendants explain, however, "there's no secret that the book is based on the show." (Golub Dep. at 95). The book is expressly directed to devotees of the television program, and it is dedicated to testing their knowledge of the show. It is all but inevitable that the *Seinfeld* name would be invoked in the book's title and in its advertising. See Twin Peaks, 996 F.2d at 1379 (there can be "little question that the title is of some artistic

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[6] Though this formulation has been developed in the context of federal claims under the Lanham Act for trademark infringement, it has also been applied to common law claims of unfair competition, and it reaches the identical "likelihood of confusion" issue which is of present concern. See, e.g., Weight Watchers, 744 F. Supp. at 1283 ("Common law unfair competition claims closely parallel Lanham Act unfair competition claims; to the extent that they may be different, the state law claim may require an additional element of bad faith or intent."); see also Kraft, 831 F. Supp. 123, 136 ("the Court has already found, in the context of the Lanham Act claims, that plaintiff has demonstrated a likelihood of confusion").

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relevance to the Book."). "The question then is whether the title," and advertising, "is misleading in the sense that it induces members of the public to believe the Book was prepared or otherwise authorized by [defendants]." Twin Peaks, 996 F.2d at 1379.

Plaintiff argues that there are similarities between the word "Seinfeld" as it appears on the cover of SAT and the *Seinfeld* logo which reveal defendants' intention to mislead consumers as to the origin of the book. Specifically, the *Seinfeld* logo and the word "Seinfeld" as it appears on the front cover of SAT share similar type face, and the *Seinfeld* lettering on the back cover appears in the same red coloring as the logo. Moreover, the word *Seinfeld* is prominently featured on the front and back covers of SAT. Though the Court agrees that there are unmistakable similarities between the *Seinfeld* logo and the SAT cover, there are distinct differences, as well. Most notably, the *Seinfeld* logo is written on a slant, with an inverted triangle over the "i." The word "Seinfeld," as it appears on the cover of SAT, is not adorned with any such flourishes.

Even accepting that the word "Seinfeld," as it appears on the cover of SAT, bears an unlikely resemblance to the *Seinfeld* logo, there is another important aspect of the SAT cover -- the disclaimer on the back cover of the book -- which is sufficient to create an issue of fact on the questions of bad faith and consumer confusion. "Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship." Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1052-53 (2d Cir. 1983) ("We are satisfied that the disclaimer is adequate to distance CU and Regina"), cert. denied, 469 U.S. 823 (1984). The parties, predictably

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enough, have sharply contrasting views of the disclaimer set out on the back cover of SAT. Plaintiff stresses the small lettering of the disclaimer; lettering that was reduced in size shortly before publication and made smaller than any other text in the book. Defendants draw the Court's attention to the black border surrounding the disclaimer, and to the shaded background allegedly designed to highlight that disclaimer. For purposes of the parties' competing claims for summary judgment, the Court is simply unable to find that any of these considerations is conclusive as a matter of law.

Given that those factors that plaintiff relies upon to establish consumer confusion are inconclusive, it is significant that plaintiff offers little in the way of empirical support for its claim. In fact, "[p]laintiff adduce[s] but one incident of actual confusion, and it is of scant probative value." Brown, 744 F. Supp. at 472. Specifically, plaintiff interprets NBC's decision to distribute copies of SAT in connection with a *Seinfeld* promotion as a clear indication that an average consumer could be misled as to the sponsorship of SAT. As plaintiff sees it, NBC's behavior suggests that the very network which airs *Seinfeld* mistook the book's origin. As defendants point out, however, the network's behavior might also be taken to suggest that NBC was not confused as to the origin of SAT so much as it was simply unconcerned with the origin of SAT.

Any inquiry into a defendant's alleged bad faith and the potential for consumer confusion necessarily entails a "factual inquiry." Brown, 744 F. Supp. at 467, 472. As such, summary judgment cannot be granted on plaintiff's claim of unfair competition unless there is no material dispute as to either of these matters. Id. at 472

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("Subjective issues such as good faith and intent are generally inappropriate subjects of summary judgment."); see also Shaw, 38 N.Y.2d 201 (upholding denial of summary judgment where issue of material fact existed as to whether reasonably discriminating members of the public would be confused by publisher's advertising of bandleader's versions of musical compositions). Plaintiff certainly has not succeeded in eliminating any such dispute: "Similarity in overall appearance alone cannot establish source confusion as a matter of law. Nor is the addition of the anecdotal evidence . . . dispositive." Coach, 933 F.2d at 169. Defendants have fared no better; there are significant questions concerning the SAT cover, defendants' alleged bad faith during editing, and the adequacy of the book's disclaimer. In short, a dispute exists between the parties, a dispute which cannot now be resolved. Accordingly, the Court denies plaintiff's motion for summary judgment on its claim of unfair competition, as well as defendants' cross-motion on this same cause of action.

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CONCLUSION

For the reasons set forth above, the Court grants plaintiff's motion For summary judgment, on the issue of liability, on its claim of copyright infringement. As for plaintiff's common law claim of unfair competition, the Court finds that there remains a dispute as to material facts between the parties. Therefore, the Court denies plaintiff's request for summary judgment on this issue, as well as defendants' cross-motion for judgment in its favor.

A conference is scheduled for March 20, 1997, at 4:30 p.m., by which time the parties are directed to present the Court with a case management plan addressing how the measure of relief for the copyright infringement claim will be determined, and proposing a schedule for proceeding to trial on the claim of unfair competition.

SO ORDERED

Dated: New York, New York
February 27, 1997

Sonia Sotomayor
U.S.D.J.

CLINTON LIBRARY PHOTOCOPY

Barbara HAYBECK, Plaintiff,
v.
PRODIGY SERVICES COMPANY, a Partnership of Joint Venture with IBM Corporation and Sears Roebuck and Co., and Jacob Jacks, Defendants.

95 Civ. 9612(SS).

United States District Court,
S.D. New York.

Nov. 12, 1996.

Customer who bought time on company's computer service and who had unprotected sex with company's employee who was positive for Human Immunodeficiency Virus (HIV) and who met customer in on-line company sex chat room brought action against company, alleging that, under theories of respondeat superior or negligent hiring and retention, company was responsible for employee's transmission of the HIV virus to her. Company moved to dismiss. The District Court, Sotomayor, J., held that: (1) employee was not acting within the scope of his employment with company when, outside the place of employment, he decided to conceal his HIV status from, and have unprotected sex with customer and thus, company could not be held liable, under the doctrine of respondeat superior, for employee's conduct, and (2) customer did not establish that company's hiring or retention of employee was negligent under New York law because customer did not allege that company knew that employee was concealing his HIV status from sex partners or was having unprotected sex with them.

Motion granted.

[1] MASTER AND SERVANT ⇐ 329
255k329
Because determination of whether a particular act was within the scope of servant's employment for purposes of respondeat superior liability is so heavily dependent on factual considerations, the question is ordinarily one for the jury under New York law; however, where court takes as true all the facts alleged by plaintiff and concludes that the conduct complained of cannot be considered as a matter of law within the scope of the employment, then court must dismiss complaint for failure to state claim.

[1] MASTER AND SERVANT ⇐ 332(2)
255k332(2)
Because determination of whether a particular act was within the scope of servant's employment for purposes of respondeat superior liability is so heavily dependent on factual considerations, the question is ordinarily one for the jury under New York law; however, where court takes as true all the facts alleged by plaintiff and concludes that the conduct complained of cannot be considered as a matter of law within the scope of the employment, then court must dismiss complaint for failure to state claim.

[2] MASTER AND SERVANT ⇐ 302(2)
255k302(2)
Under New York law, courts look to the following factors in considering whether a particular act falls within employee's scope of employment for purposes of respondeat superior liability: connection between the time, place, and occasion for the act; history of relationship between employer and employee as spelled out in actual practice; whether act is one commonly done by such employee; extent of departure from normal methods of performance; and whether the specific act was one that employer could have reasonably anticipated.

[3] MASTER AND SERVANT ⇐ 302(2)
255k302(2)
Under New York law, employee was not acting within the scope of his employment with company which sold time on its computer service when, outside the place of employment, he decided to conceal his positive Human Immunodeficiency Virus (HIV) status from, and have unprotected sex with, company's customer whom he met in an on-line company sex chat room and thus, company could not be held liable, under the doctrine of respondeat superior, for the nondisclosure off duty conduct of employee, even if it acquiesced in the conduct by accepting the benefit of increased customer use of its services from employee's sexual activity.

[4] MASTER AND SERVANT ⇐ 302(1)
255k302(1)

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Under New York law, even where employee does not act within the scope of his employment, employer may be required to answer in damages for the tort of an employee against a third party when employer has either hired or retained the employee with knowledge of employee's propensity for the sort of behavior which caused the injured party's harm.

[5] MASTER AND SERVANT ⇐ 303
255k303
Customer who purchased time from company on its computer service and who engaged in unprotected sex with company's employee who was Human Immunodeficiency Virus (HIV) positive and who met customer in on-line company sex chat room did not establish that company's hiring or retention of employee was negligent under New York law; customer did not, and presumably could not, allege that company knew that employee was concealing his HIV status from his sex partners or was having unprotected sex with them and the conduct complained of, whether it was the act of sex or employee's failure to disclose his HIV status, took place outside of employer's premises and without employer's chattels.

[6] MASTER AND SERVANT ⇐ 302(1)
255k302(1)
Under New York law, when employee's conduct is beyond the scope of employment, employer's duty to third parties to prevent misconduct is limited to torts committed by employees on employer's premises or with employer's chattels.

*327 Parker & Waichman, Jerrold S. Parker, Great Neck, NY, for Plaintiff.

Phillips Nizer Benjamin Krim & Ballon, L.L.P., New York City (Perry S. Galler, Thomas G. Jackson, Liza M. Cohn, Michael Fischman, of Counsel), for Defendants Prodigy Services Company, International Business Machines Corporation and Sears Roebuck and Co., Inc.

OPINION AND ORDER

SOTOMAYOR, District Judge.

In this diversity action, plaintiff alleges that she contracted the HIV virus from Jacob Jacks (hereinafter "Jacks"), [FN1] an employee of defendant Prodigy Services Company (hereinafter "Prodigy"), whom plaintiff first met in an on-line Prodigy sex chat room. Plaintiff contends that under theories of respondeat superior or negligent hiring and retention, Prodigy is responsible for Jacks' transmission of the HIV virus to her because Prodigy knew that Jacks had the AIDS virus and knew that Jacks was having sex with customers he met on-line. Prodigy moves pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the complaint on the ground of failure to state a claim upon which relief can be granted. For the reasons to be discussed, defendant's motion to dismiss is granted.

FN1. Jacob Jacks is believed to be deceased at this time. Although named in the complaint, neither Jacks nor his estate have been served in this action. (Defs' Mem. at 3).

*328 BACKGROUND

Plaintiff's complaint alleges that Prodigy injured plaintiff by its negligent conduct in allowing their employee, Jacob Jacks, to have sexual intercourse with customers with the knowledge that Jacks had AIDS. Although the complaint asserts that Prodigy's conduct injured plaintiff, it does not explain how. [FN2] Plaintiff's Affidavit and Memorandum of Law in Opposition to the instant motion, however, explain that after Jacks denied being HIV positive, plaintiff had sexual intercourse with him and contracted the AIDS virus. (Haybeck Aff.; Pl.Mem. at 4--5).

FN2. The Complaint merely asserts: "[t]hat by reason of the foregoing, plaintiff Barbara Haybeck sustained severe and permanent personal injuries, became sick, sore, lame and disabled, suffered mental anguish, was confined to hospital, bed and home and may, in the future, be so confined; was incapacitated and [sic] from attending to her usual duties and may in the future, be so incapacitated, plaintiff was and is substantially psychologically damaged, and plaintiff was otherwise damaged." (Compl. ¶ 152.)

The facts, assumed to be true for purposes of this motion, are that:

At some time prior to November 11, 1994 the plaintiff Barbara Haybeck became a customer of the defendant Prodigy. Prodigy sold time on their computer service and Barbara bought same. Jacob

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> Jacks was an employee of Prodigy. Mr. Jacks was a sexual predator who had full blown AIDS, a fact known and admitted by Prodigy....
> By using his position as an employee of Prodigy, Jacks was able to spend countless hours on-line with plaintiff while he was at work at Prodigy's offices. In addition, Jacks gave plaintiff months of "free time" on the Prodigy network, as well as unlimited use of his own Prodigy account. The motive for this conduct was solely to entice Barbara Haybeck, by any means necessary, into an illicit and aberrant relationship that resulted in her having a consensual sexual relationship with Jacks. Both before and during this relationship, Jacks repeatedly denied having AIDS. Thereafter, and as a direct result of this sexual relationship, Barbara Haybeck contracted AIDS--from which she will die.

(Pl.'s Mem. at 4--5.)

Plaintiff contends that Prodigy "should have taken special precautions to prevent" Jacks' conduct. (Compl. ¶ 150) Plaintiff also insists that her injuries were "due solely to the negligence, carelessness, recklessness and gross negligence of the defendants in their ownership, operation, management, repair and control of their agents, servants, employees and their on-line network and through no fault of lack of care on the part of the plaintiff." (Compl. ¶ 151.)

Defendant argues, however, that Prodigy is not responsible for plaintiff's contraction of the AIDS virus from Jacob Jacks because Jacks' sexual intercourse with plaintiff fell outside the scope of his employment. Further, it maintains that Prodigy owed no duty to plaintiff to "[i]nvolve itself in her personal or sexual conduct," (Def.Mem. at 17), because Prodigy was forbidden by law and public policy either to inquire into Jacks' HIV status or to control his relations with persons outside the work environment. (Def.Mem. at 18--21.) Defendant also contends that plaintiff's consent to the sexual union was an "unforeseeable superseding act" which "absolve[s]" Prodigy of "any possible liability." (Def.Mem. at 22). Finally, defendant urges that plaintiff cannot satisfy the jurisdictional threshold of $50,000 required for diversity jurisdiction because she accepted a contractual limitation of liability with Prodigy that limits her recovery to an amount below the threshold. (Def.Mem. at 24--25.)

DISCUSSION

A district court's function on a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is to assess the legal feasibility of the complaint. Kopec v. Coughlin, 922 F.2d 152, 155 (2d Cir.1991). The issue "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Allegations contained in the complaint must be construed favorably to the plaintiff. Walker v. New York, 974 F.2d 293, 298 (2d Cir.1992), cert. denied, 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993). Dismissal ***329** is warranted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 123 (2d Cir.1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) (footnote omitted)).

In considering a Rule 12(b)(6) motion, a court must look to: (1) the facts stated on the face of the complaint; (2) documents appended to the complaint; (3) documents incorporated in the complaint by reference; and (4) matters of which judicial notice may be taken. Hertz Corp. v. City of New York, 1 F.3d 121, 125 (2d Cir.1993) (citing Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir.1991)). See also Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir.1993) (same). In this case, I take judicial notice of the facts alleged in plaintiff's affidavit submitted in opposition to the instant motion because the facts explain the predicate for plaintiff's cause of action.

I. Scope of Employment

[1] The central issue in this case is whether Jacob Jacks' failure to disclose his HIV status before having sexual intercourse with the plaintiff was conduct which can be deemed to fall, as a matter of law, within the scope of his employment with Prodigy. I understand that "because the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury." Riviello v. Waldron, 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278 (Ct.App.1979). However, where a court takes as true all the facts alleged by plaintiff and concludes that the conduct complained of cannot

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be considered as a matter of law within the scope of employment, then the court must dismiss the complaint for failure to state a claim. See, e.g., Rappaport v. International Playtex Corp., 43 A.D.2d 393, 352 N.Y.S.2d 241 (3d Dep't.1974) (reversing lower court for failing to dismiss where conduct fell outside of the scope of employment as a matter of law); cf. Petrousky v. United States, 728 F.Supp. 890 (N.D.N.Y.1990) (holding as a matter of law that plaintiff's supervisor was acting within the scope of his employment when he libeled plaintiff in disciplinary memoranda).

[2] In considering whether a particular act falls within an employee's scope of employment, New York courts look to five factors:

> [1] the connection between the time, place and occasion for the act, [2] the history of the relationship between employer and employee as spelled out in actual practice, [3] whether the act is one commonly done by such an employee, [4] the extent of departure from normal methods of performance; [5] and whether the specific act was one that the employer could reasonably have anticipated.

Riviello v. Waldron, 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278 (Ct.App.1979). Here, defining carefully the precise act which is the subject of the complaint is crucial. To that end, it must be noted that plaintiff does not complain of Jacks' sexual relationship with her, but rather she complains of his failure to tell her that he was HIV positive and to engage in protected sex. In fact, plaintiff admits that she fully consented to the sexual union. Plaintiff insists, however, that had she known Jacks was HIV positive, she would never have consented to having sex with him. Hence, the core of plaintiff's complaint is that Jacks' failure to give her this information caused her injury, and it, therefore, is the proper focus of the scope of employment inquiry.

[3] Can it be said, then, that Jacks was acting within the scope of his employment with Prodigy when--outside the place of employment--he decided to conceal his HIV status from, and have unprotected sex with, a sexual partner? I conclude the answer is no. Courts have repeatedly held that acts taken and decisions made on an employee's personal time outside of work cannot be imputed to an employer. "New York courts have stated that 'where an employee's conduct is brought on by a matter wholly personal in nature, the nature of which is not job-related, his actions cannot be said to fall within the scope of his employment.' " Longin v. Kelly, 875 F.Supp. 196, 201--203 (S.D.N.Y.1995) (quoting Stavitz v. City of New York, 98 A.D.2d 529, 531, *330 471 N.Y.S.2d 272, 274 (1st Dep't 1984)); see also Joseph v. City of Buffalo, 83 N.Y.2d 141, 146, 608 N.Y.S.2d 396, 629 N.E.2d 1354 (Ct.App.1994) (police officer not acting within the scope of his employment when he left a service revolver where a child found it, even where a municipal law required the officer to have the gun nearby for emergencies); Kelly v. City of New York, 692 F.Supp. 303, 308 (S.D.N.Y.1988) (city not liable for assault by city corrections officer where "[i]t is undisputed that the incident ... arose from a prior personal dispute"); Forester v. State, 645 N.Y.S.2d 971 (Ct.Claims 1996) (state not responsible where SUNY instructor assaulted student, even where the "acts occurred on school property and during school hours").

In cases specifically involving sexual misconduct by employees, New York courts have carefully avoided extending liability to employers. See, e.g., Joshua S. v. Casey, 206 A.D.2d 839, 615 N.Y.S.2d 200 (4th Dep't 1994) (holding that a priest's sexual abuse of a child was, as a matter of law, not within the scope of employment); Kirkman v. Astoria General Hospital, 204 A.D.2d 401, 611 N.Y.S.2d 615 (2d Dep't 1994) (hospital security guard who raped a minor child was not acting within the scope of his employment); Koren v. Weihs, 190 A.D.2d 560, 593 N.Y.S.2d 222 (1st Dep't 1993) (psychotherapist who had sex with patient under the guise of treatment was not acting within the scope of his employment); Noto v. St. Vincent's Hospital, 160 A.D.2d 656, 559 N.Y.S.2d 510 (1st Dep't) (plaintiff "failed to allege facts on which the existence of a viable claim ... could be predicated" where she complained that her psychiatrist "engaged in sexual relations with her after she had been discharged, and after he had ceased treating plaintiff as his patient"), appeal denied, 76 N.Y.2d 714, 564 N.Y.S.2d 718, 565 N.E.2d 1269 (Ct.App.1990); Heindel v. Bowery Savings Bank, 138 A.D.2d 787, 525 N.Y.S.2d 428 (3d Dep't 1988) (mall security guard's rape of fifteen year old girl "was in no way incidental to the furtherance of [the employer's] interest" and was "committed for personal motives" and was "a complete departure from the normal duties of security guard."); Cornell v. State, 60

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A.D.2d 714, 401 N.Y.S.2d 107 (3d Dep't 1977) ("homosexual attack" committed by attendant at mental institution upon a patient was "obviously neither within the scope of the attendant's employment nor done in furtherance of his duties to his employer").

In Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir.1995), the Court of Appeals held that "an employer is not liable for torts committed by the employee for personal motives unrelated to the furtherance of the employer's business." In that case, plaintiff had been to a business dinner with several supervisors and co-employees when the group became highly intoxicated and a supervisor later sexually assaulted her. The Court viewed the assault as "a complete departure from the normal duties of a Seiler employee." Tomka, at 1318. In the instant case, the imposition of respondeat superior liability would be even more troubling because even if the sexual activity at issue furthered Prodigy's business by increasing a customer's use of its services, as alleged by plaintiff, the true conduct of which she complained is Jacks' failure to reveal a private medical condition while engaging in an off-duty, intimately personal act.

The purely personal decision by Jacks whether to disclose a medical fact about himself cannot be said to have furthered his employer's business. Rather, his decision to conceal his HIV status arose from a purely personal motivation. Therefore, just as New York courts have held that assaultive behavior arising from personal motivations do not further an employer's business, even where it is committed within the employment context, see e.g., Heindel v. Bowery Savings Bank, 138 A.D.2d 787, 525 N.Y.S.2d 428 (3d Dep't 1988) (mall security guard's rape of fifteen year old girl "was in no way incidental to the furtherance of [the employer's] interest" and was "committed for personal motives" and was "a complete departure from the normal duties of security guard."), so here must I conclude as a matter of law that Jacks' concealment of his HIV status arose from personal motivation and cannot be considered as within the scope of his employment.

One New York court has found that where "the business purpose alone would not have" prompted the conduct complained of, there *331 can be no finding of employer liability. See Rappaport v. International Playtex Corp., 43 A.D.2d 393, 397, 352 N.Y.S.2d 241, 246 (3rd Dep't 1974) (in automobile accident involving salaried company sales agent traveling to home of a girlfriend where he intended to do employment-related paperwork, court finds that sales agent was not acting within the scope of employment and respondeat superior did not apply). Here, even if Jacks' conduct arose in part out of his intent to further the business of Prodigy in that his sexual relationship with plaintiff began on line and arguably encouraged plaintiff to use more Prodigy services, there is no "business purpose" which "alone" would have compelled Jacks either to have sex with plaintiff or to hide from her the fact that he had AIDS.

Therefore, considering the factors outlined in Riviello, I find, as a matter of law, that Jacks' failure to reveal his HIV status before having sex with plaintiff cannot be deemed to be within the scope of his employment. There is no "connection" in either "time, place, [or] occasion" between his status as a Prodigy employee and his failure to reveal his medical condition to his sex partner. Any "history of the relationship between [Jacks] and [Prodigy] as spelled out in actual practice" only reveals at best, accepting plaintiff's allegations as true, that Prodigy knew that Jacks had AIDS and that he was having sex with customers. It does not reveal that Prodigy knew that Jacks was failing to inform his sex partners that he carried the AIDS virus or that Prodigy did more than remain silent in the face of Jacks' conduct. Clearly Jacks' act, whether it was his sexual conduct or his failure to reveal his medical condition, cannot be considered "one commonly done by such an employee"--there is no allegation that technical advisors in positions such as Jacks' commonly have sex with customers or failed to reveal the fact that they carried communicable diseases. Finally, Jacks' conduct was obviously a "departure from normal methods of performance," and even if Prodigy knew that Jacks was having sex with customers, it could not "reasonably have anticipated" that Jacks was doing so without revealing his medical condition. See Riviello v. Waldron, 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278 (Ct.App.1979).

