SUBMITTED UNDER SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN DOE,

Plaintiff,

-against-

ABC COMPANY LLP, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, and JOHN DOE VI,

Defendants.

----------x

14 Civ. 6867 (VEC)

ORAL ARGUMENT REQUESTED

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW

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Pursuant to the Court's directive on September 22, 2014 (Tr. 29:1-7), Defendants submit this brief on why the Complaint concerns a private dispute, not a matter of public interest.[1]

As the Court put it, "how much money [Bernstein] was owed for bringing the plaintiff in to a particular case" is "a quintessential private dispute." Tr. 32. Bernstein is a disgruntled former employee who quit after a series of unfavorable performance reviews and a pay reduction well before the events at issue here. Unemployed for almost two years, he tried to extract a huge bonus payment from BLB&G in *Merck* by threatening a public suit based on sensational, unfounded accusations about the *Satyam* Fee Petition. When these threats did not get him what he wanted, he filed the Complaint. To use the Court's words, he "put a gun to the head of the defendants." Tr. 10.

For the five following reasons, there is no matter of public interest raised here.

I. There Was No Impact on the Defendants or Class in *Satyam*

The Complaint claims that BLB&G improperly failed to disclose — in a class action fee petition *drafted by Bernstein himself* — that Vaterria Martin worked approximately 200 hours on *Satyam* and that she would be paid for this work from the fees awarded. BLB&G and a second Lead Counsel firm paid Martin for her work out of their share of the fee award. The payment to Martin did not increase the amount paid by the *Satyam* defendants or decrease the amount received by the class. This is conceded. Tr. 32. (The fee award totaled $25.585 million; BLB&G and Grant & Eisenhofer P.A. ("**G&E**") each paid Martin $112,500. Cmpl. ¶¶52-53.)

II. There Was No False Statement in the *Satyam* Fee Petition

The Complaint (¶149) asserts that the *Satyam* Fee Petition "falsely represented that attorney's fees would be paid only to the firms identified in the papers," but that is not true. The

[1] Emphasis is added to, and internal brackets, quotation marks and footnotes are omitted from, quoted material throughout this brief, unless otherwise indicated. Facts relied on this brief come from the Complaint and documents attached as exhibits to the accompanying Declaration of Courtney A. Solomon (herein "**Ex.**").

Complaint does not cite or quote *any* statement in the Fee Petition, let alone a statement that fees would be shared only with the listed firms. In fact, the filings and orders in *Satyam* show conclusively that the Fee Petition stated just the opposite. It is clear that the Court understood and intended that the fees awarded to Lead Counsel would be allocated by Lead Counsel, in their discretion, among *all plaintiffs' counsel*, without further notice to the Court. The key facts:

- Lead Counsel filed the *Satyam* Fee Petition on behalf of all plaintiffs' counsel.
- Lead Counsel had asked for discretion to allocate the fees awarded among all plaintiffs' counsel.
- The Court's fee award expressly granted this discretion.
- The Fee Petition sought 17% of the amount paid in settlement, not hourly fees.
- The Fee Petition identified certain firms and their hours only as part of a "lodestar" calculation to cross-check the reasonableness of the percentage fee.
- All four Lead Counsel firms — and Bernstein — agreed there was no need to include the hours of other firms and lawyers with relatively little time, as they were irrelevant to the 17% fee request and would only *lower* the multiple yielded by the lodestar calculation (thereby making the 17% request appear all the more reasonable under the case law).

Bernstein was intimately involved in drafting the Fee Petition. *See* Cmpl. ¶49. He spent over 100 hours on the settlement filings. His name appears in the BLB&G signature blocks. *See, e.g.*, Exs. P, Q (Fee Petition filings) and Exs. N, O (settlement filings). He participated in the joint decision by all Lead Counsel firms *not to list all plaintiffs' counsel* in the Fee Petition and did not suggest that he had any problem with it.

