NEW YORK STATE SUPREME COURT
NEW YORK COUNTY

The People of the State of New York ex rel The Bayrock Litigation Partnership,

Plaintiff,

vs.

Bayrock Group LLC et al.,

Defendants

_____/

No. 15-1245
Singh, J.

Mot. Seq. 004

AFFIRMATION AND MEMORANDUM OF LAW IN SUPPORT OF OPPOSITION TO MOTION TO DIMISS AND CROSS-MOTION

ORAL ARGUMENT REQUESTED

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Certainly, though one might understandably get the wrong idea from defendants' motion, Magistrate Judge Maas never determined privilege issues (and so Judge Schofield never did, since she referred all such to the Magistrate); but don't take our word for it; here's what Judge Maas said at a hearing on April 14, 2015 – months after the sanctions were imposed. *See* Exh. 2 @ pg. 41 *et seq.*:

> MR. OBERLANDER: My co-counsel is concerned that we have made clear that we have never stipulated anything was purloined, and that's why you said we'll call it the Bernstein documents, okay? I didn't want to accidently get estopped from doing something. The second thing is that it is correct, or I'm not mistaken, that your Honor has not ruled on privilege or confidentiality issues as to any of the documents that are Bernstein documents or otherwise brought in issue. I mean, I'm just putting that on the record and requesting confirmation that nothing has ever been ruled to have been privileged or not.
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> THE COURT: *I don't believe I ever ruled on that issue.* The gist of my order striking paragraphs from the complaint was that you didn't follow my instructions. [Emph. Add.]

In sum, there is no reality to any implied or express representation of defendants that any issue of privilege or confidentiality was ever resolved. What happened here, with defendants' motion, is (1) We always maintained the right to use whatever we had, including that which came from Bernstein; (2) we always denied that anything we had was privileged (especially citing that even if it might otherwise have been privileged, it was not privileged because of crime fraud); (3) we always denied that anything we had was confidential (not that it would matter for purposes of a suit); (4) the court ordered, or says it ordered, us to identify one public source for each allegation in the complaint that Mr. Saurack insisted was privileged or confidential; (5) the court refused our proposal that instead it first determine privilege or confidentiality; (6) the court said we did not well enough identify the sources; (6) the court struck the allegations for which it felt we had not done that; and (7) the court admitted that it had never reached the issue of privilege or confidentiality. That type of manipulation is why people hate lawyers. In this case, deservedly.

Yet all of this becomes, in the argument of defendants, only slightly paraphrasing, "Counsels argued that they could use the documents Bernstein gave them, the court ruled against them, thus it is collateral estoppel that they committed ethics violations in using the Bernstein documents." That type of manipulation