As an additional consideration, I note that by imposing respondeat superior liability on an employer in a case such as this, I would be setting a precedent under which employers would be forced

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to monitor, and in some cases control, not only the health of their employees, but also the most intimate aspects of their off-duty lives. Such monitoring would contravene clear law and public policy that prohibits employers from inquiring into the HIV status of employees and attempting to control their off-duty behavior with others. See Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (prohibiting discrimination in the workplace based upon an employee's health condition); N.Y.Exec Law § 296 (prohibiting discrimination against persons because of their disability); Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977) (explaining that within the constitutional right to privacy there is an "individual interest in avoiding disclosure of personal matters"); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (recognizing a right of privacy, particularly in matters of sexuality); Doe v. City of New York, 15 F.3d 264, 267 (2d Cir.1994) ("Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease."); Doe v. Kohn Nast & Graf, P.C. 866 F.Supp. 190 (E.D.Pa.1994) (law firm prohibited from searching plaintiff's office upon suspicion that he had AIDS). Given the legal and policy limitations on an employer's ability either to control the off-duty conduct of its employees or to disclose the medical conditions of its employees, I find as a matter of law that Prodigy cannot be held liable for the non-disclosure off-duty conduct of its employee, even if it acquiesces in the conduct by accepting the benefit of increased customer use of its services from that employee's sexual activity.

*332 II. Prodigy's Negligent Hiring and Retention of Jacks

[4] Even where an employee does not act within the scope of his employment, "an employer may be required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm." Kirkman v. Astoria General Hospital, 204 A.D.2d 401, 611 N.Y.S.2d 615 (2d Dep't 1994) (citing Detone v. Bullit Courier Service, Inc., 140 A.D.2d 278, 279, 528 N.Y.S.2d 575 (1st Dept.1988)). Here, plaintiff contends that even if Prodigy is not vicariously liable for Jacks' conduct, it is nevertheless liable for its negligent hiring and retention of him as an employee whom they knew to be infected with AIDS and having sex with Prodigy customers. (Compl. at ¶¶ 155-169).

[5] What plaintiff fails to allege, however, is that Prodigy knew that Jacks was having unprotected sex with customers without informing them that he carried the AIDS virus. This is a critical distinction because it was not Jacks' having AIDS nor Jacks' having sex with customers which was tortious under the law. Rather, it was Jacks' having unprotected sex with others without informing them that he was HIV positive that plaintiff argues is tortious. Compare Maharam v. Maharam, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1st Dep't 1986) (holding that "wife stated legally cognizable causes of action [against husband] for wrongful transmission of genital herpes on theories of either fraud or negligence") and Doe v. Roe, 157 Misc.2d 690, 598 N.Y.S.2d 678 (Justice Ct.1993) (explaining that "New York recognizes a cause of action for intentional or negligent communication of a venereal disease") with id. 598 N.Y.S.2d at 693 (dismissing action, inter alia, because "persons who engage in unprotected sex, at a time of the prevalence of sexually transmitted diseases, including some that are fatal, assume the risk of contracting such diseases. Both parties in an intimate relationship have a duty adequately to protect themselves. When on ventures out in the rain without an umbrella, should they complain when they get wet?"). Because plaintiff here has not, and presumably cannot, allege that Prodigy knew that Jacks was concealing his HIV status from his sex partners or was having unprotected sex with them, plaintiff cannot argue that Prodigy's hiring or retention of Jacks was negligent. See Kirkman v. Astoria General Hospital, 204 A.D.2d 401, 403, 611 N.Y.S.2d 615, 616 (2d Dep't), leave to appeal denied, 84 N.Y.2d 811, 622 N.Y.S.2d 913, 647 N.E.2d 119 (Ct.App.1994) (employer not liable for negligent hiring or retention of mall security guard who raped a customer where there was no showing that the employer had any knowledge of employee's propensity or history of such misconduct); Cornell

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v. State, 60 A.D.2d 714, 401 N.Y.S.2d 107 (3d Dep't 1977) (holding that where "nothing in the record indicates that the [employer] either knew or should have known of [the employee's] alleged dangerous homosexual tendencies," no liability for negligent hiring or retention of the employee could be found), aff'd, 46 N.Y.2d 1032, 416 N.Y.S.2d 542, 389 N.E.2d 1064 (Ct.App.1979).

[6] Further, under New York law, when an employee's conduct is beyond the scope of employment, an employer's duty to third parties to prevent misconduct "is limited to torts committed by employees on the employer's premises or with the employer's chattels...." D'Amico v. Christie, 71 N.Y.2d 76, 87, 524 N.Y.S.2d 1, 6, 518 N.E.2d 896 (Ct.App.1987). Here, the conduct complained of, whether it is the act of sex or Jacks' failure to disclose his HIV status, unquestionably took place outside the employer's premises and without the employer's chattels.

CONCLUSION

For the reasons discussed above, defendant's motion to dismiss for failure to state a claim is GRANTED, and the Clerk of the Court is directed to enter judgment in Defendant Prodigy's favor, dismissing the complaint with prejudice. [FN3] The Clerk of the *333 Court is also directed to dismiss the action against Jacob Jacks without prejudice pursuant to Fed.R.Civ.P. 4(m) in that plaintiff has not served Jacks within the 120 days specified by the rule and has failed to demonstrate cause for such failure.

FN3. In light of my finding that the action is dismissed for failure to state a claim, I do not reach Prodigy's argument that plaintiff cannot meet the threshold jurisdictional amount for diversity jurisdiction.

SO ORDERED.

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812 F.Supp. 22
147 L.R.R.M. (BNA) 2892
(Cite as: 812 F.Supp. 22)

FISHER SCIENTIFIC COMPANY, Plaintiff,
v.
CITY OF NEW YORK; New York City Council; Andrew Stein, as President Thereof; Charles Millard, C. Virginia Fields, Lawrence A. Warden, Jose Rivera, Rafael Castaneira-Colon, Walter L. McCaffrey, Karen Koslowitz, Annette Robinson, Susan Alter, as Council Members Constituting the Committee on Civil Service and Labor of the New York City Council, Defendants.

No. 92 Civ. 8774 (SS).

United States District Court,
S.D. New York.

Jan. 29, 1993.

Employer sought to enjoin city and city council from proposing, holding hearing on, or ratifying resolution expressing negative opinion about employer's labor negotiations. Employer requested preliminary and permanent injunctive relief. After trial, the District Court, Sotomayor, J., held that employer, which hired replacement workers during labor dispute, failed to show that it would suffer irreparable harm if city and city council were not enjoined from ratifying resolution expressing negative opinion about employer's labor negotiations and thus, employer was not entitled to permanent injunction.

Injunctive relief denied and complaint dismissed.

[1] CONSTITUTIONAL LAW ⇐ 70.1(1)
92k70.1(1)
Courts' foray into ongoing legislative activity should be restrained by healthy respect for separation of powers; implicit in that doctrine, and intertwined with requirement of ripeness, is notion that court should give legislative body the opportunity to avoid running afoul of the Constitution.

[2] CONSTITUTIONAL LAW ⇐ 70.1(1)
92k70.1(1)
Court may order legislative body to adopt particular act if legislators have signed consent decree stating that they would do so.

[3] LABOR RELATIONS ⇐ 994
232Ak994
Employer, which hired replacement workers during labor dispute, failed to show that it would suffer irreparable harm if city and city council were not enjoined from holding hearing on or ratifying resolution stating that employer's use of replacement workers called into question the quality of its medical and laboratory supplies and recommending that city agencies buy supplies from companies other than employer, and thus, employer was not entitled to permanent injunction; employer was unable to identify even one customer that expressed concern over proposed resolution and resolution might undergo substantial modification before passage or might not be passed at all.

*23 Pitney, Hardin, Kipp & Szuch, Morristown, NJ, for plaintiff; by Sean T. Quinn.

City of New York, Law Dept., New York City, for defendants; by Lawrence S. Kahn.

Shea & Gould, New York City, for Intervenor Intern. Broth. of Teamsters, Steel, Metal, Alloys and Hardware Fabricators and Warehousemen, Local 810, AFL-CIO; by Eve I. Klein, Joshua A. Adler, Mark S. Weprin.

MEMORANDUM OPINION AND ORDER

SOTOMAYOR, District Judge.

Plaintiff Fisher Scientific Company ("Fisher") seeks to enjoin defendants, the City of New York, the New York City Council ("City Council"), the City Council's Committee on Civil Service and Labor (the "Committee") and the members of the City Council (collectively, the "City Defendants"), from holding a hearing on or proposing, endorsing, or ratifying Resolution 910. Resolution 910 expresses a negative opinion about Fisher's labor negotiations with the International Brotherhood of Teamsters, Steel, Metal, Alloys and Hardware Fabricators and Warehousemen, Local 810, AFL-CIO (the "Union"), notes that Fisher's use of replacement workers calls into question the quality of its products, and recommends that City agencies buy medical and laboratory supplies from companies other than Fisher until Fisher rehires its Union workers. The parties agreed to combine the trial on

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the merits on Fisher's application for a permanent injunction with the preliminary injunction hearing. For the reasons stated below, Fisher's application for injunctive relief is DENIED and the Complaint is dismissed. In addition, Fisher's request for an injunction pending appeal is DENIED.

I. Background

A. The Events Giving Rise to This Action

Fisher manufactures and distributes medical, laboratory, and scientific equipment. Fisher's Eastern Distribution Center ("EDC"), in Springfield, New Jersey, serves as a regional warehouse and distribution point for medical and laboratory equipment, such as microscopes and test tubes.

Since 1967, Fisher and the Union have been parties to successive collective bargaining agreements covering EDC employees. The most recent collective bargaining agreement expired by its own terms on October 21, 1991 and certain Union employees at the EDC then began to strike. Fisher operated the EDC with a reduced crew of supervisors and temporary replacements until February 1992, when it permanently replaced the economic strikers at the EDC. Since the strike began, negotiations between the parties have been unsuccessful.

By letter dated November 12, 1992, Yvonne Gonzalez, Assistant Counsel to the Speaker of the City Council, notified Fisher that the City Council's Committee would be holding a hearing on Resolution 910. Resolution 910 observes that Fisher "offered their warehouse employees [at the EDC] the ultimatum of accepting a 450% increase in the employee contribution to the health insurance premium, or going out on strike," and that Fisher rejected a cost-saving proposal by the Union and instead *24 "permanently replaced those 77 long-service, experienced workers." Resolution 910 goes on to note that "[t]he quality of the products now offered by Fisher to medical institutions of the City of New York is compromised by the company's use of inexperienced replacement workers." For those reasons, the City Council would resolve to recommend "that every city agency that buys medical and laboratory supplies from Fisher Scientific seek alternative sources for products," and that the City Council notify Fisher that its action "violates acceptable labor relation standards, and that the City of New York will seek to give preference to alternative suppliers until the [EDC] warehouse employees are rehired and reinsured."

A Committee hearing was originally scheduled for December 9, 1992. Fisher advised Ms. Gonzales that it believed that the proposed hearing on Resolution 910 constituted an unlawful interference with the collective bargaining process. Two days later, Fisher brought this action pursuant to 42 U.S.C. § 1983, alleging that the Committee's and Council's actions on Resolution 910 would violate its federal right to collective bargaining. Fisher sought a Temporary Restraining Order ("TRO"), and preliminary and permanent relief from any actions by the City Defendants on the proposed resolution.

At this Court's hearing on the application for a TRO, City Defendants announced that the Committee hearing on Resolution 910 was postponed until January, 1993. In addition, the Union entered an appearance, seeking to intervene in this action, as of right or by permission, or, alternatively, to participate in the proceedings as amicus curiae. [FN1] The Court did not grant the temporary injunctive relief that Fisher sought, finding that the adjournment of the hearing removed the immediate threat of irreparable injury, and that a balance of the equities favored affording the City Defendants the opportunity to respond fully to Fisher's application. The City Defendants, however, were ordered to notify the Court at least seven days prior to "any hearing on Resolution 910 or any other resolution or action similar thereto which relates to the labor dispute or the collective bargaining negotiations between [Fisher] and [the Union]."

FN1. The Union has satisfied the requirements of Fed.R.Civ.P. 24(a)(2) and its unopposed motion to intervene as of right is granted. See, e.g., Farmland Dairies v. Comm. of New York State Dept. of Agriculture, 847 F.2d 1038, 1043 (2d Cir.1988). The Court need not consider the Union's alternative motions to intervene permissively, pursuant to Fed.R.Civ.P. 24(b)(2), or to appear as amicus curiae.

A hearing was held in January on Fisher's

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application for a preliminary injunction. The Court has granted the parties' request that, pursuant to Fed.R.Civ.P. 65(a), the preliminary injunction hearing be combined with the trial on the merits on Fisher's request for permanent injunctive relief. Timely notice has now been given that a Committee hearing on Resolution 910 is scheduled for February 1, 1993.

B. The City Council and Its Resolutions

A short review of the powers and procedures of the City Council, as well as the path by which a resolution is enacted, and its subsequent effect, illuminates the issues that this case presents.

The City Council and its committees possess and exercise all of the legislative power of the City of New York. The City Council's powers include the exclusive authority to adopt local laws and to adopt and modify the budget for New York City. In addition, the City Council has the authority to provide an opportunity for discussion of matters of public concern and to provide a forum for public comment on such issues through a public hearing process. Finally, the City Council, or any of its standing or special committees, may investigate any matters within its jurisdiction relating to the "property, affairs or government of the City." Charter of New York City § 29. The City Council is also charged with the regular review of the activities of New York City agencies. Id.

To implement these responsibilities and mandates, the City Council has previously *25 held two different types of hearings. On the one hand, following the notorious fire at a Bronx social club that resulted in the death of over eighty people, a City Council committee conducted a vigorous full-scale investigation and public inquiry, that resulted in strong criticism of New York City's regulation of clubs. In contrast, other hearings have been convened to provide fora for discussion and public comment upon issues of public concern. According to the City Defendants, the hearing on Resolution 910 falls into this latter category of less formal inquiries.

Pursuant to City Council rules, a public hearing must be held before a committee may vote on a resolution. [FN2] If a Committee then chooses to vote on the resolution, and a majority of the committee's members approves the resolution, it is then presented to the full City Council for consideration, where it may or may not be approved. A proposed resolution may be amended at numerous stages in the process. In contrast to a bill for a local law, no mayoral approval is required for a resolution: once the City Council passes the resolution, no further activity is required. In addition, unlike a local law, which has binding force and effect, a resolution such as that concerning Fisher is merely hortatory, with no binding effect.

FN2. There is a narrow exception for those resolutions that are introduced at a meeting of the full Council for immediate consideration. Resolution 910 does not fall within this exception.

II. Discussion

The purpose of a preliminary injunction is "to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." Wright & Miller, 11 Federal Practice and Procedure § 2947; Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir.1985). At the hearing on Fisher's application for a preliminary injunction, the parties agreed that no further evidence would be presented at any ultimate trial on the merits. The Court granted their request that the trial on the merits be consolidated with the preliminary injunction hearing, as prescribed by Fed.R.Civ.P. 65(a)(2). See, e.g., McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544, 1545 (2d Cir.1991). Thus, the trial on the merits has already been held, and Fisher's application for a preliminary injunction is now treated as a request for the permanent injunctive relief that Fisher sought in its Complaint.

Fisher asks this Court to enjoin City Defendants under 42 U.S.C. § 1983 from proposing, sponsoring, holding a hearing on, or ratifying Resolution 910. Fisher contends that such actions on City Defendants' part would deprive Fisher of its federal right to engage in collective bargaining free from state or municipal intrusion, as the Supreme Court has explained that right in Lodge 76, Int'l Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140, 96 S.Ct. 2548, 2553, 49 L.Ed.2d 396 (1976) ("Machinists "), and its progeny, including Golden State Transit Corp. v.

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City of Los Angeles, 475 U.S. 608, 614, 106 S.Ct. 1395, 1398, 89 L.Ed.2d 616 (1986) ("Golden State I").

[1][2] The City Defendants and the Union have offered a wide range of reasons why the Court should not issue the requested equitable relief, including legislative immunity, First Amendment rights, and lack of ripeness. Moreover, they have drawn compelling distinctions between this case and those labor law preemption cases on which Fisher relies, most notably New York News, Inc. v. State of New York, 745 F.Supp. 165 (S.D.N.Y.1990). However, the Court need not address any of these issues at this time for the simple reason that Fisher has failed to show that it would suffer irreparable injury if the Court denied its application for injunctive relief. [FN3]

FN3. This action raises serious questions about the power of a district court to enjoin legislative activity. If the courts could, and did, routinely entertain suits concerning pending legislation, they would be swamped with actions by citizens fearful that the destruction of their rights was imminent. Many of these putative suits regarding inchoate legislation are kept at bay by the requirement of ripeness, which also ensures that the court hearing such suits has the benefit of a precise factual framework. In addition, the courts' foray into ongoing legislative activity should also be restrained by a healthy respect for separation of powers. Implicit in that doctrine, and intertwined with the requirement of ripeness, is the notion that a court should give a legislative body the opportunity to avoid running afoul of the Constitution. See Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 227-30, 29 S.Ct. 67, 70-71, 53 L.Ed. 150 (1908). As the City Defendants have frequently reminded the Court, neither the Committee nor the City Council has yet passed Resolution 910, and they may yet conclude on their own that the Resolution in its current form is unlawful, or unwise. There are exceptions to this general hands-off rule. For example, although it is not the case here, a court may order a legislative body to adopt a particular act if the legislators had signed a consent decree saying that they would do so. See, e.g., Spallone v. United States, 487 U.S. 1251, 109 S.Ct. 14, 101 L.Ed.2d 964 (1988). However, none of the cases that Fisher cites in support of its request that this Court stop the legislative process in its tracks involved injunctive relief directed at a legislature's mere consideration of a bill or resolution. See, e.g., Golden State I (city unlawfully conditioned a franchise renewal on the settlement of a labor dispute); Machinists (overturning state commission's order that Union cease and desist from certain activities); New York News (State Department of Labor enjoined from convening board of inquiry). However deeply troubled this Court may be about the reach of a district court's power into the legislative process itself, there is no need to address that question today because of Fisher's failure in this case to demonstrate that it will suffer irreparable harm absent injunctive relief.

*26 [3] It is well established that a party seeking a permanent injunction must demonstrate "the absence of an adequate remedy at law and irreparable harm if the relief is not granted." N.Y. State National Organization for Women v. Terry, 886 F.2d 1339, 1362 (2d Cir.1989), cert. denied, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990). Fisher has not carried its burden of showing that it will suffer irreparable harm if the Defendants are not permanently enjoined from proposing, sponsoring, holding a hearing on, or ratifying Resolution 910. Consequently, its application for permanent injunctive relief must be denied.

Fisher contends that the consideration of Resolution 910 by the City Defendants constitutes impermissible intrusion by a municipal government into the collective bargaining process. At oral argument, Fisher conceded that a statement by the City Council members that they opposed Fisher's negotiation tactics and stance would not be unlawful. It also agreed that the City Defendants could conduct an investigation into a complaint about the safety of its products. Fisher's position, however, is that any type of hearing by the City Defendants to express an opinion on the collective bargaining process would be impermissibly coercive, and irreparably harmful, by raising the possibility of economic sanctions.

Nevertheless, Fisher has failed to introduce competent evidence sufficient to convince the Court that its faces irreparable harm. It has not shown that the City Defendants are forcing it to lose business or to capitulate to the Union, or that they will force it do so. For example, Fisher was unable to identify even one customer that had expressed concern over

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the proposed resolution.

Fisher also argues that the legislative process must be stopped now because the very passage of Resolution 910 would perfect a solicitation of an illegal boycott that would irreparably harm Fisher. However, the legislative proceedings that pertain to Resolution 910 are still at an embryonic stage. Resolution 910 may undergo substantial modification before passage or it may not be passed at all [FN4]. Even if did pass, Resolution 910 would merely render advice to agencies--advice which, the City Defendants tell us, the agencies would be free to ignore. Fisher has failed to introduce evidence as to how irreparable injury would follow the passage of a hortatory resolution. For example, Fisher has offered no evidence that any city agencies would follow such advice, and could not identify any city agencies that had stopped doing business with it as a result of the proposal of Resolution 910. For that matter, Fisher introduced no evidence on the *27 portion of business that it does with city agencies. Fisher's counsel simply noted that after the Boston City Council passed a resolution nearly identical to Resolution 910, a Boston newspaper article reported that a hospital administrator there agreed with the boycott.

> FN4. An action for damages or for an injunction against implementation of Resolution 910 would therefore be patently unripe at this juncture. See, e.g., New Orleans Public Service, Inc., v. Council of City of New Orleans, 491 U.S. 350, 371-73, 109 S.Ct. 2506, 2520, 105 L.Ed.2d 298 (1989) (ripeness holding in Prentis directed against "interference with an ongoing legislative process").

There is also no support for Fisher's contention that a legislative hearing would be coercive because it would present Fisher with the Hobson's choice of not defending itself, or of being forced to protect its interests at a hearing by disclosing its collective bargaining stance. Fisher, however, has failed to demonstrate that its absence from the hearing would necessarily result in the passage of Resolution 910, or that even if Resolution 910 did pass, irreparable harm would follow. Further, there is no merit to Fisher's suggestion that if it attended a hearing, it would be forced to reveal confidential bargaining goals and strategies that would compromise its collective bargaining position in abrogation of its federal rights. Even if the hearing did turn to the question of Fisher's negotiation strategy, which may or may not happen, Fisher would not be forced to reveal anything. The City Defendants have expressly disclaimed their subpoena powers for the hearing. Unlike the enjoined proceedings in New York News, in which the parties would have been "[c]ompelled to produce documents and testify under oath setting forth their bargaining positions," 745 F.Supp. at 169, the contemplated hearing in this case would not be coercive. It will neither "disrupt the negotiations" nor "impact upon the positions of the parties." 745 F.Supp. at 170. Thus, Fisher has made no showing that its non-coerced attendance at a hearing held in conjunction with a legislature's consideration of a non-binding resolution would constitute such impermissible governmental intrusion as to result in irreparable harm.

In sum, Fisher has not convinced the Court that the consideration of Resolution 910 by the City Defendants is coercive in any way. Fisher has simply failed to demonstrate that it will suffer irreparable harm, and absent such proof, injunctive relief cannot issue. N.Y. State National Organization for Women v. Terry, 886 F.2d at 1362. This is not to say that Fisher may never have a meritorious claim against the City Defendants. Indeed, some of Fisher's suggestions regarding Resolution 910 are quite troubling. For example, Resolution 910 states at the outset that "[t]he quality of the products now offered by Fisher to medical institutions of the City of New York is compromised by the company's use of inexperienced replacement workers." Yet, counsel for the City Defendants admitted during oral argument that the Committee had received no complaints from Fisher's customers questioning the quality of its products. Fisher's observation that Resolution 910 may erroneously and unjustifiably raise the specter of a health and safety threat in order to act as an economic bludgeon is indeed alarming. The Court, however, cannot address this concern in view of the scanty record assembled so far and in light of the inchoate character of the resolution.

III. Conclusion

For the reasons stated above, the Union's motion to intervene as of right is GRANTED. Fisher's motion for a preliminary injunction, as well as its current request for permanent injunctive relief, is DENIED and the Complaint is dismissed. Finally,

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because the Court concludes that there is little likelihood of irreparable harm to Fisher if the City Defendants continue to consider Resolution 910 in accordance with the normal legislative procedures, Fisher's request for a Fed.R.Civ.P. 62(c) injunction pending appeal is DENIED.

SO ORDERED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 96 Civ. 5305 SS

LOUIS MENCHACA, AMY BOISSONNEAULT, KATHRYN TRUDELL and SHERYL FITZPATRICK,

Defendants.

----------x

August 26, 1996
4:45 p.m.

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
MARTIN J. SIEGEL
Assistant United States Attorney

JOHN BRODERICK
Attorney for Defendants

D E C I S I O N

THE COURT: Well, counsel, I have read the papers and I'm ready to rule. If you have anything to add to the papers before I do so, let me know now.