The Fee Petition relates to two partial settlements in *Satyam*: one with Satyam Computer Services Ltd. and the other with PricewaterhouseCoopers (Exs. N, O). Each of the Settlement

Agreements (Ex. N at Ex. A; Ex. O at Ex. 1) contemplated that Lead Counsel would have discretion to allocate fees among all plaintiffs' counsel:

> Lead Counsel shall determine and distribute the attorneys' fees among plaintiffs' counsel in a manner in which, in their sole discretion, they believe reflects the contributions of such counsel to the prosecution and settlement of the Action with the Settling Defendants and the benefits conferred on the class.

Ex. N at Ex. A ¶18; Ex. O at Ex. 1 ¶15.

The factual support for the Fee Petition is set forth in ¶¶83-116 of Lead Counsels' joint declaration (the "**Joint Declaration**") (Ex. R). It includes declarations from the four Lead Counsel firms (Exs. R-2 to R-5) and two firms which represented Brian F. Adams, class representative for the Sub-Classes ("**Counsel for Plaintiff Adams**") (Exs. R-6 to R-7). It also includes a "Summary of Lodestars and Expenses" that lists these six firms (Ex. R-8).

Nowhere does the Joint Declaration state or imply that these six firms were the only plaintiffs' lawyers who worked on *Satyam* or would receive fees from the award. Quite the contrary, the Fee Petition sought an award "*on behalf of all plaintiffs' counsel* who contributed to the prosecution and settlement" of the claims. *See* Exs. R-2, R-4 to R-7 at ¶1.

The "Summary of Lodestars and Expenses" (Ex. R-8) lists the six firms and their hours. As explained in the Joint Declaration (Ex. R at ¶¶93-94), this information is backup for the lodestar cross-check. Specifically, ¶93 explains how the Summary is derived from data provided by the six firms (Exs. R-2 to R-7) , and ¶94 explains the calculation of the multiplier:

> Lead Counsel and Counsel for Plaintiff Adams have collectively expended 22,752.16 hours in the prosecution and investigation of the Action. The resulting collective lodestar is $11,709,663.25. Under the lodestar approach, the requested fee equal to 17% of the Settlement Funds (approximately $25,585,000), results in a multiple of approximately 2.18 on the lodestar ….

Had the hours of Martin and four other unidentified firms — firms of whom Bernstein was fully aware, and about whom he has never raised any issue — been included in the lodestar

calculation, the multiple would have been lower, *increasing* the likelihood of Court approval of the 17% fee. Thus, not including these hours did not benefit BLB&G or the other Lead Counsel.

At the September 8, 2011 hearing on the Fee Petition, the Court commented that the 2.18 multiple "falls squarely within the range that Courts award in complex actions of this sort." Ex. S at 32. Five days later, the Court entered its order awarding fees and granting Lead Counsels' discretion to allocate the fees among all plaintiffs' counsel:

> Lead Counsel are hereby awarded attorneys' fees in the amount of 17% of the total Settlement Funds, as well as 17% of any additional Settlement Funds recovered by Satyam from the PwC Entities . . . . The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a manner which, in the opinion of Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution and settlement of the Action.

Ex. V at ¶4. The order does not require Lead Counsel to report back to the Court on how the fees were allocated or how they spent their own shares of the award. Lead Counsel never made any representation to the Court about how much would be paid to any particular firm or lawyer.

Also on September 13, 2011, the Court entered final orders approving the settlements (Exs. T, U). The orders state that settlement on the "terms and conditions" in the Settlement Agreements "is in all respects fair, reasonable and adequate." *Id*. at ¶¶7-8. The "terms and conditions" approved by the Court include the above-quoted provision giving Lead Counsel discretion to allocate the fee award among themselves and other plaintiffs' counsel. *See* Ex. N at Ex. A ¶18; Ex. O at Ex. 1 ¶15.

BLB&G's half of the payment to Martin came from the portion of the fee award allocated to BLB&G. It did not affect the amount of money the defendants paid or the class received. No false statement was made in the Fee Petition or any other papers filed with the *Satyam* Court.