MR. SIEGEL: No, ma'am.

MR. BRODERICK: I don't, your Honor.

THE COURT: All right. I'll read my decision into the record. I'm not usually ready to rule, but it seemed as if the positions were straightforwardly set forth in the papers and there wasn't much to add.

This action arises under the Freedom of Access to Clinic Entrances Law of 1994 ("FACE") 18 U.S.C. Section 248, which provides for injunctive relief and statutory monetary relief against any person who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate each person or any other person or any class of persons from, obtaining or providing reproductive health services.

In its initial application filed on July 18, 1996, the government sought a preliminary injunction enjoining the defendants from violating FACE and coming within 15 feet of the Women's Medical Pavilion ("WMP") at Dobbs Ferry. At a conference held in this matter on August 1, 1996, I consolidated the government's application for a preliminary injunction with a trial on the merits under Federal Rule of Civil Procedure 65(a)(2).

The government alleges and has provided evidence that the four defendants in this action have over the course of six years, repeatedly hindered medical care at the WMP by physically blocking patient and staff attempts to enter the building. Each defendant has been arrested by Dobbs Ferry police on numerous occasions, convicted, served jail services, and been barred by state court orders of protection from coming near the WMP. Defendant Menchaca was convicted of trespass three times; defendant Boissonneault has been convicted three times of disorderly conduct and once of violating a permanent order of protection; defendant Trudell has been convicted twice of trespass and once of disorderly conduct; and defendant Fitzpatrick has been convicted twice of disorderly conduct, twice for violation of a permanent order of protection and once for trespass. All defendants had prior arrests for trespass that resulted in the charges being dismissed because the time served exceeded the maximum penalty.

The last incident of obstruction occurred on April 3, 1996, when each defendant blocked the only entry to the clinic by sitting at its doorway, which is at the rear of the building and which can only be reached by traversing an 18-inch wide, walkway from the building's parking lot. Police officers issued trespass warnings to the defendants who refused to leave and then the defendants were arrested

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and removed. By blocking the only entrance to the clinic, patients and employees were prevented from gaining access to the building and from receiving or giving reproductive care. Of the twelve women scheduled for treatment, only six ultimately appeared for treatment. Without protests of the type conducted by defendants, the normal "no-show" rate for treatment is only 10 percent and not 50 percent as occurred on this date. Moreover, employees scheduled to engage in counseling of patients were prevented from rendering those services.

Now, defendants Menchaca, Boissonneault and Fitzpatrick have not filed papers in opposition to the government's request for a permanent injunction. Because the government has amply proven that these defendants have violated FACE by their obstruction of the WMP's only entrance on April 3, 1996, and because there is more than reasonable cause, given their past history, to believe that these defendants will continue their unlawful conduct, I find that issuing the injunction sought by the government against these defendants is warranted. The standards for injunctive relief are more than met in this case given the irreparable injury presumed because of the statutory harm caused by the defendants to the public's interest, and the government's proof of the FACE violations by these defendants.

The same finding for the same reasons can be applied to defendant Trudell but she has filed papers opposing the preliminary injunction and moving to dismiss the complaint in this action on the ground that FACE is unconstitutional. For the reasons to be discussed, I reject defendant Trudell's constitutional challenges to FACE.

The Government's Memorandum of Law in opposition to defendant's Trudell's Motion to Dismiss the Complaint and in Further Support of Plaintiff United States' Application for a Preliminary Injunction at pages 5, 10, 11-12 and 18, lists the circuit and district courts throughout the country that have addressed almost all of defendants' constitutional challenges to FACE. I have nothing new to add to the reasoning or analysis of those courts and merely incorporate those cases and their analysis by reference. Herein I am merely summarizing the essence of why I do not accept defendants' constitutional challenges.

I am aware of the deeply personal feelings that have motivated defendant's actions in this matter. I am also fully aware of the highly charged societal debate concerning reproductive rights in our nation. I further recognize the fine line between defendant's rights to passive, nonviolent protest, and the conduct prohibited by FACE. Nevertheless, I am compelled by Supreme Court precedence, including but not limited to *Cameron vs.*

Johnson, 390 U.S. 611, 617 (1968) and *Cox vs. Louisiana*, 379 U.S. 559 (1965) to conclude that FACE in the context of this case does not penalize ideas or religious beliefs, but only that conduct, intentional obstruction of another's property, that infringes on the rights of WMP and its patients.

For similar reasons, I reject defendant's challenge to FACE as vague. I agree with the government that FACE is substantially similar to the statute upheld in *Cameron vs. Johnson* 390 U.S. 611, 617 (1968), and accordingly, I am bound by the *Cameron* reasoning to conclude that FACE is not unduly vague.

With respect to the defendant's challenge to FACE under the commerce clause and *United States vs. Lopez*, 115 S. Ct. 1624 (1995), I, like Judge Sprizzo in *United States vs. Lynch*, 95 Civ 9223 (JES), his decision of February 23, 1996, have examined the extensive legislative history of FACE and conclude that Congress had an ample and adequate basis to conclude that the blockade of clinics and other conduct examined by Congress has a likelihood of and does affect interstate commerce. I make this conclusion under the traditional analysis of commerce clauses set forth by the Supreme Court, see *Preseault vs. Interstate Commerce Clause*, 494 U.S. 1, 17, (1990) (courts "must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such

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a finding") I too find that FACE survives a commerce clause challenge to its constitutionality based on this stricture by the Supreme Court.

Defendant's equal protection argument fails for the reasons her First Amendment challenge does not survive. FACE, as it relates to defendant's conduct, only regulates her unlawful conduct, not expression, and FACE in any event is narrowly tailored to protect the government's interest as expressed by Congress.

Finally, defendant Trudell's Eighth Amendment challenge to FACE's criminal penalties is not ripe for resolution because this action is a civil, not criminal, action.

In summary, I find that FACE withstands Trudell's constitutional challenges and deny Trudell's motion to dismiss the complaint in this action for the reasons I just stated.

Trudell, however, maintains that FACE requires an individual to have "discriminatory animus" towards the employee or patients at reproductive service facilities before an injunction can issue. Defendant contends and requests that a hearing on this issue be held. I agree with the government that nowhere in Section 248 of FACE is discriminatory animus set forth as a requirement and that FACE only requires proof that a person has intentionally

interfered with others for obtaining or providing reproductive care. On this issue, there is no dispute. Defendant in her opposition papers concedes that on April 3, 1996, at WMP, she and others took their

> accustomed places in a sitting position blocking the entrance. With reverence for life they sat down ... and devoutly awaited their arrest ... [T]hey were arrested. The clinic then opened. One-half of the women scheduled on that "abortion day" changed their minds and the clinic claims damages in this action for loss of that revenue.

This is taken from Trudell's opposition to the preliminary injunction at page 12.

This concession leaves no dispute at issue that plaintiff intentionally, albeit for deeply held personal views, obstructed the clinic's entranceway with the express purpose of interfering with the rights of the clinic's patients to obtain reproductive services and of the clinic's employees to give such services. No hearing, given defendant's concessions, on the issue of intent, the only requirement by FACE, is therefore necessary. Plaintiff has been fully heard and the injunction in Trudell's case will be issued for the same reasons it is issued against the three other defendants.

Finally, I, like Judge Sprizzo, in the exercise of my discretion, do not believe it warranted to impose statutory damages at this time. Defendants are advised, however, that any further conduct at WMP violating FACE will

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both counsel the imposition of statutory damages at that time and constitute a contempt of this Court's order warranting other sanctions.

I note that I have carefully examined the description of the physical layout of this clinic and conclude that given the location of its driveway and only entrance, that a 15 feet injunction is the minimum amount of space necessary to safeguard the First Amendment rights of defendants while safeguarding the rights of persons using the clinic. The government should submit an order consistent with this opinion incorporating the Court's rulings on the motion to dismiss and the government's request for injunctive relief and statutory relief.

The government is warned that an injunction that says "don't violate the law" is meaningless. Read the case law on this issue. The injunction must specify the specific conduct which the defendant is prohibited from undertaking, not merely "don't violate the law." Everyone is under an obligation not to violate the law with or without an injunction, so set forth the specific conduct that the defendants are enjoined from engaging in.

I am going to request that the goverment give a copy of that order to Mr. Broderick. Mr. Broderick, you're representing all the defendants?

MR. BRODERICK: Yes, I am, your Honor.

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THE COURT: Including Ms. Trudell?

MR. BRODERICK: Yes, your Honor.

THE COURT: Give a copy of the order to Mr. Broderick for his review. If you have objections to the order, make up a letter explaining what the objections are and then submit the entire package to me. Let's get this done by the end of the week.

MR. BRODERICK: Yes, ma'am.

THE COURT: Okay. Mr. Broderick, take a day to review the order. No longer than a day because I don't want a delay in entering this.

MR. BRODERICK: Sure.

MR. SIEGEL: The government also requested civil penalties.

THE COURT: I thought that's what I was ruling on when I said no statutory damages.

MR. SIEGEL: Well, the law provides both for civil penalties and statutory damages.

THE COURT: My intent was to say no to both for the reasons I indicated. I think if there's further action by these defendants, then it's appropriate in the exercise of my discretion. I will await their future decision on how they want to proceed. They've been given due warning now --

MR. SIEGEL: Thank your Honor.

THE COURT: -- both by Congress and by me. All

right. That will dismiss this case hereafter, correct, once the injunction is issued and my decision?

MR. SIEGEL: It will, your Honor.

THE COURT: Thank you, counsel. Good papers on both sides by the way and not unimportant issues. But I'm not the one to decide them, Mr. Broderick.

MR. BRODERICK: I see, your Honor.

THE COURT: I'm bound by the Supreme Court.

Thank you, counsel.

MR. BRODERICK: Thank you, your Honor.

MR. SIEGEL: Thank you.

(Record closed)

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UNITED STATES of America
v.
Nelson CASTELLANOS, Defendant.

No. S2 92 Cr. 584 (SS).

United States District Court,
S.D. New York.

April 7, 1993.

Defendant charged with drug offenses moved to suppress evidence discovered during search of his apartment pursuant to warrant. The District Court, Sotomayor, J., held that: (1) affidavit used to obtain warrant contained false information, either intentionally or recklessly included by affiant, and (2) false information misled magistrate who issued warrant.

Motion granted.

[1] CRIMINAL LAW ⇦ 394.4(1)
110k394.4(1)
To deter conduct violative of Fourth Amendment, and thereby to secure and safeguard rights it guarantees, courts have developed exclusionary rule. U.S.C.A. Const. Amend. 4.

[2] SEARCHES AND SEIZURES ⇦ 191
349k191
Under some circumstances, defendant has right to challenge truthfulness of factual statements made in affidavit used to obtain search warrant issued ex parte.

[3] CRIMINAL LAW ⇦ 394.4(6)
110k394.4(6)
District court must suppress evidence obtained during execution of search warrant to same extent as if probable cause was lacking on face of affidavit used to obtain warrant if testimony at Franks hearing persuades court that allegation of perjury or reckless disregard for truth in connection with facts in affidavit is established by defendant by preponderance of evidence, and if, with affidavit's false material set aside, affidavit's remaining content is insufficient to establish probable cause.

[4] DRUGS AND NARCOTICS ⇦ 188(3)
138k188(3)
Defendant established that detective either fabricated material included in handwritten insertion, which described incident outside defendant's apartment during informant's initial meeting with defendant in which defendant placed keys in lock and informant understood that defendant would deliver narcotics inside apartment, in affidavit used to obtain search warrant for defendant's apartment or displayed reckless disregard for truth in including material, notwithstanding detective's claim that informant reminded him of material in telephone conversation on day affidavit was submitted; detective did not include material in his report to Drug Enforcement Administration (DEA) at time of initial meeting or in affidavit originally profferred to magistrate, and informant's testimony conflicted with material and with detective's testimony as to details of incident, when incident took place, and whether and when he told detective about incident.

[5] CRIMINAL LAW ⇦ 394.4(6)
110k394.4(6)
Good-faith exception to exclusionary rule does not apply where warrant affidavit contains statements made with intentional or reckless disregard for their truth.

[6] SEARCHES AND SEIZURES ⇦ 120
349k120
Information learned from illegal search cannot form basis of search warrant application.

[7] DRUGS AND NARCOTICS ⇦ 188(8)
138k188(8)
Even though magistrate's refusal to grant search warrant without false information which was added to affidavit made it unnecessary to determine whether untainted affidavit established probable cause to issue search warrant for defendant's apartment, magistrate's refusal to grant search warrant based on untainted affidavit would not have been erroneous as information in affidavit localizing narcotics activity to apartment was suspect; detective failed to reveal that he knew keys seized from defendant upon his arrest fit apartment lock only after he tested them in lock, and informant's experiences in obtaining cocaine at apartment took place nearly one year before application for warrant.

[8] CRIMINAL LAW ⇦ 394.4(6)
110k394.4(6)
False information in handwritten insertion in affidavit misled magistrate who issued search

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warrant for defendant's apartment, so that suppression was appropriate remedy; magistrate refused to issue warrant when affidavit was initially profferred and issued warrant only after insertion was made.

[9] SEARCHES AND SEIZURES ⇐ 191
349k191
Magistrate's determination of probable cause to issue search warrant must be afforded great deference.

[10] UNITED STATES MAGISTRATES ⇐ 24.1
394k24.1
District court should not substitute its own probable cause determination on issue of insufficiency of affidavit without false information where magistrate's determination with respect to untainted affidavit is on record and is clear.

*81 Roger S. Hayes, U.S. Atty., S.D.N.Y. by Allen D. Applbaum, Steven M. Cohen, for U.S.

*82 Ivan S. Fisher by Kenneth M. Tuccillo, Debra Elisa Cohen, New York City, for Nelson Castellanos.

MEMORANDUM OPINION AND ORDER

SOTOMAYOR, District Judge.

[1] The Fourth Amendment erects around each of us a barrier against governmental intrusion, shielding against "unreasonable searches and seizures" and mandating that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." To deter conduct violative of the Fourth Amendment, and thereby to secure and safeguard the precious rights that it guarantees, courts have developed the exclusionary rule. United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677 (1984), citing United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). The case at bar is not the familiar one where, as in Leon, the constable or magistrate merely blundered, thereby permitting admission of otherwise improperly seized evidence, but rather the not-rare-enough one where a law enforcement officer not only flouted the Constitution, but intentionally misled a magistrate into issuing a search warrant that she had initially refused to grant. This type of egregious conduct must be deterred if the Fourth Amendment is to have any meaning.

Following a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), the Court concludes that false material facts were used to procure a warrant to search Apartment A2 at 200 West 109th Street in Manhattan ("Apt. A2"). The Court is also persuaded by the record that the magistrate would not have issued a warrant absent those deceptions, and therefore defers to the magistrate's own initial disposition of the probable cause inquiry. For these reasons, more fully set out below, the motion of defendant Nelson Castellanos to suppress the evidence seized in connection with the search of Apt. A2 is GRANTED.

I. Background

On July 1, 1992, defendant Nelson Castellanos was arrested in the vicinity of 200 West 109th Street and charged with conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine. Complaint, Mag.Dkt. No. 92-1324. Late that evening, Detective Stephen Guglielmo, of the New York Drug Enforcement Task Force, went with Assistant United States Attorney ("AUSA") Maxine Pfeffer to the home of Magistrate Judge Barbara A. Lee to obtain a warrant to search Apt. A2. The magistrate initially did not issue the warrant, but only did so after additional facts were inserted into the affidavit signed by Detective Guglielmo. Challenging the veracity of statements contained in that affidavit, defendant moves to suppress the evidence seized as a result of the execution of the warrant.

With the numerous disputed and inconsistent factual details set to one side, a straightforward outline of the relevant facts emerges. Detective Guglielmo was the case agent in charge of the investigation of the defendant. One of the primary goals of his investigation was to determine the "stash location" where defendant's narcotics were stored. He enlisted the assistance of a confidential informant, Jose "Tony" Vega, who began cooperating with the government in December 1991, several months after his own arrest that September. Detective Guglielmo learned from Vega that he had bought cocaine from the defendant inside Apt. A2

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on numerous occasions prior to his cooperation with law enforcement authorities. Detective Guglielmo also spoke to the local precinct that had, at some unspecified previous time, received anonymous letters concerning the drug activities at the building at 200 West 109th Street (the "building").

On February 27, 1992, Detective Guglielmo gave Vega $2,300 with which to purchase cocaine from the defendant. Vega and Castellanos met that day in front of 200 West 109th Street, and then entered the building for either a "short time" or "approximately five minutes." What actually happened while they were in the building is the subject of this hearing. There is no dispute among the witnesses, however, that defendant did not *83 deliver any drugs to Vega inside the building, but instead directed Vega to go outside the building. After Vega left the building, he went to 108th Street and Broadway, a few blocks away, where co-defendant Hector Venicio Soto, also known as Venicio, gave him a Remy Martin box containing 250 grams of cocaine. During the debriefing that followed the transaction, Vega told Detective Guglielmo that he had paid $2,300 for 125 grams of the cocaine, obtaining the rest on credit.

Detective Guglielmo prepared a Drug Enforcement Administration ("DEA") report concerning the events of February 27. The report does not include any information about where Vega and Castellanos had been when they were inside the building. It does not mention Apt. A2, the suspected stash location, in any way. It also does not mention that anyone other than defendant and Vega was inside the building, or that Hector Venicio Soto--who allegedly gave the cocaine to Vega--had been with the defendant inside the building.

Yet, at the Franks hearing, Detective Guglielmo testified that he learned from Vega during the February 27 debriefing that Vega and Castellanos had gone up to the second floor of the building and had spoken in front of Apt. A2. They "were going to go into the apartment, but another individual ... Venicio, stated that the block was hot." Detective Castellanos continued his testimony by explaining that in response to the warning that the block was "hot," defendant had directed Vega to pick up the cocaine around the corner. There, Vega met Hector Venicio Soto and obtained the cocaine from him. Out of all of this testimony, only the material in the last sentence was included in the DEA report.

On March 10, 1992, Detective Guglielmo videotaped a second meeting between Vega and the defendant in front of the building. Again, the two entered the building. At the Franks hearing, Vega distinctly recalled that on March 10 he remained with the defendant on the staircase to the second floor, adamantly denying that on that day they had approached Apt. A2. Vega also testified that he had only been inside the building twice with the defendant after he began cooperating with the government--February 27 and March 10. Although he insisted that on one of those two occasions, the defendant approached the door of Apt. A2, keys in hand, Vega would not agree that the approach to the door of Apt. A2 did occur, or had to have occurred, during their February 27 meeting.

On July 1, 1992, Detective Guglielmo and several other agents arrested Castellanos pursuant to an arrest warrant. They searched a white shopping bag that the defendant was carrying and found it to contain approximately $10,000 in cash, which consisted mostly of $1 and $20 bills. They also took custody of defendant's keys, and then went into the building and inserted the keys into the locks on the door of Apt. A2, determining that the keys fit those locks. While they were testing the keys, they heard noise or music coming from within the apartment and entered it to conduct a security sweep.

That evening, Detective Guglielmo and AUSA Pfeffer prepared a search warrant affidavit for Apt. A2 and brought it to Magistrate Judge Lee's home. AUSA Pfeffer has stipulated that she was not told about the security sweep and that the sweep was not disclosed in the affidavit or in conversation with the magistrate. Moreover, after the magistrate reviewed the affidavit, rather than issue a warrant, she asked that additional information be provided with respect to Apt. A2. In response to the magistrate's inquiry, Detective Guglielmo, without AUSA Pfeffer, went into the hallway outside of the magistrate's apartment and contacted Vega by cellular telephone. Detective Guglielmo claims that Vega reminded him of the February 27 approach to Apt. A2. During the Franks hearing, however, Vega only recalled telling Detective Guglielmo about the location of a safe inside Apt. A2 and could not recall anything else that he might have said during their telephone

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conversation.

After he completed his call with Vega, Detective Guglielmo returned to the magistrate's apartment. AUSA Pfeffer inserted into the affidavit by hand the information that Detective Guglielmo represented he had just learned from Vega. This handwritten insert in Paragraph 6 of the affidavit ("handwritten *84 insertion") relates to the February 27 meeting and reads as follows:

> After agreeing to and receiving payment for the narcotics, Castellanos took out his keys, began to place the keys in the lock of the door to Apt. A2 [Mr. Castellanos] said, in substance and in part, let's go in here. [Vega] has further informed me that [he] understood that Castellanos would deliver the narcotics inside Apartment A2 at that time.

At the hearing, Vega denied telling Detective Guglielmo that the keys had ever been placed in the lock, but he did insist that they had been moving toward the door--although he would not say on what date or during which meeting that had occurred.

Magistrate Judge Lee was again presented with Detective Guglielmo's affidavit, now containing the handwritten insertion. Upon reviewing this modified affidavit, she then issued the requested search warrant.

Castellanos has moved to suppress the evidence that was obtained during the search, attacking the validity of the warrant in light of the questionable veracity of the handwritten insertion. The Court, finding that defendant had made a sufficient preliminary showing to entitle him to a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), held a Franks hearing on February 4, 5, and 11, 1993.

II. Discussion

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation...." This Fourth Amendment protection would be "reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." Franks v. Delaware, 438 U.S. 154, 168, 98 S.Ct. 2674, 2682, 57 L.Ed.2d 667 (1978).

[2] A defendant in a criminal proceeding, under certain circumstances, has the right "to challenge the truthfulness of factual statements made in an affidavit" used to obtain a search warrant issued ex parte. Franks, 438 U.S. at 155, 98 S.Ct. at 2676. If the defendant's challenge is successful, the suppression of evidence may result, for "a district court may not admit evidence seized pursuant to a warrant if the warrant was based on materially false and misleading information." U.S. v. Levasseur, 816 F.2d 37, 43 (2d Cir.1987).

[3] A district court must suppress the evidence obtained during the execution of a search warrant "to the same extent as if probable cause was lacking on the face of the affidavit" if the testimony at a Franks hearing persuades the court that two conditions are met. 438 U.S. at 156, 98 S.Ct. at 2676. First, "the allegation of perjury or reckless disregard [for the truth] is established by the defendant by a preponderance of the evidence." Id. Second, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." Id. Each requirement is addressed in turn.

The Handwritten Insertion

The first prong of the Franks test requires that the affidavit contain information "that the affiant knew was false or would have known was false except for his reckless disregard of the truth." United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984), citing Franks. " 'Reckless disregard for the truth' means failure to heed or to pay attention to facts as [the affiant] knew them to be." Rivera v. United States, 728 F.Supp. 250, 258 (S.D.N.Y.1990), aff'd in relevant part, 928 F.2d 592 (2d Cir.1991). Thus, if the affiant "made statements which failed to take account of the facts as he knew them, or which he seriously doubted were true, that would show reckless disregard for the truth." Id.

[4] Defendant contends that the handwritten insertion in the warrant affidavit satisfies this element of the Franks test. After carefully weighing the testimony at the Franks hearing and examining the submissions of the parties regarding these disturbing allegations of a tainted affidavit, the Court must agree with defendant. For the reasons stated below, defendant has established *85 by a

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preponderance of the evidence that Detective Guglielmo either fabricated the material in the handwritten insertion, or, if during the July 1 telephone conversation Vega did indeed make the statements attributed to him, that Detective Guglielmo displayed a reckless disregard for the truth in accepting Vega's comments and including them in his affidavit.

At the outset, the Franks hearing raised doubts about Detective Guglielmo's credibility. Shortly after arresting the defendant on July 1 and confiscating his keys, Detective Guglielmo not only tested them in the lock of the door to Apt. A2 but, after hearing some noise or music coming from the apartment, made a warrantless "security sweep" of it. Detective Guglielmo claims that he told AUSA Pfeffer about the warrantless entry before they submitted the warrant application to the magistrate. Yet, the government has stipulated that Detective Guglielmo did not tell AUSA Pfeffer about the sweep and that he did not disclose the sweep to the Government until just before he took the stand in the Franks hearing.

Similarly, Detective Guglielmo testified at the hearing to a number of crucial facts that he had purportedly learned from Vega during the February 27 debriefing. He claimed to have learned that Vega and the defendant were going to enter Apt. A2 to effect their drug transaction, but were stopped when Hector Venicio Soto, one of the "guys" who worked for defendant, warned them that they should go elsewhere because the street was "hot." Yet Detective Guglielmo neglected to mention either of these two critical accomplishments in his February 27 DEA report. Although the report did mention that Vega had taken delivery from an individual later identified as Hector Venicio Soto at 108th Street and Broadway, it failed to include any mention that Soto was in the building with the defendant. These omissions are utterly inconsistent with Detective Guglielmo's claims. Even accepting Detective Guglielmo's testimony that not all pertinent information is included in DEA reports, this Court finds it inconceivable that the detective would exclude such relevant information as putting the drug deliverer, Soto, in the same location as the defendant, the suspected drug supplier, and placing both in the immediate vicinity of the suspected stash apartment. Not only the DEA report but also the affidavit originally proffered to the magistrate omitted these crucial items. [FN1]

FN1. Another suspicious omission in Detective Guglielmo's affidavit is his failure to advise the magistrate that he had learned that one "Rosa Soto" was registered with Con Edison to Apt. A2, but that a fifth floor apartment was registered to defendant's wife, Judelka Soto Castellanos, and another apartment on the second floor was registered to another Soto. Indeed, despite this knowledge, Detective Guglielmo had testified at one grand jury presentation that Apt. A2 was registered to the defendant's wife. His willingness to testify to this assumption, in light of all of the information that he had, is but one of many incidents that brings his veracity in question.

Vega's testimony is inconsistent with that of Detective Guglielmo in several respects, and the inconsistencies are troubling. The most disturbing aspect of Vega's testimony was his refusal to identify his February 27 meeting with the defendant as the date that the defendant, wielding his keys, purportedly approached Apt. A2. Vega stated numerous times that he only met with the defendant twice during the investigation, and adamantly denied that they had approached Apt. A2 during their second meeting, on March 10. Yet, as though fearing a trap, he would not agree that the episode occurred on February 27--the logical consequence of his own testimony. In this regard it is significant that Vega remembered making out a written statement to Detective Guglielmo after the February 27 meeting and that, not surprisingly, the statement did not include any information about Apt. A2 or Soto's or anyone else's presence in the building.

It is equally significant that Vega only testified that an unidentified person had come in from the outside and warned him and the defendant that the street was "hot." This is incompatible with Detective Guglielmo's testimony that Vega had identified Soto as the one inside the building who had issued the warning, and with his testimony that Vega and the defendant were the only two people to enter and exit the building while he was observing it.

*86 It is also noteworthy that Detective Guglielmo would add to his affidavit the material concerning the keys only after he had his July 1 conversation with Vega. Yet, Vega only remembered that they

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had discussed a safe in Apt. A2, but could not remember discussing anything else.

Finally, Vega's testimony about what had happened with the keys also deviates from the scenario included in the handwritten insertion. The handwritten insertion states that the defendant "took out his keys, [and] began to place the keys in the lock of the door to Apt. A2." At the hearing, Detective Guglielmo testified that Vega had told him that the keys were in the door, but Vega testified only that the defendant was "going towards the door," which Vega knew he was "about to open" because he "had keys in his hand." Vega did not testify, as Detective Guglielmo claimed, that when they were on the second floor landing in the building, the defendant had "said, in substance and in part, let's go in here." Nor did Vega testify that he "understood that Castellanos would deliver the narcotics inside Apartment A2 at that time." In short, Vega never testified to any of the items about which the handwritten insertion purports to quote him--expanding this Court's already substantial doubt that Vega told the detective, either on February 27 or on July 1, what the detective says he was told.

If on July 1 Vega did communicate to Detective Guglielmo the information that he incorporated in the handwritten insertion, Detective Guglielmo's judgment in accepting these statements was reckless. For example, Detective Guglielmo himself did not remember the details on July 1, thus necessitating the call to Vega. In view of the pivotal role of this information in linking the drug activity and Apt. A2, it is incredible that Detective Guglielmo would have forgotten these details. Given Vega's general demeanor, which suggested a savvy comprehension of what "cooperation" with the government demanded of him, Detective Guglielmo was indifferent to the truth in purportedly relying on Vega's recollection of the facts to refresh his own memory, particularly when the detective testified that he did not see anyone enter the building who could have warned the defendant and Vega, as Vega claimed had happened. [FN2]

FN2. The Court discounts the possibility that, in contradiction to his testimony, Detective Guglielmo first learned about the approach to Apt. A2 during his July 1 conversation with Vega. After all, Vega knew and understood that he was a government informant charged with the duty of obtaining and conveying information about drug transactions to Detective Guglielmo. Had he and the defendant approached Apt. A2 as indicated in the handwritten insertion, or been warned by the same person who subsequently delivered the drugs, Vega surely would have recognized the importance of that action and conveyed it to Detective Guglielmo during their February 27 debriefing. The defendant's motions were accompanied by an affidavit in which the defendant disputes the truthfulness of statements made by Detective Guglielmo and by Vega. The Court is cognizant that defendant's statement that he did not see Vega between February 27, 1992 and May 26 of that year is at odds with the weight of evidence that suggests that they met in March of 1992, particularly the March 10 videotape, which clearly shows Vega and the defendant greeting each other. In evaluating the credibility of other witnesses and in finding the relevant facts, the Court has given the defendant's affidavit the appropriate weight in light of this inconsistency.

[5] It is possible that Vega reported the information contained in the handwritten insertion to Detective Guglielmo during their debriefing on February 27, that the detective omitted it from his DEA report on the debriefing and again from his original submission to Magistrate Lee, and that Vega duly recounted the same information during the July 1 telephone conversation. Mere possibility, however, is not the standard governing the motion at bar. The Court must find only that defendant has demonstrated by a preponderance of the evidence that Detective Guglielmo knew, or, absent a reckless disregard for the truth, would have known, that the handwritten insertion was false. The aforementioned peculiarities and inconsistencies, and the Court's observation of the witnesses who testified at the hearing, convince the Court that the defendant has met this burden, [FN3] and therefore the Court turns to the second prong of the Franks test.

FN3. Consequently, the government's application for a good-faith exception to the suppression of the evidence obtained during the search can be dismissed at the outset. The good-faith exception to the exclusionary rule does not apply where a warrant affidavit contains statements made with intentional or reckless disregard for their truth. U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82

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L.Ed.2d 677 (1984).

*87 The "Untainted" Affidavit

[6][7] The second task confronting a district court after a Franks hearing is to examine the affidavit with the false material--herein the handwritten insertion--placed to one side. Typically, this requires a de novo review of the sufficiency of the remaining material to establish probable cause. [FN4] This *88 case is unusual in that the Court need not, and should not, even make a probable cause inquiry because the record unambiguously reflects that Magistrate Judge Lee did not issue the warrant absent the handwritten insertion. When Detective Guglielmo and AUSA Pfeffer presented Magistrate Judge Lee with the warrant affidavit at her home, she did not issue the search warrant and required that they provide additional information linking Apt. A2 with the drug activity. Only after the handwritten insertion was included in the affidavit did she conclude that there was probable cause and issue the warrant.

FN4. The sufficiency of the untainted affidavit to establish probable cause is a close call. Putting the handwritten insertion to one side, the following items pertaining to Apt. A2 remain: (1) Vega stated that on February 27, 1991, in front of the door to Apt. A2, he and "Castellanos discussed the possibility of [Vega] purchasing 125 grams of cocaine and obtaining another 125 grams of cocaine on consignment." Para. 6. Vega paid a sum of money to the defendant, who, "upon hearing ... that there might be law enforcement officers in the area," directed Vega to pick up the cocaine elsewhere. Para. 6. (2) Vega advised Detective Guglielmo that "on numerous occasions prior to cooperating with law enforcement authorities, [Vega] obtained large quantities of cocaine from [the defendant and someone else] inside of" Apt. A2, and that "quantities of cocaine were kept" in Apt. A2. Also, "in the past, Vega observed [defendant] maintain a ledger [in Apt. A2] which contained notations about the distribution of cocaine." Para. 7. (3) "Previously, [Vega] had described [Apt. A2 as] a studio apartment." This is consistent with Con Edison records. Para. 9. (4) Detective Guglielmo arrested defendant on July 1, 1992, pursuant to an arrest warrant, after observing the defendant leave the building carrying a white shopping bag, which he found to contain $10,000 in primarily small denominations. "At the time of his arrest, [defendant] was also found to be in possession of keys which fit the locks on the door to [Apt. A2]." Para. 11. The Supreme Court has set forth a "totality-of-the-circumstances" test for determining probable cause to support a search warrant. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The issuing judicial officer must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 238, 103 S.Ct. at 2332. " '[O]nly the probability, and not a prima facie showing, of criminal activity' " is required to establish probable cause. 462 U.S. at 235, 103 S.Ct. at 2330 (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)); see generally United States v. Wagner, 989 F.2d 69 (2d Cir.1993). Guided by these principles, the Court is troubled by two aspects of Detective Guglielmo's "untainted" affidavit, both involving how the alleged narcotics activity may be localized to Apt. A2. First, Detective Guglielmo knew that the defendant's keys unlocked the door to Apt. A2 only because he had tried the keys in that door after confiscating them from the defendant. It is well settled that information learned from an illegal search cannot form the basis of a search warrant application. Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). There is a distinct possibility that defendant's reasonable expectation of privacy in his door lock was violated when Detective Guglielmo tested the confiscated keys in the lock. There is, however, no clear Second Circuit authority on this subject and such would be essential in assessing the existence of probable cause in this case because that search was central in localizing suspected drug activity to Apt. A2. In this regard, Judge Woodlock's dissent in U.S. v. Lyons, 898 F.2d 210, 219 (1st Cir.), cert. denied, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990), is provocative. "The penetration and manipulation--cursory or sustained, modest or substantial--of the guardian mechanisms of [locked objects] is no trivial matter for Fourth Amendment purposes." Id.; but see U.S. v. Concepcion, 942 F.2d 1170, 1172 (7th Cir.1991) (although "inserting and turning the key" in the lock to an apartment

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door is a search, since it yields "information [about] the inside of the lock, which is both used frequently by the owner and not open to public view," warrant was not necessary, because search was "reasonable," and "although a warrant may be an essential ingredient of reasonableness much of the time, for less intrusive searches it is not"); U.S. v. Lyons, 898 F.2d 210, 213 n. 2 (1st Cir.1990) ("[T]he insertion of a key into a lock, followed by the turning of its tumbler in order to determine the fit, is so minimally intrusive that it does not implicate a reasonable expectation of privacy."). Since the insertion of a key into a lock at least arguably implicates Fourth Amendment concerns, Detective Guglielmo's failure to explain to the magistrate how he had learned that defendant's keys opened Apt. A2 is disturbing. This concern may have been exacerbated had the magistrate been informed that both Vega and Con Edison records had disclosed to the detective that defendant's wife and other members of his family also had other apartments in the building. Therefore, the defendant's exiting of the building with a shopping bag did not necessarily imply that he exited from any apartment in the building, even one to which he carried keys. Had all of this information been disclosed to the magistrate, it might have given her even more pause about issuing the requested warrant. Second, Vega had not been inside Apt. A2 since prior to his arrest on September 5, 1991--almost one year before the warrant's affidavit was submitted to the magistrate. The last contact Vega had had with the defendant was on March 10, almost four months before his July 1 arrest. On that date, no drugs were given to Vega. There is thus a strong question as to whether Vega's experiences obtaining cocaine from the defendant inside Apt. A2, and his observations of a transaction ledger and drug stockpile there, are stale. The Second Circuit recently explained that although "there is no bright line rule for staleness, the facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past." United States v. Wagner, 989 F.2d 69, 75 (2d Cir.1993). In Wagner, the Second Circuit upheld a determination that a search warrant affidavit describing the purchase of four "nickel bags" of marijuana from a co-defendant in her home six weeks earlier was stale. Nevertheless, staleness may be cured if an affidavit also "establishes a pattern of continuing criminal activity so there is reason to believe that the cited activity was probably not a one-time occurrence." Id. Moreover, "[n]arcotics enterprises are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness." Id., quoting U.S. v. Feola, 651 F.Supp. 1068, 1090 (S.D.N.Y.1987), aff'd mem., 875 F.2d 857 (2d Cir.), cert. denied, 493 U.S. 834, 110 S.Ct. 110, 107 L.Ed.2d 72 (1989). Whether or not the affidavit establishes a pattern of continuing criminal activity sufficient to overcome the staleness of the material in the affidavit is a close question which the Court need not resolve at this time. It suffices to say that it is close enough to warrant serious consideration. Even though it is not necessary to determine whether or not the "untainted" affidavit establishes probable cause, enough troubling issues infect this warrant application that the Court may conclude that, at the very least, a magistrate's decision not to grant a warrant would not have been erroneous.

[8] From this sequence of facts, the Court can only conclude that the magistrate had determined that the affidavit originally proffered by Detective Guglielmo and AUSA Pfeffer was insufficient to establish probable cause. Thus, the second prong of the Franks test is satisfied, since "[s]uppression [is] an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit" that the affiant knew or should have known was false. U.S. v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984) (explaining that Franks survived its decision) (emphasis added). What is relevant, therefore, is the effect of the false material--that of misleading the magistrate into finding probable cause where otherwise she would not find it.

[9][10] Ordinarily, a district court does not know whether or not the magistrate would have accepted an untainted affidavit or was misled by an affidavit and consequently must conduct its own probable cause inquiry in order to ascertain whether the false material supported the finding of probable cause. The second prong of the Franks test must have been premised on this typical uncertainty. In this unusual case, however, the magistrate's own judgment on the untainted affidavit is in the record. The magistrate read the untainted affidavit, was not

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convinced by it, and did not sign it. As the Supreme Court has stated, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." U.S. v. Leon, at 914, 104 S.Ct. at 3416, citing Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969). Right, wrong, or otherwise, a magistrate's determination of probable cause must be afforded great deference, United States v. Nichols, 912 F.2d 598, 602 (2d Cir.1990), and a district court should not substitute its own probable cause determination on an issue of insufficiency where that of the magistrate is on the record and is clear.

*89 To reject the magistrate's original determination in a case such as this would reward and encourage deception by giving the government and police multiple bites at the apple. Where a magistrate determined that there was not probable cause, or questioned the sufficiency of facts proffered during a warrant hearing, the applicant would be encouraged to supplement the affidavit with false information that would guarantee the issuance of a warrant. Then, the search will have occurred and the police and government would still have a de novo review of the affidavit. This result would be contrary to the basic tenets expressed by the constitutional requirements for a search warrant. If the court is always to determine de novo whether probable cause exists, even after a magistrate has determined that it does not, then there is no purpose to having a magistrate issue warrants. The police might as well conduct warrantless searches since the magistrate's review would be of no consequence. The good-faith exception in Leon was founded on the principle that the government should not be penalized for the good-faith errors of an independent magistrate. This policy, however, demands that the government insure the independence of a magistrate by not benefiting from falsehoods that directly induce a warrant. In short, if the exclusionary rule is to have any meaning, it must be applied in a situation such as this where a magistrate, right or wrong, did not issue a warrant except after a proffer of perjured testimony.

The "alternative sanctions of a perjury prosecution, administrative discipline, contempt or a civil suit are not likely" to repel the "specter of intentional falsification." 438 U.S. at 168-69, 98 S.Ct. at 2682-83. The exclusionary rule's goal of deterrence, coupled with the "solemnity and moment of the magistrate's proceeding," 438 U.S. at 166, 98 S.Ct. at 2682, and the policy of great deference to the magistrate, compel this Court's decision to adopt the magistrate's apparent determination that probable cause was not established absent the handwritten insertion. The Court must therefore suppress the evidence whose seizure directly resulted from the deceit by a law enforcement officer.

III. Conclusion

The Second Circuit recently observed that "the police must be dedicated, in our democratic society, to exercising the authority of their office in a manner that protects the constitutional rights of suspects and encourages respect for the rule of law by its proper enforcement." U.S. v. Gribben, 984 F.2d 47, 52 (2d Cir.1993). In light of this important policy, and for the reasons stated above, defendant's motion is GRANTED and the fruits of the search of Apt. A2 shall be suppressed from his trial.

SO ORDERED.

END OF DOCUMENT

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880 F.Supp. 145
24 Media L. Rep. 1139
(Cite as: 880 F.Supp. 145)

DOW JONES & COMPANY, INC. and Robert L. Bartley, Plaintiffs,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

No. 94 Civ. 0527 (SS).

United States District Court,
S.D. New York.

Jan. 5, 1995.

Action was filed seeking disclosure under Freedom of Information Act (FOIA) of reports prepared by United States Park Police and Federal Bureau of Investigation (FBI) concerning death of former deputy White House counsel, and photocopy of note he had apparently written prior to his death. On cross-motions for summary judgment, the District Court, Sotomayor, J., held that: (1) reports were exempt from disclosure under FOIA exemption for law enforcement records that would interfere with enforcement proceedings if produced; (2) in camera hearing was not required to determine whether exemption was waived; but (3) suicide note was not exempt from disclosure as law enforcement record that would invade personal privacy if produced.

Judgment accordingly.

[1] RECORDS ⇐ 54
326k54
Exemptions from Freedom of Information Act (FOIA) disclosure are narrowly construed, and agency seeking to withhold documents bears burden of proving applicability of claimed FOIA exemption. 5 U.S.C.A. § 552.

[1] RECORDS ⇐ 65
326k65
Exemptions from Freedom of Information Act (FOIA) disclosure are narrowly construed, and agency seeking to withhold documents bears burden of proving applicability of claimed FOIA exemption. 5 U.S.C.A. § 552.

[2] FEDERAL CIVIL PROCEDURE ⇐ 2481
170Ak2481
Freedom of Information Act (FOIA) cases are not immune to summary judgment, and mere disagreement between parties as to probable consequences of disclosure will not defeat adequately supported summary judgment motion. 5 U.S.C.A. § 552; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] RECORDS ⇐ 60
326k60
Reports prepared by United States Park Police and Federal Bureau of Investigation (FBI) concerning death of former deputy White House counsel were exempt from disclosure under Freedom of Information Act (FOIA) as law enforcement records or information that could be expected to interfere with enforcement proceedings if disclosed, where independent counsel had stated that public disclosure of information found in reports could hamper his ability to elicit untainted testimony during continuing "Whitewater" investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇐ 54
326k54
Voluntary disclosure of all or part of document may waive otherwise valid Freedom of Information Act (FOIA) exemption. 5 U.S.C.A. § 552.

[5] RECORDS ⇐ 54
326k54
Neither general discussions of topics nor partial disclosures of information constitute waiver of otherwise valid Freedom of Information Act (FOIA) exemption. 5 U.S.C.A. § 552.

[6] RECORDS ⇐ 66
326k66
In camera review was not required to determine whether Department of Justice (DOJ) had waived Freedom of Information Act (FOIA) exemption with regard to United States Park Police and Federal Bureau of Investigation (FBI) reports prepared during investigation of deputy White House counsel's death, where DOJ had disclosed portions of Park Police report dealing with death and stated that further disclosure of reports would interfere with ongoing investigation. 5 U.S.C.A. § 552(b)(7)(A).

[7] RECORDS ⇐ 60
326k60

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Suicide note written by deputy White House counsel prior to his death was not exempt from disclosure under Freedom of Information Act (FOIA) exemption for law enforcement records that would invade personal privacy if disclosed; note discussed matters touching on several events of public interest and implicated government agencies and employees in misconduct. 5 U.S.C.A. § 552(b)(7)(C).

[8] RECORDS ⇐ 60
326k60
Freedom of Information Act (FOIA) exemption for law enforcement records that could be expected to invade personal privacy if produced is applicable only if invasion of privacy that would result from release of information outweighs public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[8] RECORDS ⇐ 64
326k64
Freedom of Information Act (FOIA) exemption for law enforcement records that could be expected to invade personal privacy if produced is applicable only if invasion of privacy that would result from release of information outweighs public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

***146** Dow Jones & Company, Inc. Legal Dept., New York City (Stuart D. Karle, of counsel), for plaintiffs.

Mary Jo White, U.S. Atty., S.D.N.Y., New York City (Steven I. Froot, of counsel), for defendant.

OPINION AND ORDER

SOTOMAYOR, District Judge.

Plaintiffs Dow Jones & Company, Inc. ("Dow Jones") and Robert L. Bartley ("Bartley") seek disclosure, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, of two reports, one prepared by the United States Park Police (the "Park Police") and the other by the Federal Bureau of Investigation (the "FBI"), concerning the death of former deputy White House Counsel Vincent W. Foster, and a photocopy of a torn-up note (the "Note"), apparently written by Foster, and found in his briefcase several days after his death. The Department of Justice ("DOJ") has refused to release portions of the Reports or copies of the Note, maintaining that 5 U.S.C. §§ 552(b)(7)(A) & 552(b)(7)(C) exempt them from disclosure. Plaintiffs move, pursuant to Fed.R.Civ.P. 56, for partial summary judgment enjoining DOJ from withholding the requested documents on the ground that DOJ waived the claimed exemptions. DOJ cross-moves for summary judgment dismissing the complaint. For the reasons discussed below, plaintiffs' motion is denied in part and granted in part, and defendant's motion is granted in part and denied in part.

FACTUAL BACKGROUND

The relevant facts, set forth in a joint Statement of Stipulated Facts, dated April 18, 1994, are not in dispute. On or about ***147** July 20, 1993, then deputy White House counsel Vincent W. Foster was found dead in Fort Marcy Park, McLean, Virginia. The Park Police began an investigation into the circumstances of Foster's death. A week after Foster's death, the White House announced that a torn-up note had been retrieved from Mr. Foster's briefcase, and the following day the FBI commenced an investigation into the discovery and handling of the Note.

A. The DOJ Press Conference

At a press conference held on August 10, 1993 (the "Press Conference"), the then Deputy Attorney General announced that the Park Police and the FBI had provided him with completed reports (the "Reports") of their respective investigations. The Chief of the Park Police, Robert Langston, and the Special Agent in charge of the FBI's Washington, D.C. field office, Robert Bryant, who had both read all or part of their agencies' respective Reports, acted as agency spokespersons and discussed the investigations and the conclusions reached. Among the information disclosed at the Press Conference was that:

1. based on the condition of the scene, the medical examiner's findings and information gathered during its investigation, the Park Police had concluded that Mr. Foster's death was a suicide;
2. the FBI had completed its investigation into the handling of the Note and determined that nothing illegal or improper had occurred;
3. the White House Counsel's office had conducted the initial search of Mr. Foster's office and set aside its initial invocation of the executive privilege after discussions with DOJ, ostensibly

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prompted by discussions between the Park Police and DOJ about the privilege issue;
4. there were no fingerprints on the Note when it was turned over to the FBI, only a smudged palm print, and the Park Police could not determine who had torn up the Note;
5. Mr. Foster's widow told investigators that she had advised her husband to write a list of issues that had been troubling him;
6. only one gun was found near Mr. Foster's body, and members of the Foster family told investigators they believed the gun to be Mr. Foster's;
7. Mr. Foster had spoken with a doctor about depression, and anti-depressant medication had been prescribed, but investigators were unaware of any particular incident that might have prompted Mr. Foster to commit suicide.