III. There Was No Legal Requirement that the Fee Petition Disclose Fees Paid to Martin

The Complaint does not identify any legal requirement that the Fee Petition include

information about Martin, and no such requirement existed on August 1, 2011, when the petition was filed. Until July 11, 2011, S.D.N.Y. Local Civil Rule 23.1 required that class action legal fee petitions must "disclose any fee sharing agreements with anyone," as follows:

> Fees for attorneys and others shall not be paid upon recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and shall disclose any fee sharing agreements with anyone. . . .

Ex. K at R. 23.1. This rule, which applied to both derivative and class actions, was repealed effective July 11, 2011. Ex. M at Order & R. 23. Local Rule 23.1.1 maintained the disclosure requirement only in derivative actions, not class actions. Ex. M. at R. 23.1.1.

Local Rule 23.1 was eliminated because, as to class actions, "it is redundant" — "[t]he topic of attorney's fees in class actions is now dealt with in Fed. R. Civ. P. 23(h)." *See* Final Report of Joint Committee at 30 (Ex. L). Rule 23(h)(1) provides that class action counsel seeking fees must make a motion under Fed. R. Civ. P. 54(d)(2). Rule 54(d)(2)(B)(iv) prescribes the contents of the motion, including that "[u]nless a statute or a court order provides otherwise, the motion must … disclose, *if the court so orders*, the terms of any agreement about fees for the services for which the claim is made." There was no such order in *Satyam*. The only reasonable interpretation of the Local Rule change is that no disclosure as to Martin was required.

IV. The Complaint Pleads No Ethical Violation by Defendants

The Complaint asserts that Defendants tried to deter Bernstein from, and retaliate against him for, reporting their unethical conduct outside the Firm. Cmpl. ¶¶5-6, 74, 147, 151-55. But it cites no ethical rule that Defendants supposedly broke, and there was none.

Preliminarily, it should be stressed that Bernstein initially claimed that BLB&G constructively discharged him to keep him *from* reporting. Almost a year later, he reversed

course, claiming that he was constructively discharged *for* reporting. Both claims are false.

Defendants did not attempt to deter Bernstein from reporting. Bernstein does not allege that he ever told Defendants he intended to report them. Rather, he alleges that he "reported the Kickback Scheme" to the U.S. Attorney's Office ("USAO") on December 21, 2011, after which, at some point, Defendants supposedly learned of this because they were monitoring his emails. *Id*. ¶¶75, 91-92. Defendants were *not* monitoring his emails and did not learn of the report until Bernstein imparted this information to them in late 2013. But whenever Defendants learned of it, it is clear that their actions through December 21, 2011 did not deter him from reporting. As to the period after December 21, 2011, the Complaint does not assert that Bernstein had any intention to report Defendants to anyone, so there was nothing for Defendants to deter.

Bernstein first raised his purported concerns about the *Satyam* Fee Petition on the eve of his annual performance review in late 2011, months after the petition was filed and fees were awarded. Cmpl. ¶¶57, 68. Then he was silent for nearly a year. On the eve of his annual review in late 2012, he abruptly quit, after eavesdropping on partner conversations about someone else, which he misunderstood as being about him. *Id.* ¶¶93-95. His resignation letter was *the first time since December 2011* he mentioned any supposed concern about the Fee Petition.

Defendants did not retaliate against Bernstein for reporting to the USAO. They did not learn of it until late 2013. But even if they had known about it earlier, the Complaint does not plausibly allege retaliation. Defendants allegedly did two things after December 21, 2011: plan to fire Bernstein (Cmpl. ¶¶93-94) (which they did not in fact do) and persuade Reynolds to stay with the Firm (*id.* ¶¶126.k-l, 140, 153, 155, 172).[2] The Complaint thus hypothesizes that BLB&G (1) waited for 10 months (December 2011 to October 2012), during which time

[2] After communicating with both Bernstein and BLB&G, Reynolds chose to continue to be represented by the Firm. *See* Solomon Dec. Ex. H ¶¶ 4-6 ("I had no desire to leave [BLB&G] and either follow Mr. Bernstein to another, unknown law firm or have Mr. Bernstein represent me as a solo practitioner in [*Merck*].").