Noting that the press "m[ight] want to see [the Note] so that [they] could describe what it looks like," the Deputy Attorney General informed the audience that Carl Stern of DOJ would "have a copy available and anyone who want[ed] to see it [wa]s welcome to see it." Transcript at 1. Thereafter, members of the media inspected the Note in Mr. Stern's office; plaintiff Bartley viewed the Note in October 1993.

Prior to concluding the Press Conference, Mr. Stern stated that media members who wanted to obtain copies of the Reports should submit FOIA requests to DOJ. DOJ received plaintiffs' request (the "FOIA Request") for the Reports on August 18, 1993.

B. Appointment of Independent Counsel Fiske

On January 20, 1994, Attorney General Janet Reno appointed Robert Fiske independent counsel (the "Independent Counsel") to investigate whether any individuals or entities had violated any federal laws relating in any way to the President or Mrs. Clinton's relationship to Madison Guaranty Savings & Loan, Whitewater Development Corporation or Capital Management Services. The Independent Counsel was also authorized to investigate and prosecute any other violations of federal criminal law "developed during" his investigation of the above matters "and connected with or arising out of that investigation," any violations of 28 U.S.C. § 1826, and any obstruction of justice or false testimony in connection therewith. Under this authority, the Independent Counsel's investigation has inquired into the circumstances *148 surrounding Vincent Foster's death and events occurring in the White House following his death, including the discovery and handling of the Note.

C. DOJ's Denial of the FOIA Request

1. The Reports

As of January 28, 1994, plaintiffs had received no response to their FOIA Request, and thereafter, commenced this action. By letter dated February 28, 1994, Independent Counsel Fiske informed DOJ that public disclosure of all or any part of the Reports would substantially prejudice his investigation of the events covered therein and he claimed that the Reports were exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)"). Exemption 7(A) excludes from the FOIA's mandatory disclosure requirements:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings.

Based on Independent Counsel Fiske's assessment of the propriety of disclosing the Reports, DOJ, in its answer to the complaint, asserted that "the public release of all or any part of the records at this time would be detrimental to the investigation currently being conducted by" Independent Counsel Fiske.

2. The Note

After DOJ answered the complaint in this action, Independent Counsel Fiske advised the agency that public release of the Note would not be detrimental to his investigation, and hence, Exemption 7(A) would not bar its disclosure. DOJ reviewed the Note to determine if any other FOIA exemptions applied, and ultimately concluded, after consulting with the attorney representing the family of Vincent Foster, that it would withhold the document pursuant to 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)"). Exemption 7(C) exempts "records or information compiled for law enforcement purposes ... to the extent that the [ir] production ... could reasonably be expected to constitute an unwarranted

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invasion of personal privacy."

D. The Cross-Motions for Summary Judgment

Both the plaintiffs and DOJ have moved for summary judgment. Plaintiffs seek partial summary judgment on the grounds that disclosures made by DOJ, the Park Police and the FBI at the Press Conference waived Exemption 7(A) to the extent it applied to the Reports. Plaintiffs, request an in camera review of the Reports for the Court to determine which segments should be released under the waiver.

DOJ in turn seeks summary judgment dismissing plaintiffs' complaint contending that no genuine issues of material fact exists as to whether Exemption 7(A) applies to withheld sections of the Reports, and that plaintiffs have not established that the exemption has been waived. DOJ further requests summary judgment as to the propriety of its withholding of the Note under Exemption 7(C).

E. Subsequent Developments

After the cross-motions for summary judgment had been fully briefed, and prior to the oral argument scheduled for July 15, 1994, Independent Counsel Fiske announced on June 30, 1994, that his investigation into the death of Vincent Foster had been completed, and he issued a written report concluding that Foster's death had been a suicide. Fiske further determined that "substantial portions" of the Park Police Report could be released without interfering with his continuing investigation. Fiske also announced that his investigation into the handling of Mr. Foster's documents by the White House immediately following Foster's death, an area of inquiry covered by the FBI Report and a portion of the Park Police Report, was in its final stages and would be completed shortly.

In a letter to the Court dated July 12, 1994, DOJ stated that it was reviewing whether any other FOIA exemptions applied to the portions of the Park Police Report that Fiske concluded could be released. On July 20, 1994, DOJ released about 91 pages *149 of the Park Police Report, from which material had been redacted pursuant to FOIA Exemptions 7(A) and 7(C). DOJ continued to withhold the redacted portions of the Park Police Report and the entire FBI Report pursuant to Exemption 7(A).

On September 8, 1994, I requested that the parties submit additional papers on the issue of whether the July 20, 1994 disclosure of portions of the Park Police Report had placed into the public domain information contained in the undisclosed portions of the Park Police Report and the FBI Report such that Exemption 7(A) would no longer apply to those undisclosed documents. DOJ submitted its brief on September 19, 1994; plaintiffs submitted their response on September 26, 1994. Appended to DOJ's response was a declaration by newly appointed Independent Counsel Kenneth W. Starr, which stated that although Independent Counsel Fiske had concluded his investigation of the death of Vincent Foster and released those portions of the Park Police Report relevant to that investigation, further release of portions of the Park Police Report and the FBI Report would interfere with Starr's ongoing investigation relating to the handling of documents in Mr. Foster's White House office immediately following his death.

DISCUSSION

I. Exemption 7(A)

A. Requirements

[1] FOIA sets a policy favoring government disclosure of documents. N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 220-21, 98 S.Ct. 2311, 2316-17, 57 L.Ed.2d 159 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976); EPA v. Mink, 410 U.S. 73, 79-80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). Documents are exempt from disclosure only if they come within one of the nine exemptions specified in FOIA. 5 U.S.C. § 552(b). Exemptions from FOIA disclosure are narrowly construed, see Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir.1987), and the agency seeking to withhold documents bears the burden of proving the applicability of a claimed FOIA exemption. Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir.1994).

In their initial moving papers, plaintiffs did not challenge Exemption 7(A)'s applicability to the Reports. In subsequent papers, however, they

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asserted that genuine issues of fact existed as to the effect release of all or portions of the Reports would have on Independent Counsel Fiske's investigation. First, plaintiffs claimed that the release of the Reports "would represent little threat to Mr. Fiske's investigation given that it is unrelated to the earlier, completed FBI and Park Police probes." Pl. Mem. in Further Support of Motion for Partial Summary Judgment ("Pl. Supp. Mem.") at 11-12. Second, substantial questions existed, they argued, as to the scope of circulation of the Reports before and after Independent Counsel Fiske's appointment. Plaintiffs surmised that the Reports probably were not kept "under lock and key for the entire five month interim when no investigation was pending" (Pl. Supp. Mem. at 13), arguing that it would be "human nature" for friends and associates of Mr. Foster to seek review of the Reports. Id.

[2] Summary judgment is appropriate only when the movant demonstrates that there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). FOIA cases are not immune to summary judgment, and mere disagreement between the parties as to the probable consequences of disclosure will not defeat an adequately supported summary judgment motion. See Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 313-14 (D.C.Cir.1988) (a contrary rule would mean that "any motion for summary judgment could readily be defeated by submission of a counteraffidavit that merely draws from a single set of uncontroverted facts a conclusion different from that reached by the agency").

[3] Prior to Independent Counsel Fiske's determination that disclosure of substantial portions of the Park Police Report would not interfere with his ongoing investigation, DOJ had clearly met its burden of demonstrating that the Reports came within Exemption 7(A). An agency affidavit or declaration providing ***150** reasonably detailed explanations why withheld documents fall within a claimed exemption is sufficient to sustain the agency's burden on summary judgment. Spannaus, 813 F.2d at 1289. Here, DOJ submitted declarations of Independent Counsel Fiske (collectively the "Fiske Declaration") which identified, in a general manner, the information contained in the Reports, and explained how dissemination of these documents might impede his investigation. Specifically, the Fiske Declaration averred that the Reports contained, inter alia, summaries of interviews by the Park Police and the FBI with relevant witnesses; reports of investigative steps taken by the Park Police in connection with the investigation of Mr. Foster's death; copies of documents found in Mr. Foster's possession; an autopsy report; documents obtained from the White House in connection with both investigations; and computer-generated documents. Fiske Declaration ¶ 4. The Fiske Declaration further stated that public disclosure of information found in the Reports, such as statements by interviewees and the facts gathered and the conclusions reached as to certain matters, might affect the testimony or statements of other witnesses and could severely hamper the Independent Counsel's ability to elicit untainted testimony. Id. ¶ 7.

Such potential harm has been recognized to warrant exemption from disclosure under Exemption 7(A). See Spannaus, 813 F.2d at 1289 (possible fabrication of fraudulent alibis sufficient to warrant 7(A) exemption). Certainly, plaintiffs' contrary view of the potential harm posed by disclosing the Reports did not, prior to Independent Counsel Fiske's statements of June 30, 1994, create an issue of material fact as to whether Exemption 7(A) applied to the Reports. Alyeska, 856 F.2d at 313-14 (an FOIA plaintiff's competing conclusion regarding a single set of uncontroverted facts does not defeat an agency's properly supported motion for summary judgment).

Nor did plaintiff's mere speculation that the Reports were not kept under lock and key raise an issue of material fact or otherwise cast doubt upon the credibility of the Fiske Declaration. Agency affidavits or declarations are accorded a presumption of good faith, Carney, 19 F.3d at 812, and only tangible evidence of bad faith, not mere conjecture that representations made by the agency are incredible, may overcome that presumption.

Consequently, prior to Independent Counsel Fiske's decision that disclosure of significant sections of the Park Police Report posed little threat to his investigation, DOJ had demonstrated, as a matter of law, that the Reports fell within Exemption 7(A), and thus, DOJ's entitlement to summary judgment.

If the Government fairly describes the content of

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> the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

Id.

DOJ's subsequent disclosure of portions of the Park Police Report, however, raised questions as to whether Exemption 7(A) applies to the withheld portions of the Park Police Report and to the FBI Report, since such disclosure may have placed in the public domain the specific information contained in the documents or excerpts DOJ seeks to withhold. Questions about the continued applicability of Exemption 7(A) were resolved by the Declaration of Independent Counsel Starr, dated September 16, 1994, submitted with DOJ's supplemental letter brief, which stated,

> The information contained in the FBI Report and the portions of the Park Police Report that have not been disclosed is central to my continuing investigation. The questions addressed in this inquiry are wholly separate and apart from those addressed in the June 30 Fiske report. Consequently, the prior release of portions of the Park Police Report relating to the issues in the Fiske report does not adversely affect this continuing investigation.

B. Waiver

[4][5] Voluntary disclosures of all or part of a document may waive an otherwise valid *151 FOIA exemption. See Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir.1989); Afshar v. Department of State, 702 F.2d 1125, 1133 (D.C.Cir.1983); Mehl v. EPA, 797 F.Supp. 43, 47 (D.D.C.1992). "The existence and scope of a waiver depends upon the scope of the disclosure." Mehl, 797 F.Supp. at 47. Plaintiffs asserting waiver of an applicable FOIA exemption generally are required to show " 'that the withheld information has already been specifically revealed to the public and that it appears to duplicate that being withheld.' " Mobil, 879 F.2d at 701 (emphasis in original); Mehl, 797 F.Supp. at 47; United States Student Ass'n v. CIA, 620 F.Supp. 565, 571 (D.D.C.1985); see also Public Citizen, 11 F.3d at 201 (plaintiff bears initial burden of "pointing to specific information in the public domain that duplicates that being withheld," and that burden is not met by "simply show[ing] that similar information in the public domain has been released"). Specificity is the touchstone in the waiver inquiry, and thus, neither general discussions of topics nor partial disclosures of information constitute waiver of an otherwise valid FOIA exemption. Public Citizen v. Department of State, 787 F.Supp. 12, 14 (D.D.C.1992), aff'd, 11 F.3d 198 (D.C.Cir.1993); Mehl, 797 F.Supp. at 47.

[6] Plaintiffs claim that the statements made at the Press Conference waived Exemption 7(A) as to substantial portions of the facts and conclusions contained in the Reports. According to plaintiffs, the FBI and Park Police officials provided specific facts about each agency's findings at the Press Conference. In camera review, plaintiffs maintain, is required to determine which of the facts and conclusions disclosed at the Press Conference are contained in the Reports.

As plaintiffs point out, the standard for deciding whether in camera review is appropriate depends on whether it is for purposes of determining if a particular FOIA exemption applies or whether it is for purposes of assessing if an applicable FOIA exemption has been waived. In camera review is the exception, and not the rule, when the plaintiff seeks such review merely to determine if a claimed exemption applies. See Local 3, I.B.E.W. AFL-CIO v. National Labor Relations Board, 845 F.2d 1177 (2d Cir.1988) (in camera review unnecessary because agency's detailed affidavit was sufficient to provide basis for court's ruling that documents were exempt from disclosure under Exemption 6 and Exemption 5); Doherty v. United States Department of Justice, 775 F.2d 49, 52-53 (2d Cir.1985) (district court "should restrain its discretion to order in camera review" where the "Government's affidavits on their face indicate that the documents withheld logically fall within the claimed exemption and there is no doubt as to agency good faith"). In contrast, courts are more likely to conduct in camera review in those cases where the plaintiff asserts that an otherwise applicable FOIA exemption has been waived. E.g., Public Citizen v. Department of State, 782 F.Supp. 144 at 145 (D.D.C.1992); see also Mobil, 879 F.2d at 702-04 (appears that appellate court, if not district court, reviewed the contested documents).

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Originally, plaintiffs sought in camera review of both the Park Police Report and the FBI Report. DOJ's disclosure of 91 pages of the Park Police Report, along with Independent Counsel Fiske's and Independent Counsel Starr's statements that the portions of the Park Police Report dealing with Mr. Foster's death have been released and that only those portions dealing with the still on-going investigations have been retained, renders in camera review of this Report needless. Plaintiffs nevertheless urge that I conduct in camera review of the FBI Report, which covers the investigation of the handling of documents in Mr. Foster's White House office immediately following his death. I decline to do so. In light of Independent Counsel Starr's declaration that further disclosure of the Reports would interfere with his investigation of the handling of Mr. Foster's papers, I need not conduct in camera review to find, as I do find, that the FBI Report falls squarely within Exemption 7(A). Moreover, I find that plaintiff has not set forth a sufficient, specific prima facie case that the limited, general and cursory discussions during the Press Conference of the White House handling of the Foster papers *152 constituted a waiver of the 7(A) Exemption. [FN1] Therefore, I find no reasonable basis to conclude that an in camera review of the Reports is necessary.

FN1. Plaintiffs attempt to bolster their contention that DOJ waived Exemption 7(A) for the FBI Report by presenting a line-by-line comparison of released sections of the Park Police Report juxtaposed to statements made during the Press Conference, and arguing that DOJ's disclosures of the Park Police Report at the Press Conference in fact waived the 7(A) Exemption. This argument is unconvincing. I am not persuaded that DOJ waived the FOIA Exemption 7(A) for the Park Police Report. Although some of the statements made during the Press Conference are similar to information contained in the Report, I do not find the level of specificity of statements made at the Press Conference necessary to constitute waiver. See Mobil, 879 F.2d at 701. Nor do I find, as plaintiff alleged during oral argument, that statements made during the Press Conference "tracked" the Park Police Report.

II. Exemption 7(C)

[7] Although DOJ has released a transcript of the Note, and made a photocopy of the Note available for viewing in DOJ's Washington, D.C. offices, DOJ seeks to withhold the Note under Exemption 7(C), which protects "records or information compiled for law enforcement purposes ... to the extent that the [ir] production ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." DOJ claims that the Foster family's privacy interests outweigh any incremental public interest that would be served by disclosure of the Note, and thus, summary judgment that the Note is exempt from disclosure under Exemption 7(C) is warranted. DOJ has submitted the declaration of Mr. Foster's widow and Acting Associate Attorney General William Bryson in support of its motion for summary judgment on the Exemption 7(C) issue.

[8] Exemption 7(C) "reflects Congress' desire to preserve confidentiality and personal privacy." Hale v. United States Dep't of Justice, 973 F.2d 894, 900 (10th Cir.1992). Exemption 7(C) is, therefore, applicable only if the invasion of privacy that would result from release of the information outweighs the public interest in disclosure. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989).

The public has a substantial interest in viewing the Note. The matters discussed in the Note touched on several events of public interest, including the controversy involving the White House travel office, and implicated government agencies and employees in misconduct. Stip. Facts. ¶ 40. However, the public not only has an interest in the contents of the Note but also in viewing a photocopy of the actual document. According to statements made at the Press Conference, the Note was torn up by someone, and some of the pieces are missing. Stip. Facts ¶ 54. The missing pieces, the "look" of the handwriting, and the significance to be drawn therefrom, are, as plaintiffs note, matters of public concern. DOJ itself has implicitly recognized the public interest by making a photocopy of the Note available for viewing. I disagree with DOJ's assertion that it has fulfilled its duty to the public by making the Note available for viewing in its Washington, D.C. office. Interested persons should not be required to make a time-consuming and costly trip to the capitol in order to view the Note.

I do not doubt that making photocopies of the

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Note available on a wider scale may spark a new round of media attention toward the Foster family, and I sympathize with them for the pain they will bear as a result of any renewed scrutiny. I am not convinced, however, that any such renewed interest will be so substantial as to outweigh the important public interest in viewing the Note.

For its contention that the Note falls within Exemption 7(C), DOJ relies on New York Times v. NASA, 782 F.Supp. 628 (D.D.C.1991), which held that the audiotape of Challenger astronauts recorded immediately before their death was exempt from disclosure, even though NASA had published a transcript of the tape, since "[e]xposure to the voice of a beloved family member immediately prior to that family member's death" would cause Challenger families great pain and would not contribute to the public's understanding of the operations of government. In both the present case and New York Times, the relevant government agency produced *153 a transcript of the deceased's words, and thereby claimed that the original--the audiotape in New York Times and the Note in the present case--is exempt from production. This case is distinguishable from New York Times, however, because the Foster family's privacy interest in the Note is weaker than the deceased Challenger astronauts' families' interest in the audiotape, and because the public interest in disclosure of the Note is stronger than it was in the audiotape. In New York Times, the court held that "how the astronauts said what they did, the very sound of the astronauts' words" was such an "intimate detail" that their families could protect the tape from disclosure. New York Times, 782 F.Supp. at 631. Although Mr. Foster's suicide note may have been intensely personal, the written word is qualitatively different from an audio recording of the last words of the astronauts. As for the public interest in disclosure, the New York Times court found that the background noises and voice inflections contained in the tape would not " 'contribute significantly to public understanding of the operations or activities of the government," the purpose underlying FOIA. New York Times, 782 F.Supp. at 632 (quoting United States Dep't of Justice v. Reporters Comm., 489 U.S. 749, 775, 109 S.Ct. 1468, 1482, 103 L.Ed.2d 774 (1989)). In the present case, however, the missing pieces of the Note, and therefore the physical look of the Note, are an integral part of the public's interest.

Nor is DOJ's position for nondisclosure supported by Katz v. National Archives & Records Administration, 862 F.Supp. 476 (D.D.C.1994) (privacy interests of Kennedy family outweighed public interest in autopsy reports despite prior unauthorized disclosure of photographs of x-rays contained in the autopsy). This is not a case of partial disclosure or unauthorized prior disclosure of withheld documents.

DOJ has not met its burden of demonstrating that Exemption 7(C) applies to the Note, and its motion for summary judgment on this ground is denied and plaintiffs' cross-motion for summary judgment enjoining DOJ from withholding the Note is granted.

CONCLUSION

For the reasons discussed above, defendant's cross-motion for summary judgment pursuant to Fed.R.Civ.P. 56 to dismiss those portions of the Complaint addressed to the disclosure of the Park Police and FBI Reports is granted. Plaintiffs' motion for summary judgment is partially granted in that the Department of Justice is enjoined from withholding circulation of copies of the Foster "Note." The Clerk of the Court is directed to enter judgment on the Complaint in accordance with this Opinion.

SO ORDERED.

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UNITED STATES of America, Plaintiff,
v.
REAL PROPERTY KNOWN AS 77 EAST 3RD STREET, NEW YORK, NEW YORK, Described as
Block 445, Lot 47 in the Records of the Clerk of the County of New York,
Defendant-in-Rem.

No. 85 Civ. 3351 (SS).

United States District Court,
S.D. New York.

Sept. 14, 1994.

Government filed forfeiture proceeding against building which served as meeting place or club house of motorcycle club. On motion for judgment as a matter of law or for new trial, the District Court, Sotomayor, J., held that although government presented sufficient evidence to establish probable cause, it did not provide substantial evidence of wide-ranging methamphetamine conspiracy operated out of building during relevant time period as required to warrant forfeiture, particularly given special care exercised by club members to shield club house from illegal activities.

Motion denied.

[1] DRUGS AND NARCOTICS ⇐ 195
138k195
In forfeiture trial, government bears initial burden of demonstrating probable cause to believe that real property at issue was used or was intended to be used to commit or facilitate commission of felony narcotics violations. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[2] DRUGS AND NARCOTICS ⇐ 195
138k195
After court found government had shown probable cause that nonpersonal use of narcotics had occurred in building which was subject to forfeiture proceeding during relevant time period, burden of proof shifted to claimants to demonstrate either that building was not used unlawfully or that its illegal use was without claimants' knowledge or consent.

[3] FEDERAL CIVIL PROCEDURE ⇐ 2608.1
170Ak2608.1
In deciding a motion for judgment as to matter of law, court may not weigh conflicting evidence, assess credibility of witnesses or substitute its judgment for that of jury. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⇐ 2610
170Ak2610
In assessing posttrial motions for judgment as matter of law, district courts apply the same standard used in assessing whether factual issues exist as used in reviewing summary judgment motions. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[5] FEDERAL CIVIL PROCEDURE ⇐ 2608.1
170Ak2608.1
More than mere metaphysical doubt as to material facts must exist to defeat judgment as a matter of law; party opposing motion for judgment as a matter of law must offer concrete evidence from which reasonable juror could return verdict in his favor. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[6] FEDERAL CIVIL PROCEDURE ⇐ 2608.1
170Ak2608.1
Complete failure of proof on essential element of nonmoving party's case, and on which such party bears burden of proof, renders all facts immaterial and entitles movant to judgment as matter of law. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[7] DRUGS AND NARCOTICS ⇐ 195
138k195
Claimants to defendant building had no obligation to affirmatively disprove that alleged drug sharing occurred in building during relevant time period, as court's finding of probable cause for forfeiture was not based on any drug sharing; court discredited government witness' testimony that he witnessed drugs being shared in apartment in building, in light of dramatic conflicts in his description of apartment with other evidence, his confession to being prone to memory lapse because of past heavy drug use, his admission to being "high" on night in question and lack of corroboration, and witness who admitted sharing drugs in building did not admit that it occurred during relevant time frame.

[8] DRUGS AND NARCOTICS ⇐ 190

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138k190
Sharing of any amount of methamphetamine and cocaine constitutes "distribution" for purposes of narcotics forfeiture provision. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

See publication Words and Phrases for other judicial constructions and definitions.

[9] DRUGS AND NARCOTICS ⇐ 191
138k191
Club member's admission to distributing methamphetamine during relevant time period, without indication that it occurred in defendant's clubhouse building during relevant time, was insufficient to mandate forfeiture of building; member stated that no drug activity was allowed in the building, discussed club rule prohibiting drugs in building except for personal use, stated that most club parties occurred outside of building, and that in relevant time period only parties in building were for his children's birthdays. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[10] FORFEITURES ⇐ 5
180k5
Claimants to building which was subject to forfeiture proceeding had no burden to affirmatively disprove contentions which government failed to establish in its probable cause showing and which were not clearly admitted in testimony on which government relied. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[11] DRUGS AND NARCOTICS ⇐ 190
138k190
Building resident's general assurance to undercover agent and informant that he could obtain "real good" cocaine for them, without more, was not negotiation of specific drug transaction so as to warrant forfeiture of building in which conversation occurred; no specific agreement to transact cocaine sale was reached during that meeting, no price, quantity or type of cocaine was discussed and parties did not even arrange or schedule future meeting. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[12] DRUGS AND NARCOTICS ⇐ 194.1
138k194.1
Evidence as to telephone calls from undercover agent, informant and another to resident's apartment in defendant building created jury question as to whether drug transaction occurred in building so as to require forfeiture of building; there was no explicit reference to cocaine or price or quantity in any of alleged 18 calls to arrange drug deal, many calls were innocuous or arguably related to other projects, and others at most set up meetings at which cocaine sales were arranged or occurred but did not themselves involve actual sale or arrangement of sale. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[13] DRUGS AND NARCOTICS ⇐ 195
138k195
Forfeiture claimants adduced substantial evidence rebutting government's claim that building which was subject to forfeiture proceeding was used for commercial distribution of narcotics during relevant time period; admitted methamphetamine manufacturer's testimony that methamphetamine conspiracy ended months prior to enactment of forfeiture laws was substantiated by other evidence, he testified about unwritten club rules prohibiting drug distribution activities and stated that items found in his apartment were put to innocent uses or were left over from defunct methamphetamine conspiracy, and there was evidence contradicting expert testimony that small quantity of high purity narcotics seized in building indicated commercial drug activity in building. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[14] FEDERAL CIVIL PROCEDURE ⇐ 2313
170Ak2313
District court has substantial discretion to grant motion for new trial, and trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

[14] FEDERAL CIVIL PROCEDURE ⇐ 2373
170Ak2373
District court has substantial discretion to grant motion for new trial, and trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner. Comprehensive Drug Abuse Prevention and Control

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Act of 1970, § 511, 21 U.S.C.A. § 881.

[15] FEDERAL CIVIL PROCEDURE ⇐ 2339
170Ak2339
Government was not entitled to new trial in forfeiture proceeding against building used as clubhouse by motorcycle club; although government's evidence met low threshold of establishing nexus sufficient to show probable cause, it did not provide substantial evidence of wide range of methamphetamine conspiracy operated out of building during relevant time period, particularly given special care exercised by club members, confirmed by government witnesses, to shield building from illegal activities, and notwithstanding criminal activity by individual club members. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

***1044** Pamela L. Dempsey, U.S. Atty's Office, New York City, for U.S.

Nina J. Ginsberg, DiMuro, Ginsberg & Lieberman, P.C., Alexandria, VA, for Real Property Known as 77 E. 3rd St.

Merril Rubin, Mark Gombiner, New York City, for Church of Angels, Inc.

***1045** OPINION AND ORDER

SOTOMAYOR, District Judge.

Defendant-in-rem 77 East 3rd Street, New York, New York (the "Building") is a six-story building located on the Lower East Side of Manhattan. Since 1969, the Building's first floor has served as the meeting place or "club house" of the New York City ("NYC") Chapter of the Hells Angels Motorcycle Club ("HAMC"), an organization whose founding members include claimant Sandy Alexander. The Building's upper five floors contain residential apartments, the majority of which are occupied by HAMC members.

A nationwide investigation of the HAMC, launched in or about 1977 to 1985 by the Federal Bureau of Investigation (the "FBI") and other federal, state and local law enforcement agencies, revealed that HAMC, through its individual chapters, including the NYC Chapter, was conducting illegal drug transactions. As a result of the investigation, numerous HAMC members from various chapters across the country were arrested and prosecuted. On May 2, 1985, law enforcement agents raided the Building and thereafter, over a dozen members, former members and associates of the NYC Chapter of HAMC, including claimants Colette and Sandy Alexander and a trustee of claimant the Church of Angels, Inc. (the "Church of Angels"), Paul Casey, were all convicted and sentenced for narcotics-related offenses.

The federal drug forfeiture laws, 21 U.S.C. § 881, were amended by Congress on October 12, 1984, to permit forfeiture of real property used for narcotics-related activities. See 21 U.S.C. § 881(a)(7) (1994). On May 1, 1985, plaintiff United States of America (the "Government") filed a complaint against the Building alleging that it was subject to forfeiture under 21 U.S.C. § 881(a)(7) because the NYC Chapter of HAMC, on or after October 12, 1984, the effective date of the forfeiture amendment, to May 2, 1985, the date of the raid, had used the Building to commit and to facilitate the commission of felony narcotics transactions.

Sandy Alexander, his wife Colette Alexander and the Church of Angels subsequently intervened as claimants in this action. [FN1] On February 4, 1994, after an approximately five-week trial, the jury returned a verdict in favor of all of the claimants. Specifically, the jury found that the claimants had proven, by a preponderance of the evidence, that defendant-in-rem, the Building, was not used, or intended to be used, to commit, or to facilitate the commission of, a felony drug violation between October 12, 1984 and May 2, 1985.

FN1. The claimants have disputed the ownership and possessory interests of each other in the Building. Because only state law property issues were involved in the disputes among the claimants and a jury verdict in favor of or against all claimants on the forfeiture question would have obviated the need to decide the state law issues, I decided to try the forfeiture question first. The jury's verdict in favor of all claimants removed all federal claims from this action and there being no just reason to retain supplemental jurisdiction over the state law property issues among the claimants, I entered judgment on February 24, 1994, dismissing the complaint and this action.

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The Government now moves for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b), and alternatively, for a new trial under Fed.R.Civ.P. 59(a). The Government argues that during the trial, the claimants admitted using the Building to commit felony narcotics violations, namely the distribution of methamphetamine and cocaine, and failed to rebut the Government's probable cause showing. Therefore, asserts the Government, no reasonable jury could have concluded that claimants had met their burden of proving that the Building was not used to facilitate narcotics felonies. According to the Government, the "claimants' improper pleas for sympathy incited the jury to nullify the forfeiture law that th[e] Court instructed the jury to apply," and the jury's verdict, therefore, must be set aside.

I disagree with the Government's description and assessment of the evidence in this case. The Government sought at trial to portray the Building as the nerve center from which all the NYC Chapter HAMC members' illegal activities flowed. Yet, having lost its star witness, William "Wild Bill" Medeiros, a founding member of the NYC Chapter and the only Government witness who purportedly had personal knowledge of drug transactions in the Building, the Government *1046 was left with rather inconclusive, and in some instances, scanty and highly unreliable evidence tying the Building, as opposed to the individuals, to the felony narcotics violations alleged. The Government ostensibly believes that the confessed criminality of the individual members of the HAMC group, and perhaps even their unorthodox lifestyle, should have enveloped the Building in a cloud of criminality in the jurors' mind. Such, however, was not the case. Based on the evidence presented at trial, viewed in the light most favorable to the claimants, I can not conclude that the jury's decision was unreasonable in the least and find no reason in the record to grant the Government's motion for judgment as a matter of law, or its alternative motion for a new trial.

THE EVIDENCE AT TRIAL

I. The Government's Direct Case

[1] In order to assess the Government's motion, and the sufficiency of the evidence in this case, it is necessary to carefully and accurately set forth the evidence, or lack of evidence, presented at the trial of this action. At a forfeiture trial, the government bears the initial burden of demonstrating probable cause to believe that the real property at issue was used or was intended to be used to commit or facilitate the commission of felony narcotics violations. To meet its burden in this case, the Government presented three experts, an undercover agent and a cooperating witness to establish the requisite nexus between the Building and (1) Sandy Alexander's admitted cocaine sales, and (2) the alleged club-wide conspiracy to manufacture and distribute methamphetamine.

A. The Government's Expert Witnesses

1. State Investigator Louis Barbaria

The Government's first witness was New York State Police Investigator Louis G. Barbaria, Jr., a self-styled expert on outlaw motorcycle gangs, including the HAMC. His opinions about the structure and practices of HAMC and the NYC Chapter were based, in part, on intelligence gathered during the nationwide investigation known as "Operation Roughrider," and his debriefings of former HAMC members and cooperating witnesses, including William "Wild Bill" Medeiros, a founding member of the NYC Chapter of HAMC and Robert Banning, a member of the Bridgeport HAMC Chapter.

The parties to this action had stipulated that from the NYC Chapter's inception in 1969 until March 25, 1984, Sandy Alexander was the president of the Chapter. Stipulated Facts ("Stip. Facts") ¶ 6. He was succeeded by William Medeiros, who left the post four months later. Id. at ¶ 53. Paul Casey then assumed the presidency. Id. at ¶ 24. Barbaria testified that the other officers of the NYC Chapter of HAMC were the vice-president, secretary, treasurer, road captain and security officer.

"Socially [and] business-wise," the clubhouse, according to Barbaria, "was basically the hub of [HAMC] activity." Tr. [FN2] at 228. "Church meetings," mandatory weekly club meetings of HAMC members, were, according to Barbaria, the "center of Hells Angels activities." Tr. at 172. The NYC Chapter of HAMC held its weekly church meetings in the clubhouse located on the first floor of the Building. Minutes of the meetings were kept (Tr. at 172-73), and attendance was noted therein. Tr. at 176. The actual minutes of meetings from

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July 1982 to March 1985 were seized during the May 2, 1985 raid and were admitted into evidence. Tr. at 173.

FN2. "Tr." refers to the trial transcript.

Barbaria also testified about the "lifestyle" of NYC Chapter HAMC members, and described it as consisting mainly of motorcycle runs, parties and drugs. Tr. at 206-07, 465-66. According to Barbaria, very few of the members held steady jobs, and many simply loitered around the clubhouse. Tr. at 207-08. He further described the travel by members all over the country, and indeed, the world, to attend anniversary parties of HAMC chapters. Tr. at 210-11. He further testified that methamphetamine, also referred to as "crank" or "speed," was the "fiber" of the NYC Chapter of HAMC during the period October 12, 1984 to May 2, 1985, *1047 and would be passed freely at parties. Tr. at 465-66.

To finance this lifestyle of constant partying and drugs, the NYC Chapter, according to Barbaria, manufactured and distributed methamphetamine. Barbaria described the NYC Chapter's methamphetamine enterprise as follows:

> A. Well, basically, there were three people within the New York City Chapter of the Hells Angels that controlled the acquisition of, the obtaining of, the drugs and the distribution within the membership, and those three people were Mr. Sandy Alexander, who was basically the head of this drug organization, Mr. Howie Weisbrod, the vice president at the time--he distributed the drugs primarily to other members of the Hells Angels--and the third individual was Mr. Paul Casey, who is in the courtroom here also, and he was primarily the manufacturer.

Tr. at 215. The other members of the NYC Chapter, according to Barbaria, participated in the methamphetamine conspiracy "by obtaining the drugs from this organization and then [going] out and d[oing] their own distribution." Id.

Barbaria stated that the Weisbrod-Alexander-Casey run methamphetamine project began to breakdown in 1983, and "by the end of 1984, ... wasn't effective anymore ... [and] didn't operate along [the same] lines." Tr. at 216. He further testified that some members became frustrated with restrictions on methamphetamine distribution imposed by the Weisbrod-Alexander-Casey control group, and formed a "Nomad" chapter in October 1984, to distribute greater quantities of methamphetamine than was permitted in the NYC Chapter. Tr. at 451-53.

According to Barbaria, the NYC Chapter's methamphetamine manufacturing and distribution activities continued up until the time of the May 2, 1985 raid, albeit in a different manner. After the breakdown of the Weisbrod-Alexander-Casey control group, individual members distributed methamphetamine obtained from other sources. Tr. at 216. Barbaria based his conclusion that the methamphetamine conspiracy continued until the date of the raid on several factors: (1) information derived during Operation Roughrider; (2) drug purchases made by an FBI undercover agent from various members during that period; and (3) certain physical evidence seized from apartments in the Building during the May 2, 1985 raid. With respect to the physical evidence, Barbaria deemed the high purity of the .39 grams of methamphetamine found in HAMC club member Brendan Manning's apartment especially telling. Barbaria opined that the purity of those narcotics was "consistent with someone who's in the distribution end of an enterprise." Tr. at 218. He also stated that the lifestyle of parties, travel and motorcycle runs did not end with the breakdown of the Weisbrod-Alexander-Casey enterprise, and thus, the members "had to make their money from some source." Tr. at 218.

On cross-examination, Barbaria admitted that there was a "drought" in methamphetamine during the fall of 1984 to spring 1985 because Paul Casey had stopped manufacturing (Tr. at 459); that there was a club rule against discussing illegal activities during church meetings (Tr. at 337); that several members and their spouses or live-in girlfriends were employed (Tr. at 373-98); that generally a representative of a chapter, not the entire chapter, traveled to out-of-state HAMC anniversary parties or events; that the Building was not "a lap of luxury" (Tr. at 348, 418); that he could not tell when the alleged cutting agents found in Sandy Alexander's apartment had last been used (Tr. at 286-87); and that the grinder found there was not in itself indicative of a methamphetamine conspiracy. Tr. at 288.

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2. Sergeant Terry Katz

Maryland State Police Sergeant Terry Katz, an expert on drug conspiracies, offered testimony on the significance of the physical evidence seized from the Building during the May 2, 1985 raid. In the apartments of Paul Casey, Sandy Alexander, Brendan Manning and Michael Manfredonio, FBI agents found small amounts of high purity methamphetamine, and substances, such as mannitol, inositol and dextrose, which are commonly used as drug dilutants or "cut." Stipulated Facts *1048 ¶¶ 9, 26, 46, 50. The agents also retrieved from those apartments (1) small amounts of cocaine; (2) clean vials; (3) a small grinder; (4) two small spiral notebooks with handwritten notations; (5) a Bearcat scanner; (6) two telephone wire testers; (7) a hand held bug detector; and (8) a bug sweeper. In addition, FBI agents found two Ohaus triple beam balances and an Ohaus dial-a-gram balance from the third floor apartment of Martha "Marty" Grabe, a tenant in the Building who was not an HAMC member.

At trial, based on stipulated facts, the Government offered a chart listing the items seized from the various apartments, but presented no evidence as to where in the apartments the items were found. Moreover, the Government did not introduce the actual seized items into evidence. Near the end of the trial, the parties realized that certain items had been returned to the claimants after the criminal trials, and the claimants introduced some of these into evidence during Paul Casey's testimony.

Sergeant Katz testified as follows about the seized items:

(1) highly pure methamphetamine such as that found in Brendan Manning's apartment strongly suggests that the possessor is very close to the original source of the drug's manufacture (Tr. 1044, 1053);
(2) cutting agents are used by drug distributors to increase profits by increasing the weight of the drugs sold (Tr. at 1044-45);
(3) drug users do not use cutting agents because the agents dilute the product and ostensibly their effect (Tr. at 1047);
(4) inositol, mannitol, and sugars, such as dextrose and lactose, are commonly used to "cut" methamphetamine, and inositol may be used to cut cocaine as well (Tr. at 1045-47);
(5) scales are commonly used by drug distributors to weigh their products (Tr. at 1051);
(6) clean vials are commonly used by drug dealers as receptacles for their products (Tr. at 1049-50);
(7) drug dealers commonly use Bearcat scanners, telephone line testers, bug sweepers, and other such devices to maintain security over their operations and to attempt to avoid detection by law enforcement (Tr. at 1060-67);
(8) the presence of high purity narcotics, cutting agents, packaging material such as clean vials, scales, and security devices suggests drug distributions in that location (Tr. 1043-51, 1076-77).

On cross-examination, Sergeant Katz admitted that he had no idea where in the apartments the seized items were found, or their condition at the time they were seized, and that an item's location and condition is highly important in determining whether it is related to or indicative of drug activity. Tr. at 1130. He nevertheless maintained that the seized items indicated drug distribution in the Building. Tr. 1070, 1076-77.

3. Special Agent Robert Howen

Robert Howen, a special agent employed in the electronics analysis unit, testified as to the operation and use of scanners and other surveillance devices. Tr. at 931-63. He stated that these items could be purchased at electronics stores, that scanners are frequently used as entertainment, and that books containing frequencies for the police, fire department and other official agencies could be purchased over the counter. Tr. at 963. Special Agent Barbaria had previously testified that HAMC members were always concerned about security and used such devices and information to monitor and secure their operations. Tr. at 228-29.

B. The Government's Non-Expert Evidence

1. FBI Undercover Agent Kevin Bonner

Kevin Bonner, an FBI special agent, testified that from March 1983 through May 2, 1985, he worked undercover, posing as a Baltimore drug dealer interested in purchasing methamphetamine, and later, cocaine from HAMC members. Tr. at 517. Bonner explained that, working with an informant named Vernon Hartung (Tr. at 520), he purchased

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narcotics from members of nine different chapters of HAMC, including from NYC Chapter members Howie Weisbrod and *1049 Sandy Alexander. Tr. at 530-31. He also purchased over 14 pounds of methamphetamine from a Troy Chapter member, James Harwood, who purportedly obtained his methamphetamine from NYC Chapter members. Tr. at 533-34, 628-29.

Bonner and Hartung used Sandy Alexander's interest in the prisoner of war ("POW") situation in Southeast Asia, and the activities of Colonel Bo Gritz, who had made a foray into Laos to try and rescue POWS, to gain Alexander's confidence and thereby, learn firsthand about the illegal drug activities of the NYC Chapter. Tr. at 55, 638-39. Bonner testified that in his initial meeting with Sandy Alexander, he promised to try and obtain for Alexander information about Colonel Gritz and his activities. Id. Bonner also admitted that Hartung spoke to Sandy Alexander on several occasions about gathering information on Colonel Gritz and the POWs, and that on two occasions, they sent Sandy Alexander letters about Bo Gritz. Tr. at 639.

Other than Sandy Alexander acknowledging that he knew of Bonner and Hartung's methamphetamine transactions with Harwood and assuring them that he would step in if they encountered any difficulties with Harwood, Sandy Alexander's only narcotics dealings with Bonner and Hartung involved the sale of cocaine. As for the cocaine sales, Bonner testified that he and Hartung first discussed the sales with Alexander in Alexander's apartment in the Building on November 20, 1984. During that meeting, at which Colette Alexander was present, Sandy Alexander, according to Bonner, specifically offered to sell them cocaine, and stated that he could get them ounces to a pound of Peruvian Flake or Colombian Rock cocaine. Tr. at 577-80.

Bonner further testified that following that meeting, he purchased cocaine from Sandy Alexander on at least four occasions: November 30, 1984, December 19, 1984, January 26, 1985 and February 27, 1985. Tr. at 535. Each of these sales was preceded by telephone calls placed by Bonner or Hartung to Alexander at his residence in the Building for the purpose, testified Bonner, of arranging the four sales. Tr. 585-92, 598-603, 611-14, 619-21. At trial, the Government played a total of eighteen (18) tapes of conversations conducted on Alexander's telephone in the Building. GX 41-58. Fifteen of those conversations were between Bonner or Hartung and Alexander or his wife Colette Alexander. Bonner testified that all fifteen of those conversations, even those to which he was not a party, related to the scheduling of cocaine deals. Tr. 582-623. The three remaining tapes were conversations between Alexander and Jerry Buitendorp, an individual whom Bonner testified supplied Alexander with cocaine. Tr. at 590.

However, in none of the eighteen conversations were there explicit references to narcotics, nor any reference, express or in "code," to price or quantity. Tr. at 584. Bonner testified that Sandy Alexander specifically directed him not to discuss the drug transactions on the phone, but that one day he slipped and used the phrase "cassettes" referring to cocaine. Id. Bonner also testified that Alexander told him to use military time to indicate the quantity of cocaine he wanted to purchase and the date he wanted to pick it up (Tr. at 581); however, there were no references to military time in any of the taped conversations with Alexander. Tr. at 658-59. The actual specifics of the deals, including the quantity and price, were worked out in face-to-face meetings at locations outside the Building. Tr. at 593-94. The telephone calls to Alexander only set up a date and time for the parties to meet, and many of the calls did not even accomplish that. In several calls, Sandy Alexander said little more than "I'll call you back" or "call back later." Moreover, no call preceded the final cocaine sale on February 27, 1985. Bonner testified that this was because Sandy Alexander, during an anniversary party in Bridgeport, Connecticut, told Hartung not to use the telephone to arrange the next cocaine deal, but to "send a letter to him." Tr. at 618. Bonner explained that a letter, written in a code suggested by Alexander, was sent to arrange a cocaine sale for February 26, 1985 (Tr. at 618-23), but Sandy Alexander misunderstood the purported code, and thought the sale was to take place the next day. Tr. at 659-60.

*1050 2. Cooperating Witness Robert Banning

Also testifying on behalf of the Government was Robert Banning, a former member of the Bridgeport, Connecticut Chapter of HAMC and an admitted former heavy cocaine user. Tr. at 846. Banning testified that he witnessed members of the

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NYC Chapter of HAMC distributing methamphetamine in the Building during his various visits to the club. Tr. at 789, 793, 796. Particularly, he described coming to New York in April 1985 for a Willie Nelson concert and attending a party, supposedly held in Paul Casey's apartment in the Building, at which drug sharing was rampant. According to Banning, he went into a second floor apartment in the Building, the home of Paul Casey or an individual named "Ted," and asked Casey for some methamphetamine. Banning testified that Casey pulled a Ziploc bag filled with over a pound of methamphetamine from a garbage bag in the corner of the room and gave him some. Tr. at 804-05. Some NYC Chapter HAMC members also used methamphetamine that Casey had placed on a mirror on a coffee table. Tr. at 805. NYC Chapter members, according to Banning, also helped themselves to some of his cocaine. Tr. at 806.

On cross-examination, when asked to describe Paul Casey's apartment, Banning testified as follows:

> Q. Can you describe Paul Casey's apartment at 77 East 3rd Street?
>
> A. I don't believe so.
>
> Q. How many rooms did it have, do you recall?
>
> A. I walked in the door; he was sitting on a couch. I was loaded on cocaine. I didn't go no further than there and back out the door.

Tr. at 846-47. Banning also testified, however, that the first thing he saw walking through the door was a couch in front of a coffee table; that the door opened directly into a room, and that he could not remember if there was a kitchen in the apartment. Tr. at 850.

Banning's description of Paul Casey's apartment differed significantly from a photograph of the apartment taken during the May 2 raid, and from the description offered by FBI Special Agent Richard Demburger, who led the FBI team that searched Paul Casey's apartment during the raid. Agent Demburger testified that upon entering the front door of Paul Casey's apartment, you turned down a hallway, and "then you encounter[ed] this kitchen area from which you c[ould] make a left-hand turn into another broader, bigger room which is like a living room and loft bedroom area." Tr. at 1206. Banning did not mention the loft area--a prominent and conspicuous part of Casey's living room.

3. Other Evidence

The Government also presented Stipulations of Fact that eleven members of the NYC Chapter of the HAMC pled guilty to or were convicted of participating in a conspiracy to manufacture and distribute methamphetamine during the period 1982 continuously up to and including May 2, 1985. However, the Government proffered no admission by a NYC Chapter HAMC member that this methamphetamine conspiracy emanated from or was otherwise tied to the Building.

II. The Probable Cause Finding

At the close of the Government's direct case, I concluded that the Government had established probable cause to support forfeiture of the property in that the Government had demonstrated a "nexus" between the Building and narcotics felonies. See United States v. All Right, Title and Interest in Real Property and Appurtenances Thereto Known as 785 St. Nicholas Avenue and 789 St. Nicholas Ave., 983 F.2d 396, 403 (2d Cir.), cert. denied, 508 U.S. 913, 113 S.Ct. 2349, 124 L.Ed.2d 258 (1993). My determination was based on the expert testimony concerning the items seized from the Building during the May 2, 1985 raid in combination with the testimony that HAMC members of the NYC Chapter continuously used methamphetamine outside of the Building during the relevant time period, and undercover agent Kevin Bonner's description of his discussions with Sandy Alexander in the Building to arrange future cocaine sales.