Bernstein was silent about his *Satyam* concerns, before suddenly retaliating by planning to fire him, and (2) wanted to keep Reynolds as a client in order to retaliate against Bernstein, not because it was in the Firm's economic interest. Neither hypothesis makes sense.

Count III of the Complaint attempts to invoke *Wieder v. Skala*, 80 N.Y.2d 628 (1992), which held that the predecessor of N.Y. Rule 8.3(a) was an implied term of the at-will employment relationship between the plaintiff lawyer and defendant law firm. *Wieder* concluded that the lawyer stated a breach of contract claim by alleging that the firm fired him for insisting that the firm report serious dishonesty on the part of another lawyer at the firm. In Count III, Bernstein claims that he had a duty under N.Y. Rule 8.3(a) to report BLB&G for filing the *Satyam* Fee Petition. Cmpl. ¶¶148-50. He had no such duty. N.Y. Rule 8.3(a) provides:

> A lawyer who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct <u>that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer</u> shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

The word "knows" means "actual knowledge of the fact in question." N.Y. Rule 1.0(k); *see* Green Dec. ¶44; *see also id*. ¶¶40-43.

A lawyer who actually knows that another lawyer has violated an ethical rule should be able to identify the rule, but Bernstein cannot. As set forth above, there was no false statement in the Fee Petition. Thus, there was no violation of N.Y. Rule 3.3(a)(1), which bars making a false statement of fact or law to a tribunal or failing to correct one previously made. The Complaint does not cite N.Y. Rule 3.3(a) because it cannot point to any false statement in the petition.

Nor is Bernstein able to explain why, if he "knew" the Fee Petition was false, he said nothing about it at the time of filing and did nothing since then to correct it. He tries to suggest that he did not know, when the petition was filed, that Martin would be paid for her work. Cmpl. ¶53. But this does not explain why, if he believed that all fee recipients had to be disclosed, he

did not insist on disclosure of the four other unidentified firms he knew would not be disclosed.

Moreover, Bernstein's suggestion that he did not know Martin would be paid is not credible. The Complaint nowhere alleges that he actually believed she would not be paid. Martin submitted detailed timesheets to Bernstein in February 2011 (*id*. ¶38) and again in April 2011 (*id*. ¶44), making it clear that she expected to be paid. If, as Bernstein contends, Martin's work did not benefit the class (*id*. ¶¶46-47), then BLB&G acted appropriately in *not* seeking fees based on her work. *See In re Dell Inc. Sec. Litig.*, No. A–06–CA–726–SS, 2010 WL 2371834, at *15 (W.D. Tex. June 11, 2010) (duty not to include wasted hours in class action applications). But this does not mean that BLB&G and G&E were free not to pay her. She was hired; she was given work to do; after she submitted the memo Bernstein disparages, she was given no other work; but she had worked on the understanding she would be paid for her time.

The Complaint (¶53) concedes that by November 2011, Bernstein knew Martin had been paid. If, at any time during the nearly three years since then, he genuinely believed that the Fee Petition he drafted and put his name to contained a false statement, he was required by N.Y. Rule 3.3(a) to make a corrective statement to the *Satyam* Court. But he never did so.

Since there was no false statement, and thus no violation of Rule N.Y. 3.3(a), the key element of N.Y. Rule 8.3(a) is unsatisfied: there was no "violation of the Rules of Professional Conduct that raises a substantial question as to [the reported] lawyer's honesty, trustworthiness or fitness as a lawyer." *See* Green Dec. ¶¶44-46.

Nor is it relevant (Cmpl. ¶51) that Martin did not file a *pro hac vice* application or a notice of appearance in *Satyam* and was not licensed to practice law in New York State. Martin performed limited, behind-the-scenes legal work under the auspices of counsel of record. *Id*. ¶¶38-39, 44-46. A lawyer who plays such a minor role in a federal court case need not be

admitted *pro hac*, file a notice of appearance, or be licensed in the state.[3]

There was also no impropriety in the fact that, while Martin was working on *Satyam*, her husband was a Special Assistant Attorney General and Director of the Mississippi AG's Child Desertion Unit. Cmpl. ¶56; *see* Exs. X, Y, Z. His work concerned unpaid child support; he had no role in the state's securities fraud litigation. Mississippi expressly allows an individual to accept work from a government agency that employs his or her spouse, as long as the spouse does not influence the individual's contract. *See* Miss. Code Ann. § 25-4-105(4)(d) & (f); § 25-4-103(k)(iv). Martin's work on *Satyam* was entirely proper under Mississippi law.