***1051** I did not, however, find that the Government had shown probable cause that non-personal use of narcotics had occurred in the Building during the relevant time period, despite the Government's expert testimony that NYC Chapter HAMC members engaged in a "party lifestyle," where narcotics sharing was rampant, and indeed, integral to their lives. The only direct evidence of any drug sharing in the Building during the relevant time period came from Robert Banning, whose description of Paul Casey's apartment, where he claimed to have witnessed large quantities of methamphetamine being shared, was substantially contradicted by a photograph of the apartment and Agent Demburger's testimony. In light of these contradictions, Banning's admitted lapses in memory and intoxication on the night in question,

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and the fact that the Government offered no corroborating evidence that a Willie Nelson concert had occurred at all during the relevant time frame, I found Banning's testimony concerning the location of the drug sharing party he purportedly attended in April 1985 less than reliable, and I, therefore, discredited it.

III. The Claimants' Case

[2] After I found probable cause, the burden of proof shifted to the claimants to demonstrate either that the Building was not used unlawfully, or that its illegal use was without the claimants' knowledge or consent. See United States v. Property at 4492 S. Livonia Rd., Livonia, 889 F.2d 1258, 1267 (2d Cir.1989); 785 St. Nicholas Avenue, 983 F.2d at 403 (2d Cir.1993). To meet their burden, claimants presented deposition testimony of Vernon Hartung, the informant who, along with Kevin Bonner, purchased cocaine from Sandy Alexander, and live testimony from Colette Alexander and Paul Casey. The claimants also introduced into evidence some of the items seized from Paul Casey's apartment during the raid, namely the scale, an owner's manual for a scanner, and some of the books containing police and fire frequencies.

A. Vernon Hartung's Deposition Testimony

In contrast to Agent Bonner's testimony, Vernon Hartung testified that Sandy Alexander, in the November 20, 1984 meeting with Hartung and Bonner in Alexander's apartment, spoke only generally about cocaine.

> Q. Did you discuss drugs with Mr. Alexander in his apartment on that occasion?
>
> A. Yes, basically we did discuss a little bit. I am remembering back on it, and it pertained to about if we ever needed any more drugs, he could get the drugs for us.
>
> Q. Did he say what kind of drugs?
>
> A. He could get us anything, cocaine, crank, he can get us by the pound whatever we need. Let him know, he can get it.

Hartung Dep.Tr. 278.

Hartung testified, however, that no specific arrangements to purchase cocaine were made during that meeting (Hartung Dep.Tr. at 211-12), and that the actual details of the first cocaine deal were worked out at a later meeting in a restaurant in New York. Id. at 170-71. Hartung corroborated Bonner's testimony that Sandy Alexander during that the November 20 meeting told them to stay away from heroin, that Hartung had brought Alexander Vietnam handkerchiefs in which Alexander had an interest and that the three discussed several topics. Id. at 135-36.

B. Colette Alexander

Colette Alexander admitted that drugs had been a large part of her life as well as that of several members of the HAMC and their "old ladies," i.e., girlfriends or wives. Tr. at 1318-19, 1341-42. She also admitted observing HAMC members sharing methamphetamine at club parties, and to having shared methamphetamine with Paul Casey's wife, Hope Casey, in their respective apartments in the Building. Tr. at 1341-42. She claimed, however, that her narcotics use and involvement in club activities declined significantly after her son Erik was seriously injured in an accident on April 8, 1982. Tr. at 1303-07. She further testified that her life revolved around her son after his accident, and the she lost interest in drugs and in the HAMC generally. Finally, she admitted ***1052** meeting Bonner and Hartung on November 20, but denied being present during most of their discussions with her husband. Tr. at 1393-1401.

As for the items seized from her apartment during the May 2 raid, Colette stated that she used the grinder on occasion to grind rocks of cocaine, and that she believed the purported cutting agents to be Sandy Alexander's "protein" powders. Tr. at 1314-15. However, on cross-examination, the Government introduced her deposition testimony where she claimed that she occasionally used those substances to "cut" or dilute her personal stash of methamphetamine. Tr. at 1350-51.

C. Paul Casey

Paul Casey testified that he joined the NYC Chapter of HAMC in August 1970. Tr. at 1427. At that time, he worked as a journeyman carpenter and was a member of the New York Carpenters Union. Tr. at 1428. He also testified that other members of the NYC Chapter, including Sandy Alexander and Howie Weisbrod, held jobs as diverse as stuntman, motorcycle mechanic, welder, professional boxer, bodyguard, tunnel diggers,

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video shop owner and truck driver. Tr. at 1440-53.

1. The NYC Chapter's Methamphetamine Manufacturing and Distribution Enterprise

Casey admitted manufacturing methamphetamine from the middle of 1978 to the spring of 1984. Tr. at 1494-1511. According to Casey, sometime in mid-1978, Howie Weisbrod told him that he had a contact who could supply them with P2P--the main ingredient in methamphetamine. Tr. at 1495. Sandy Alexander provided Casey with a formula for manufacturing methamphetamine, and Casey began producing the drug. Tr. at 1497.

Casey described the multi-stage manufacturing process, and stated that it took him some time to perfect it. Tr. at 1497-99. He also described some of the tools he used in the process, which included a triple beam Ohaus scale, similar to one of the scales seized from 87 East 3rd Street, to weigh the various component chemicals and substances he used in manufacturing large quantities of methamphetamine. Casey denied ever having used the scale seized from his apartment in his methamphetamine production. Tr. at 1506. He stated that this scale, a rather small scale [sometimes used by dieters to weigh small portions of meat or other food] with no weight markings or gradations, was just for decoration, although it was sometimes used as an ashtray. Tr. at 1506-07.

Casey emphatically denied ever manufacturing methamphetamine in the Building (Tr. at 1502, 1567-68), and listed a series of locations in Staten Island and Connecticut where he set up his manufacturing operations. Tr. at 1502-04. Casey also denied ever storing commercial quantities of methamphetamine in the Building, but admitted maintaining personal use amounts there on occasion. Tr. at 1567-68. He did, however, state that he stored an ounce of methamphetamine in his shop at 87 East 3rd Street. Tr. at 1568.

According to Casey, half of the methamphetamine he produced went to Weisbrod's P2P supplier, and the other half to Weisbrod. Tr. at 1509-10. Weisbrod then would distribute the methamphetamine to NYC Chapter members, who then would sell it, returning some of the profits to Weisbrod. Sandy Alexander, according to Casey, did not play much of a role in the methamphetamine enterprise, other than providing the initial formula. However, Sandy Alexander was given some of the profits from the methamphetamine enterprise to help pay for his activities on behalf of the club, and to compensate him for providing the formula. Tr. at 1510. Although admitting that the methamphetamine enterprise subsidized the income of NYC Chapter HAMC members, Casey stated that he, Weisbrod and Alexander did not want the chapter involved in dealing large amounts of methamphetamine for sales greater than necessary to pay basic living expenses.

> Q. Do you recall that there was a rule imposed by the [Weisbrod-Casey-Alexander] group that members of the New York City Chapter had to come to Mr. Weisbrod in order to obtain methamphetamine during the period 1979 to '84?
> *1053 A. I wouldn't say it was a rule. It was something where we didn't want anybody--we didn't want--we were aware of the fact that methamphetamine is something you don't see in New York. It's something you don't see in the East Coast. We didn't want to see a lot of it out here.
> We didn't want to see any of it out, we just wanted enough to get our rents paid and that was it. Nobody was looking to get rich here. In reality, if a person wanted to sell methamphetamine, there was people lining up for half a mile.
> That wasn't the intent here. We purposely did not want people in the drug business per se. What went on in this case, it looks to us like Mr. Bonner went around offering people money and they went out and found the drug....

Tr. at 1667.

The NYC Chapter's methamphetamine business ended, according to Casey, in the spring of 1984. Casey testified that he stopped manufacturing the drug after Weisbrod's P2P source dried up, and personal problems took him away from New York City and the club for extended periods of time. Tr. at 1511-13. In fact, the minutes of church meetings confirm Casey's repeated absences from club meetings commencing in the spring of 1984 and thereafter.

Casey further testified that his failure to attend the April 1 run had led the NYC Chapter members to consider throwing him out of the club. Tr. at 1515-16. Indeed, according to Casey, his "patch" was

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suspended for a period of time. Tr. at 1516. Ultimately, however, Casey decided that he did not want to leave the club, moved back to New York and resumed his life as an active member of the NYC Chapter. Tr. at 1516-17. His methamphetamine production, however, ceased.

A. We were out of business. Howie had no more P2P. I really didn't particularly care for doing it anymore, even if he did.

Tr. at 1642-43.

That did not, however, prevent Casey from distributing methamphetamine. Casey testified that he sold methamphetamine to Jimmy Canestri sometime in the summer of 1984 from his shop at 87 East 3rd Street, down the street from the Building (Tr. at 1640), and admitted that he pled guilty to distributing methamphetamine to someone at his shop on or about May 2, 1985. He also admitted occasionally giving a "snort" of methamphetamine to people after he ceased manufacturing the drug in the spring of 1984. Tr. at 1641.

2. The NYC Chapter Rules Regarding Narcotics

During his testimony, Casey described the NYC Chapter's long history with the Building and the special care and attention club members paid to maintaining and repairing the Building and protecting it from association with illegal activities. Casey also testified about certain NYC Chapter HAMC rules regarding drugs, which included prohibitions against bringing commercial quantities of narcotics into the Building and sanctions for abusing drugs.

A. Well, there were club policies regarding drugs; you couldn't inject a drug.

Mr. Sipioria: Time period please?

A. That was from day one; you couldn't inject a drug. From day one, no drugs in the building; that's from day one.

Q. When you say the building, do you mean the entire building at 77 East 3rd Street?

A. I mean the entire building.

Q. Does that refer to personal use amounts or to commercial amounts?

A. That would refer to commercial amounts.

Q. There was no, I take it, club policy regarding personal use of substances in the building?

A. No, so long as nobody was abusing.

Q. What would occur if somebody in the view of the club began to abuse a substance, whether an illegal substance or alcohol?

A. They would be told about it.

Q. If they continued to abuse it, what would happen?

*1054 A. They would either be told again or be brought up to be 86'd from it.

Q. What does that mean?

A. That would mean you are forbidden to use it any longer.

Q. In the minutes--

A. That's an absolute.

Q. What would happen if you violated an 86?

A. They would kick you out. As far as the club would be concerned, you are [sic] taking that drug means more to you than membership in the Hells Angels Motorcycle Club.

Tr. at 1518-19. Casey further testified that an HAMC member could be "86'd" from using drugs or alcohol only by a vote of the membership. He described various instances, reflected in the minutes, where members had been "86'd" from using certain drugs or alcohol or where motions had been made that such action be taken. Tr. at 1519, 1520-21, 1523-28.

Casey also testified that the entire club was "86'd" from using methamphetamine in October 1984, and that the "86" was not removed prior to the raid. Tr. at 1528-30. Although the "86" on members' use of crank was enforced on an honor system, NYC Chapter members, according to Casey, took it seriously.

Q. What would happen if a member was seen by another member using crank after that point in time?

A. He would, what would be done, that person would, I don't know what an individual would do, I know what would have to be done. It would be brought up in the meeting, this guy is breaking the 86. It would be brought up to the individual, when he did it, you know; you have an 86, you have an 86. You would be brought up, thrown out of the club. Whether or not the club would throw him out, I can't say positively he would be. It would depend on the circumstances.

It's not an acceptable behavior. It's an absolute. You don't do it; it's not done. We have rules within our group that you abide by. There are not that many rules. We don't restrict people from living their own lives. There are certain rules you have to abide by.

Q. Would you operate based on an honor system?

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A. Absolutely.
Q. I take it from that point in time, a member would be careful not to use crank in the presence of another member?
A. I would take it from that point in time a person wouldn't use crank period, or hit the road.
Tr. at 1530-31.

Casey did admit, however, that this "86" did not prohibit members from distributing speed, just using it. Tr. at 1685-86.

3. The Physical Evidence Seized from His Apartment

Casey also testified that many of the items, including the scale, seized from his apartment during the May 2, 1985 raid were not used in or related to any drug activity. The small oilcan, a gift, was merely a can and did not contain a false compartment; it, according to Casey, was a false compartment only if one "look[ed] at the can as being a false can." Tr. at 1508. He denied ever having stored methamphetamine in the oilcan. Id. As for the Bearcat scanner, Casey claimed that it could not monitor any sensitive law enforcement activities, and that he used it merely for entertainment. Tr. 1565-66. He further claimed that the alleged telephone tester was a portable phone. Tr. at 1737.

4. The NYC Chapter's "Party Lifestyle"

On cross-examination, when questioned about the "party lifestyle" of the NYC Chapter of HAMC, Casey denied Barbaria's contention that methamphetamine was passed writ large at NYC Chapter parties.
Q. Well, did you see that reality there? Did you ever see members passing drugs during parties?
A. At one time or another, I'm sure I have. To tell you a date or time, that would be--it wasn't a common practice. *1055 If anybody had any speed, they didn't want to share it in the first place.
Q. Well, when you saw members passing drugs in this building, did you make any attempt to stop that activity?
A. It wasn't a common practice to pass drugs in the building and it wasn't a thing that was done on a common basis. Has it ever happened? I wouldn't doubt that it did. But, I mean, this isn't a common practice. Whether or not someone ever passed another person a joint in the course of a party and they took a puff of marijuana, I mean, let's be realistic.
Tr. at 1623. (Emphasis added).

Moreover, Casey stated that NYC Chapter parties were generally held outside the Building, and that there were no Chapter parties held in the Building during the relevant time period. Indeed, the only parties Casey remembered in the Building during the relevant time period were parties for his two children, Christopher and Cassidy, who respectively, were nine and six years old at the time of the May 2 raid. Tr. 1436, 1681.
Q. But, Mr. Casey, what I'm asking you is not whether there were parties outside, I'm asking you whether there were parties that took place in the building from the period '80 to '85?
A. Was there ever one? I'm sure there was.
Q. And there were parties in the time period '84 to '85 as well, weren't there?
A. Parties. Now we're plural. In one year period? I don't know if I would agree with you on that. You'd have the Fourth of July party took place outside. You're using you know--I'm not trying to be rude to you. Fourth of July party took place outside. That's an outside block party that we have for the people in the area and the poor kids who don't have any money that want to have fun on Fourth of July.
And what else is there? There's an anniversary party we'd have in December, and that we'd rent a place. The April 1 run we'd be off on the road. On other runs we are on the road.
Q. So--
A. You know, the day of people hanging out in the clubhouse is--that changed when everybody got their own apartments per se.
Q. So you deny that there were parties in this building, 77 East 3rd Street, during the period October '84 to the time of the raid, May '85?
A. I can't put my finger on any party in specific, although I'm sure I had a party for Chris and Cassidy, who were both born in the month of March.
Tr. 1680-81.

In the same vein, Casey had also testified:
Q. ... Were there parties in that building from '80 to '85?
A. What type of party? I mean, I've had parties

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for my children for their birthday.
Q. Parties involving members of the New York City Chapter of the Hells Angels.
A. Generally a party would take place, such as anniversary party, at a place other than the clubhouse. The clubhouse was too small.
Tr. 1679-80.

III. The Government's Rebuttal Evidence

Initially, the Government intended to call William "Wild Bill" Medeiros, a founding member of the NYC Chapter of HAMC, a past NYC Chapter president and the only witness with direct knowledge of what occurred or did not occur in the Building during the relevant time frame, to rebut the claimants' case. However, Medeiros suffered numerous heart seizures during the trial and never recovered sufficiently to testify.

Instead, the Government called Sandy Alexander, who invoked the Fifth Amendment in response to over one hundred questions, including those inquiring into the manufacture and distribution of methamphetamine by NYC Chapter HAMC members. Alexander did, however, admit that he acted as a middleman for the cocaine supplier Jerry Buitendorp in selling cocaine to FBI Agent Kevin Bonner and Vernon Hartung. Alexander admitted but recalled only three, not four, sales of cocaine to Bonner. Tr. at 2063.

***1056** Although Alexander did not deny meeting Bonner and Hartung in his apartment on November 20, 1984, he denied arranging the sale of cocaine during that meeting. Tr. at 2066. He also testified that the main topic of discussion during that meeting was the activities of Colonel Bo Gritz and POWs in Southeast Asia. Tr. 2066.

Alexander also testified that Bonner and Hartung called him incessantly, remarking that had he had a beeper, they "would [have] beep[ed] [him] to death." Tr. at 2073. He claimed that he never told the two to stop calling him at home because "they were trying to help [him] with the Prisoners of War thing." Tr. at 2070.

IV. The Jury's Verdict and the Instant Motion

I charged the jury on January 31, 1994. Four days later, on February 4, 1994, the jury returned a verdict in favor of the claimants, finding that the claimants had proven, by a preponderance of the evidence, that the Building had not been used to commit, or facilitate the commission of, a felony drug violation between October 12, 1984 and May 2, 1985. Having so found, the jury did not reach claimants' "innocent owner" defenses of lack of knowledge and lack of consent.

The Government thereafter timely filed the instant motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) or alternatively for a new trial pursuant to Fed.R.Civ.P. 59(a).

DISCUSSION

I. The Motion for Judgment as a Matter of Law

A. The Rule 50(b) Standard

[3] In this Circuit, a district court may grant a Rule 50(b) motion for judgment as a matter of law only if, "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.' " Samuels v. Air Transport Local 504, 992 F.2d 12, 14 (2d Cir.1993) (citation omitted). Hence, judgment as a matter of law is inappropriate unless there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or ... such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against [the movant]." Id. (quoting Mattivi v. South African Marine Corp., Hugvenot, 618 F.2d 163, 168 (2d Cir.1980)). In deciding a Rule 50(b) motion, a court may not weigh conflicting evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. Weldy v. Piedmont Airlines, Inc., 985 F.2d 57 (2d Cir.1993).

[4][5][6] Moreover, in assessing post-trial motions for judgment as a matter of law, district courts apply the same standard used in assessing whether factual issues exist as used in reviewing summary judgment motions under Fed.R.Civ.P. 56. Piesco v. Koch, 12 F.3d 332, 341 (2d Cir.), cert. denied, 502 U.S. 921, 112 S.Ct. 331, 116 L.Ed.2d 272.

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Consequently, more than a mere "metaphysical doubt as to the material facts" must exist to defeat judgment as a matter of law, see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); the party opposing the Rule 50 motion must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A complete failure of proof on an essential element of the nonmoving party's case, and on which such party bears the burden of proof, renders all facts immaterial and entitles the movant to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

B. The Evidence Supporting the Jury's Verdict

The Government contends that the evidence presented at trial amply demonstrates its entitlement to judgment as a matter of law. First, the Government maintains that both Colette Alexander and Paul Casey "admitted 'sharing' or 'passing' undefined small *1057 amounts of methamphetamine and/or cocaine in the Building." Plaintiff's Memorandum of Law ("Pl.Mem.") at 12. Second, the Government argues that Sandy Alexander and his counsel in summation conceded that Alexander used his apartment in the Building, particularly his telephone, to arrange the four cocaine sales to undercover agent Bonner. Third, the Government argues that the claimants failed to rebut the "overwhelming physical evidence proving that individual tenants used the Building to sell narcotics." Pl.Mem. at 3. Each of these contentions will be addressed in turn.

1. Claimants' Purported Admissions that Narcotics were Shared or Passed in the Building during the Relevant Time Period

[7] Before addressing the purported admissions of drug sharing, I must first clarify a point the Government obscures in its brief. The claimants had no burden to prove that drug sharing did not occur in the Building during the relevant time period since my finding of probable cause was not based on any such drug sharing. In finding probable cause, I discredited Robert Banning's testimony that he witnessed methamphetamine and cocaine being shared in Paul Casey's apartment since (1) his description of Paul Casey's apartment conflicted dramatically with that of the FBI agent who raided the apartment, (2) he confessed to being prone to memory lapses because of past heavy drug use, (3) he admitted being "high" on the night in question, and (4) there was no corroborative evidence of club members attending a Willie Nelson concert in the Spring of 1985. The Government offered no other direct evidence of drug sharing in the Building during the relevant time period, and I limited my probable cause finding to the methamphetamine conspiracy the Government alleged was operated out of the Building, and Sandy Alexander's cocaine transactions which the Government claimed were facilitated by the November 20 meeting in the Building and the telephone calls to the Building. Thus, the claimants had no obligation to affirmatively disprove that drug sharing occurred.

[8] Forfeiture would have been compelled as a matter of law if, as the Government contends, the claimants admitted that methamphetamine and cocaine had been shared in the Building during the relevant time period, since the sharing of any amount of these substances constitutes a distribution. See United States v. Corral-Corral, 899 F.2d 927, 936 n. 7 (10th Cir.1990); United States v. Brown, 761 F.2d 1272, 1278 (9th Cir.1985); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir.1979). However, none of the testimony the Government cites rises to the level of a clear admission of drug sharing in the Building during the relevant time frame of October 12, 1984 to May 2, 1985.

a. Colette Alexander's Testimony

Colette Alexander unquestionably admitted "sharing" drugs with either the wives or girlfriends of HAMC members or the members themselves in the Building. See, e.g., Tr. at 1318-19, 1341-42, 1351-52. It is also undisputed that Ms. Alexander testified she observed HAMC members sharing and passing methamphetamine in the Building. Tr. at 1356-57.

She did not, however, admit that she or others distributed, shared or passed narcotics in the Building during the relevant time frame. This critical omission is highlighted in the very testimony the Government claims mandates forfeiture of the

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Building as a matter of law:

Q: Now, you said that after Erik's accident [in 1982] you did less visiting amongst your friends and tried to spend more time in the house, right?

A: Yes.

Q. However, the other people who lived in the building, sort of community of people, continued to visit each other as they had before, correct?

A. I really don't know. I suppose so.

Q. But you have no reason to think that any of their pattern of behavior had changed in any way up to the time of the raid?

A. Well, actually, I'm not sure what year it was, but Hope and Casey had a third child, I think his name was Michael, and ***1058** he died before his first year of infant syndrome. I know that affected them greatly also.

Q. In terms of practices of the Hells Angels community, the sharing of drugs and the partying that they occasionally did, as you said?

A. I'm sure nothing changed in pattern that way.

Tr. at 1420-21.

This testimony does not definitively place any drug activity by NYC Chapter HAMC community members within the relevant time period or in the confines of the Building. At most, it establishes that some drug sharing occurred, somewhere, after April 8, 1982, when Alexander's son, Erik, was injured in an accident. This certainly permits but does not compel a jury to infer that HAMC members distributed drugs in the Building during the relevant time period.

Nor does the following testimony by Alexander compel the conclusion that she and Hope Casey shared narcotics in the Building during the relevant time period:

Q. There was nothing that occurred in 1984 to change that relationship between you and Hope; you could still freely go back and forth and say, do you have a little something, on occasion?

A. I don't know.

Q. From 1984, from 1983, from 1982, from 1985?

A. I don't know.

Q. My question is not specifically recalling an incident; did anything change your relationship with Hope?

A. Only thing in my life was my son, and my relationship with everybody had changed from that point on.

Q. After Erik's accident, you still had a relationship with Hope; you would stop in her house, she would stop in yours, you would pass crank?