Even if Bernstein otherwise had a duty to report under N.Y. Rule 8.3(a) (he did not), it was trumped by his confidentiality duty under N.Y. Rule 1.6. Rule 8.3(c) provides: "This Rule does not require disclosure of … information otherwise protected by Rule 1.6." *See* Green Dec. ¶¶42-43. He thus had no duty to report, and has no claim based on interference with such a duty.

V. Alleged Work of Mississippi Lawyers in *Merck* Raises No Issue of Public Interest

Bernstein claims that BLB&G was asked to allocate work on *Merck* to Mississippi lawyers, and that it did so. There is nothing improper in this. Nor does the Complaint allege that Defendants ever made any false or misleading statement relating to the use of Mississippi lawyers in *Merck*. It does not allege that Bernstein, while at BLB&G, expressed any ethical concern about these Mississippi lawyers; or that Bernstein intended to report this supposed concern outside the Firm or that Defendants deterred him from doing so; or that he did report it or that Defendants retaliated against him for doing so. Before being served with the Complaint, BLB&G never heard Bernstein assert any issue about Mississippi lawyers in *Merck.*

[3] *See Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 169 (2d Cir. 1966) (en banc) (unlicensed law clerk not engaging in unauthorized practice if working under licensed attorney); *Gsell v. Rubin & Yates, LLC*, No. 13-Civ.-5723, 2014 WL 4364890, at *5-6 (E.D. Pa. Sept. 4, 2014) (multifactor test drawn from *Spanos* and other cases determines whether *pro hac* status should be sought). No *pro hac* motion was required under these precedents. Nor is there reason to suppose that Martin would have been denied *pro hac* admission had she applied.

The Complaint uses this issue as window-dressing, to try to create the illusion of a link between the *Satyam*-related allegations and the *Merck* bonus claim. There is no link. Bernstein alleges that he "expected" BLB&G to pay him a 10% bonus based on fees attributable Reynolds in *Merck* (there have been no fees yet). Cmpl. ¶¶27, 182-83. This bonus claim depends entirely on the terms of his employment by BLB&G — it has nothing to do with the alleged Kickback Scheme or alleged tortious interference with his relationship with Reynolds.

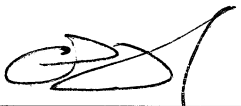
As a matter of policy, Mississippi and its agencies engage local and minority lawyers to work on their litigation. They also encourage outside counsel to give such lawyers the opportunity to gain experience, at no cost to the State and its agencies, that would enable them to play a larger role in future such litigation. The Complaint does not claim that this was unlawful. Instead, it resorts to flimsy innuendo. For example, the Complaint (¶¶81-82) asserts that the Mississippi lawyers who reviewed certain documents in *Merck* had no "apparent" prior experience "handling" securities class actions, but does not claim that such experience was necessary or that their work was deficient. The Complaint (¶77) asserts that Neville asked Graziano to assign work to a friend of Neville's father, but does not claim that Graziano was aware of this connection (he was not). The Complaint (¶86) asserts that the Mississippi lawyers did not file notices of appearance and were not admitted in the District of New Jersey, but does not claim that such notices and admissions were required. They were not (*see supra* n.3).

The Complaint (¶¶170-71) asserts that Defendants "prevented" Reynolds from learning about the Mississippi lawyers in *Merck*, but Bernstein never claims he told Reynolds what he now contends was crucial for Reynolds to know. Informing Reynolds, like correcting the allegedly false Fee Petition in *Satyam*, would deplete his ammunition against BLB&G in the fight for a bonus, which is what this case is really about — not any matter of public interest.

Dated: New York, New York
October 29, 2014

Respectfully submitted,

JOSEPH HAGE AARONSON LLC



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