A. I am sure it was.

Tr. at 1342. Alexander's rather cryptic statement "I am sure it was" does not squarely place any narcotics sharing between her and Hope Casey in the relevant time period, particularly, given Alexander's inability to recall any such sharing from 1982 to 1985. Moreover, given the Government's compound question regarding her relationship with Hope Casey after Erik's accident and the passing of crank, a jury reasonably could have taken Alexander's remark as simply an affirmation that she continued to have a relationship with Hope Casey after her son's accident. The jury certainly was not compelled to conclude that Alexander and Hope Casey shared methamphetamine in the Building sometime during October 12, 1984 to May 2, 1985.

As the above portions of Colette Alexander's testimony illustrate, the Government did not, as it contends, elicit a definitive admission from her that she witnessed or participated in drug sharing in the Building during the relevant time period. Forfeiture is not, contrary to the Government's assertions, compelled on the basis of Ms. Alexander's ambiguous testimony.

b. Paul Casey's Testimony

[9] Nor does Casey's testimony, which the Government admitted at trial was the "only thing that stood between the Building and forfeiture," mandate forfeiture of the Building. Paul Casey admitted observing, "[a]t one time or another," HAMC members passing drugs during parties in the Building (Tr. at 1623), and sharing methamphetamine with his wife Hope and others in the Building prior to 1984. Tr. at 1685. Casey also admitted to distributing methamphetamine in the spring of 1985, however, those distributions occurred outside of the Building at 87 East 3rd Street. Tr. at 1788, 1797. Similarly, Casey also admitted distributing methamphetamine from 87 East 3rd Street on or about May 2, 1985, while on guard duty. Tr. at 1795-97.

However, the Government has not pointed to a single admission by Casey that establishes a

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distribution of narcotics in the Building during the relevant time period. Casey testified that he did not "throw away" his stash of methamphetamine after an October 1984 Church of Angels resolution barred all HAMC members from using methamphetamine because his wife "Hope would take some now and then if she wanted some" or *1059 "somebody else would want some." Tr. at 1803. Nothing in Casey's testimony indicates that this leftover "stash" of methamphetamine, however, was kept in the Building, or that he made any distributions of those drugs there. To the contrary, that Casey had to go to 87 East 3rd Street to distribute methamphetamine to an individual who had just completed working at the Building on May 2 suggests that he kept his leftover methamphetamine at 87 East 3rd Street and distributed it from that location.

Not only did Casey fail to admit that narcotics activity occurred in the Building during the relevant time period, he affirmatively stated that no such activity was ever allowed in the Building. Casey discussed the club rule against drugs in the building, which prohibited all drugs except those for personal use. He also stated that most club parties occurred outside the Building at restaurants or outdoors, and that in the relevant time period, the only parties in the Building he recalled were for his children's birthdays. As for the methamphetamine conspiracy, he testified that it ended in summer 1984, and that in October 1984 all members were banned from using the drug.

[10] Recognizing the ambiguous and indefinite nature of Casey's and Alexander's purported "admissions" of methamphetamine distribution in the Building during the relevant time period, the Government asserts that their "conspicuous failure to deny such distributions (and, indeed admitting the possibility that they occurred) fails to create a disputed issue of fact on this point." Pl.Mem. at 19. Nothing could be further from the truth, however, since the claimants had no burden to affirmatively disprove contentions the Government had failed to establish in its probable cause showing and which were not clearly admitted in the testimony upon which the Government relies. Therefore, the Government has not borne its initial burden of demonstrating the absence of a genuine issue of fact on the question of drug sharing in the Building during the relevant time frame.

2. Sandy Alexander's Cocaine Transactions

The Government next argues that judgment as a matter of law is compelled in this case because the claimants failed to rebut (1) Agent Bonner's testimony that Alexander agreed to sell him and Vernon Hartung cocaine in their initial meeting in Alexander's apartment on November 20, 1984; and (2) the evidence that Alexander used his phone in the Building to arrange the four cocaine sales to Bonner and Hartung. The Government also contends that counsel for the Alexanders, in her summation, conceded that Alexander offered to sell Bonner cocaine during their November 20 meeting in the Building (Tr. at 2235), and that "the calls that preceded the sales certainly had something to do with drugs." Tr. at 2307-08.

Although the Government's arguments concerning Sandy Alexander's cocaine transactions and the use of the Building to arrange them are more compelling than its drug sharing contentions, they are, nonetheless, unconvincing.

a. The November 20, 1984 meeting in the Building

Agent Bonner testified that during the November 20, 1984 meeting in Sandy Alexander's apartment, Sandy Alexander agreed to sell cocaine to him and Hartung. Specifically, Bonner stated as follows:

Q. Did you have any discussions with Mr. Alexander regarding narcotics?
A. Yes, I did.
Q. What was discussed in the area of narcotics?
A. In the area of narcotics, I told Mr. Alexander that I was having a very successful business in Baltimore selling cocaine and methamphetamine, Vernon Hartung and I were doing very lucratively in the business. I told him I was thinking we could do it with regard to drugs for the Hells Angels, to let me know, because I was in a real good financial situation at that time.
Q. What did Mr. Alexander say in response?
*1060 A. He told me he didn't want to interfere with any business Gorilla, James Harwood, and I were doing at the time.
Q. What did you say in response?
A. I told him Gorilla and I were only doing a methamphetamine business at that time and not cocaine.
Q. Did Mr. Alexander say anything in response?

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A. Yes, he did.
Q. What did he say?
A. He told me that in terms of cocaine, that he could get cocaine, he could get any amount, from ounces to a pound of cocaine he could get for me.
Q. Did he offer to sell cocaine to you?
A. Yes.
Q. What did you say in response?
A. I told him I would be interested in purchasing cocaine from him if he got good quality cocaine, that I would purchase up to 1/2 pound the first time, I wanted to see how good the stuff would be first.
Q. Did he describe the type of cocaine he would get for you?
A. Yes, he did.
Q. How did he describe it?
A. He described it as Colombian Rock or Peruvian flake.
Q. In terms of quantity, did he represent any particular quantity that he would provide?
A. He said from ounces up to a pound.
Q. Did you discuss obtaining cocaine from him?
A. Yes, we did.
Tr. at 579-80.

However, Vernon Hartung, in his deposition, cast doubt on Bonner's rendition of the conversation in Alexander's apartment on November 20, 1984. While Hartung confirmed Bonner's testimony that drugs were discussed during that meeting, he stated that cocaine was discussed only in the most general terms. Hartung testified as follows in his deposition:

Q. Okay. How did you arrange to meet Sandy Alexander at this apartment?
A. We made initial phone calls after the 4th of July thing, for example, kept contacting them, and Kevin Bonner and I went up to visit him. We told him we were coming up, he said stop up and see him. And I brought some stuff up for him, handkerchiefs, and Vietnam stuff, he wanted handkerchiefs. And Kevin and I went up there to see him. We had a conversation, we told him that we had been doing real good. He said I heard how you guys are doing real good right now. We said yes, we are looking to buy some heroin. He said don't be fooling with heroin, he said no club member fools with heroin, you don't want to get involved with that.
Q. This is not the conversation in his apartment?
A. Yes, this is in his apartment.
Q. Okay.
A. And he said he would give us a call sometime, if I get--he said I can get some real good stuff, you know, I don't remember the exact words word for word, and Kevin was present the whole time. I said well, we will do that. But he said don't fool around with no heroin.
We left there, there was no more conversation with Sandy pertaining to this, and I cannot recall what date it was, but we received a phone call from Sandy to come and see him, and we was going to meet him somewhere, pertaining to he can get us some cocaine, it was. And that's exactly what happened.
Hartung Dep. Tr. 135-36.

Later in his deposition, Hartung testified:

Q. Okay. When is the first time you had a conversation with Sandy about buying drugs?
A. That was the time when he had mentioned we wondered about heroin, he said no. There was another time we had talked to him, we went up, it may have been four occasions. It wasn't at the clubhouse, it was outside, I am talking about inside his apartment, and we were in New York, and he said, you know, I got a line on some good stuff. He said I will get back with you in a couple of *1061 weeks and it was approximately two weeks, it may have been three at the most, that he did get back with us. But we went back to New York to buy the drugs, and Kevin and him talked price stuff, I don't remember exactly how much it was. But we didn't meet at the clubhouse, when we went back to New York, we met in a restaurant.
Q. Where did the--the conversation that you just described--
A. In front of the clubhouse.
Q. So when he said to you, I have a line on some good stuff--
A. Yes.
Q. --that occurred outside?
A. Yes, best of my recollection, it was outside, yes.
Hartung Dep. Tr. 170-71. (Emphasis added).

Expressly denying that any specific arrangements to purchase cocaine were made during the November 20 meeting, Hartung further testified:

Q. There were no specific arrangements made at the time you were in Sandy's apartment?
A. No.

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Q. In fact, he didn't have any--he indicated that he did not have any at that time?
A. No, he said he would have some coming.
Q. Okay. But that's the full extent of what he said?
A. Yes. Best I can recall.
Q. Okay. And that's the only conversation about drugs you had with him on that occasion?
A. On that occasion.

Hartung Dep. Tr. 211-12; see also id. at 202 ("[t]hat was set up in the apartment, the drug deal, that he could get some stuff, but the actual meeting place and stuff was discussed over the phone, and the first one was done in a restaurant").

[11] Thus, in Hartung's version of the November 20, 1984 meeting, Sandy Alexander only generally assured them that he could obtain "real good" cocaine for them. Hartung's testimony corroborates Sandy Alexander's testimony that he did not arrange to sell cocaine to Hartung and Bonner during their November 20, 1984 meeting with him in their apartment. Tr. at 2065-66. Therefore, no specific agreement to transact a cocaine sale was reached during that meeting. Nor was price, quantity or type of cocaine discussed. Indeed, according to Hartung, the parties did not even arrange or schedule a future meeting. Sandy Alexander's general assurances that he had access to cocaine, as described by Hartung, is hardly tantamount to negotiating or arranging a specific drug transaction. Cf. United States v. Ruiz, 932 F.2d 1174, 1184 (7th Cir.1991) (defendant's comment that he could get ten kilograms of cocaine was "hardly the negotiation of a specific drug transaction" and did not demonstrate, by a preponderance of the evidence, that defendant agreed to sell ten kilograms of cocaine for purposes of sentencing).

Indeed, Alexander's assurances during that meeting are qualitatively indistinguishable from those he allegedly made in an earlier conversation with Bonner regarding methamphetamine, which I found failed to establish even a "nexus" to the Building that would justify a finding of probable cause. Bonner testified that on July 4, 1984, Sandy Alexander told him, in the clubhouse, that if James Harwood, Bonner's methamphetamine supplier was convicted on drug charges, he should come see Alexander and he would "arrange something." Tr. at 558. I rejected the Government's argument that probable cause as to the methamphetamine conspiracy could be based on that conversation alone because of the general nature of Sandy Alexander's comments. Specifically, I stated:

> It still goes in the category of ... assurances. It is not actually setting up the deal, it is not delivering on the deal, what it is is a promise, if you don't get delivery in the future from Harwood, I'll step in. There's no agreement of any kind being discussed during that meeting. There is merely a recognition that something has occurred and that I will step in if something else doesn't occur. I would not consider that a nexus sufficient to create grounds for forfeiture standing alone.

*1062 Tr. at 1228-30. Sandy Alexander's general statement, as testified to by Hartung, that he could get "good stuff", i.e. cocaine, similarly falls into the category of mere "assurances." Therefore, crediting Hartung's testimony, a reasonable jury could have concluded that Alexander's apartment did not facilitate his later cocaine sales to Bonner and Hartung, as the November 20, 1984 conversation therein was only tangentially linked to Alexander's later cocaine sales.

b. The Telephone Calls to Sandy Alexander's Residence in the Building

[12] Though they present a closer question, the telephone calls from Bonner, Hartung and Jerry Buitendorp to Alexander's residence in the Building do not, as a matter of law, require forfeiture of the Building. Before turning to the substantive legal issues raised by the phone calls, it is useful to first place the calls in context. Although the Government's brief spins a tale of numerous calls to arrange drug transactions, with the parties speaking in code to elude suspicion, the tapes themselves, which the jury heard, depict a far less compelling yarn.

First, as stated before, there was not a single explicit reference to cocaine, or price or quantity in any of the alleged 18 calls to arrange drug deals. Second, many of the calls were innocuous, or arguably related to other projects which the parties were involved in, namely obtaining information about the POWs and Colonel Gritz's operations in Southeast Asia. In seven of the calls, for example, little more was said than "I'll call you back" or "call me back later." (GX26A; GX27A; GX44A; GX45A; GX49A; GX51A; GX58A). Three other calls between Hartung and Sandy Alexander referred

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to "lobbyists," "senators" and "papers." Because Bonner was not a party to these calls, the jury reasonably could have concluded that those three calls related to Hartung's efforts to provide Alexander with information about POWs, despite Bonner's testimony that he believed Hartung and Alexander were speaking in code about aspects of a contemplated drug deal. Tr. at 638-39.

As for those limited number of calls which Alexander's counsel conceded "had something to do with drugs," [FN3] I do not agree that they compel forfeiture as a matter of law. Accepting that those calls to the Building were somehow related to the cocaine deals, I do not believe that, as a matter of law, they necessarily facilitated Alexander's cocaine sales. Those calls were one step removed from the actual sales or even arranging of the sales, since, at best, they simply set up meetings at which the sales were arranged or occurred. No specifics, such as amount or price were discussed explicitly, or in code. Hence, the arranging as well as the consummation of the cocaine sales required the privacy or inconspicuousness of some other setting; the privacy afforded by Sandy Alexander's telephone, thus, was not integral to the arranging of the cocaine sales. In fact, by purposefully not discussing specifics about drug transactions, such as price or quantity, the parties to the calls expressly declined to make use of the privacy of the telephone in their illegal activities. Under these circumstances, it was a jury question whether the use of the telephone was incidental or fortuitous to the actual drug sales.

> FN3. GX43A(11/28/84): Bonner calls Alexander, and Colette Alexander picks up. She says "Listen, he's in the tub still, uh.... Listen. He said, uh, to tell you before that, uh, he needs about 24-hour's notice and, uh, (U/I) for you to come up, and spend a day. And he'll take you over to see the producers and all that stuff."); GX44A (11/30/84: Buitendorp call to Alexander setting up meeting at the Daily Planet); GX52A (12/18/84: Buitendorp arranges to meet Alexander at "America," a New York City restaurant); GX 53A (12/18/84: Hartung arranges to meet Alexander for dinner on 12/19 at 7:30 p.m.); GX57A (1/24/85: Buitendorp tells Colette Alexander that he will be at house in 1/2 hour).

The Government contends that the phone calls were critical to the cocaine sales because it was only by calling Sandy Alexander at his residence that Bonner and Hartung could inform him that they wanted to arrange another deal. This argument ignores the fact that Bonner and Hartung could have travelled to meet Alexander outside the club as they had on other occasions. In any event, even if arranging a meeting had to be done by calling Alexander at home, the calls were still a substantial step removed from the actual arranging of the deals and the *1063 privacy of Alexander's telephone line was not necessary in arranging the actual sales. Emphasizing the privacy afforded by telephone lines generally, the Government ignores the fact that the parties did not employ this privacy in setting up the meetings where the cocaine sales were arranged or consummated since the last sale, by the Government's own evidence, was not arranged by telephone calls.

The cases cited by the Government do not suggest that a tangential link between phone calls and the actual arranging of illegal transactions suffices to compel forfeiture as a matter of law. For example, in the two telephone calls at issue in United States v. One Parcel of Real Estate Commonly Known As 916 Douglas Avenue, Elgin Illinois, 903 F.2d 490 (7th Cir.1990), cert. denied, 498 U.S. 1126, 111 S.Ct. 1090, 112 L.Ed.2d 1194 (1991), the parties entered into a specific agreement to purchase cocaine, specifying the quantity and price of the drugs to be purchased during the calls. Since the claimant had "negotiated the price and quantity of cocaine to be sold" in the calls, the Seventh Circuit held that "the connection between the underlying drug transaction and [the claimant's] property was more than incidental and fortuitous." 903 F.2d at 494. Similarly, in United States v. Lewis, 987 F.2d 1349, 1356 (8th Cir.1993), the Eighth Circuit held that the record supported the jury's finding that more than an "incidental or fortuitous contact" between the claimant's cellular phone and his criminal activity existed since, on one occasion, the claimant telephoned his cocaine supplier on the cellular phone and obtained a price quote for five kilograms of cocaine. [FN4]

> FN4. The nature of the telephone calls at issue in United States v. 9239 South Central, Oak Lawn, Illinois, 1991 WL 222180 (N.D.Ill.1991) is unclear. The government in that case contended that the parties arranged the drug transactions. The district court, however, only mentioned that in two of the

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conversations, the parties spoke of "do[ing] it," which the undercover agent testified referred to doing a cocaine deal. 1991 WL 222180 at *2. It is uncertain, then, whether more specific aspects of the deals were discussed in the telephone conversations at issue. In any event, the court's finding that the claimant's home facilitated the cocaine transactions was not based solely on the telephone conversations. The government had presented uncontradicted evidence that the agent had sold cocaine to the claimant on approximately twenty-four occasions, often delivering the drugs to the claimant's home. Although in United States v. Zuniga, 835 F.Supp. 622 (M.D.Fla.1993) the court found the claimant's home forfeitable as a matter of law based on ten phone calls placed to an undercover agent, nowhere does the opinion indicate the substance of these conversations. I assume that the actual drug transactions at issue were arranged on the phone, since the court found that "[t]he use of the telephone substantially connected the home to the offenses of which [claimant] was convicted," giving the home "more than an incidental or fortuitous connection to the offenses." 835 F.Supp. at 624.

Because the telephone calls here were one step removed from the arranging of the drug transactions, and the privacy provided by Sandy Alexander's telephone line was not used to arrange the drug deals, I do not believe that the phone calls establish, as a matter law, that the Building was used to facilitate felony narcotics violations. Whether the calls constituted facilitation was, therefore, a jury question, which a reasonable jury could have resolved in favor of the claimants.

c. The Evidence Rebutting the Government's Prima Facie Showing that the Building was Used in the Commercial Distribution of Narcotics during the Relevant Time Frame

[13] As a final argument, the Government maintains that the claimants failed to rebut its "prima facie showing that individual HAMC members used their respective apartments in the Building during the relevant time period in connection with their commercial drug-dealing." Pl. Mem. at 31-32. This prima facie showing, according to the Government was made out through the Stipulation of Facts that 12 NYC Chapter HAMC members were convicted of drug conspiracy offenses; physical evidence seized from the Building during the May 2, 1985 raid; and the expert testimony of Louis Barbaria and Terry Katz purporting to explain the significance of that evidence.

However, Paul Casey's testimony, if credited, certainly provided a basis upon which the jury could conclude that the claimants had disproved, by a preponderance of the evidence, ***1064** that HAMC members operated a methamphetamine distribution network from the Building. First, Casey, the admitted manufacturer or "cooker" of methamphetamine for the club, stated in no uncertain terms that the methamphetamine conspiracy had ended months prior to the enactment of the forfeiture laws. Tr. at 1511-13. Indeed, Casey's claim was substantiated by Barbaria's testimony that there was a methamphetamine "drought" during most of the relevant time period, Tr. at 504, and that the Weisbrod-Alexander-Casey enterprise had ended by October 1984.

Second, Casey testified about certain unwritten club rules that, if believed, would suggest that the Building was never used in any illegal drug distribution activities of NYC Chapter HAMC members. He stated that commercial quantities of narcotics were never allowed in the Building, (Tr. at 1567-68, 1606), although members were allowed to maintain "personal use" amounts there. Tr. at 1518. Casey also testified, and the Government's expert Barbaria confirmed, (Tr. at 337), that illegal activities were not to be discussed, and were never discussed, during NYC Chapter HAMC "church meetings." Tr. at 1727, 1730-31.

Third, Casey testified that the items found in his apartment were put to innocent uses, had not been used at all or were leftover from the defunct methamphetamine conspiracy. As for the counter-surveillance devices, Casey claimed that he used the scanner and frequency books, like many law-abiding citizens, as entertainment, and asserted that those devices did not reveal sensitive law enforcement information. (Tr. 1735) Casey further testified that he had never operated the hand held scanner, (Tr. at 1565-66), and that he had used the telephone wire testers as a portable phone. Tr. at 1737.

The small quantity of methamphetamine found in Casey's apartment, when coupled with Casey's

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testimony about the club rule against possession of commercial quantities of narcotics in the Building (albeit with the proviso that "personal use" quantities were permitted), certainly permitted the jury to reject the expert's testimony that the small quantity of high purity of narcotics seized in the Building bespoke commercial drug activity in the Building. The jury was free to infer that the small quantities of methamphetamine found were remnants from the earlier methamphetamine conspiracy or personal use amounts derived from larger high purity stashes kept elsewhere. This is especially true given the absence of large quantities of drug dilutants in the various apartments at the time of the raid and the admitted high tolerance for methamphetamine among many NYC Chapter HAMC members.

As for the other items found in the Building, the jury was also free to reject the expert's conclusions given the absence of any evidence as to where in the various apartments these items were found--a factor one of the Government's experts, Terry Katz, admitted was highly relevant in determining whether an item was related to on-going drug activity. Tr. at 1129-31 (Sergeant Katz admits that because a wide-variety of household items might be used in drug activity, the location of such items is "very important" in determining whether they are drug-related).

II. The Motion for a New Trial

The same evidence that compels denial of the Government's motion for judgment as a matter of law also convinces me that a new trial is not warranted.

[14] "A motion for a new trial should be granted when, in the opinion of the district court, 'the jury has reached a seriously erroneous result' or ... the verdict is a miscarriage of justice." Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1047 (2d Cir.1992); Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 370 (2d Cir.1988). A district court has substantial discretion to grant a motion for a new trial, and unlike the posture required in considering motions for judgment as a matter of law, the trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner. Song, 957 F.2d at 1047; Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir.1978).

[15] I, however, decline to exercise my discretion to grant the Government's motion for a new trial because I do not believe that ***1065** the jury's verdict was seriously erroneous or a miscarriage of justice. While the Government's evidentiary presentation met the low threshold of establishing a "nexus" sufficient to demonstrate probable cause, I did not, and still do not, consider that the Government provided substantial evidence of a wide-ranging methamphetamine conspiracy operated out of the Building during the relevant time period, [FN5] particularly given the special care exercised by NYC Chapter HAMC members--confirmed by the Government's own witnesses--to shield the clubhouse from illegal activities. For the reasons discussed previously, I also do not find as a matter of law that the Government established that the Building facilitated Sandy Alexander's cocaine deals.

> FN5. The Government demonstrated that Alexander had sufficient time and notice before the raid to discard narcotics or other incriminating evidence. This factor does not establish, however, that drugs actually existed in the Building prior to the raid.

I do not doubt for a moment that individual HAMC members, including Sandy Alexander and Paul Casey, engaged in criminal activity, often violent and corrupt. However, it is the Building and not the general criminality of HAMC members that was on trial in this case--a point the Government sometimes lost track of. Without the testimony of William Medeiros, the Government's evidence linking the Building to felony narcotics violations was, in my estimation, rather scanty indeed. Casting the Building in the haze of the HAMC's general criminality and the unconventional lifestyle of its members might have been a potent, although improper, method of bolstering the fairly tenuous connection between the Building and drug activities during the relevant time frame. The jury, as its verdict demonstrates, did not succumb to the temptation of concluding that the individual members' admitted criminal activities engulfed every aspect of their lives, including their homes, but rather parsed through the evidence, giving it the weight they believed it merited. All in all, on this record, I can not and do not say that the jury's ultimate decision that the Building was not used to facilitate a felony narcotics violation was seriously erroneous, or even different from the conclusion I

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would have reached were I the trier of fact. Consequently, the Government's motion for a new trial is denied.

CONCLUSION

For the reasons set forth above, the Government's motion for judgment as a matter of law, or alternatively, for a new trial is DENIED.

SO ORDERED.

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