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

----------X Index No. 650188/2007

JAMES L. MELCHER,

Plaintiff,

FIRST AMENDED COMPLAINT

-against-

GREENBERG TRAURIG, LLP and
LESLIE D. CORWIN,

Defendants.

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Plaintiff JAMES L. MELCHER, by his attorney, Jeffrey A. Jannuzzo, Esq., as and for his First Amended Complaint against defendants GREENBERG TRAURIG, LLP and LESLIE D. CORWIN, pursuant to the stipulated Order dated November 19, 2009 granting plaintiff permission to file an amended complaint, alleges as follows:

1. This is an action for treble damages pursuant to Judiciary Law Section 487, which provides that an attorney or counselor who is guilty of any deceit or collusion, or who consents to any deceit or collusion, with intent to deceive the court or any party, shall pay treble damages to the injured party. Plaintiff's damages after trebling are in excess of $10 million. The conduct complained of below occurred in an action in the Commercial Division. Assignment to the Commercial Division is requested.

THE PARTIES AND VENUE

2. Plaintiff James L. Melcher is a resident of the County of New York.

3. Defendant Greenberg Traurig, LLP ("Greenberg Traurig") is a domestic registered limited liability partnership, with its offices at 200 Park Avenue, New York, NY 10166.

4. Defendant Leslie D. Corwin ("Corwin") does business in person in the County of New York at the offices of defendant Greenberg Traurig.

5. Defendant Corwin is a partner or shareholder in defendant Greenberg Traurig, or otherwise holds an equity interest in such firm.

6. Defendants Greenberg Traurig and Corwin are engaged in the practice of law in the State of New York.

7. Venue is proper in New York County pursuant to CPLR 503(a) and (c) by reason of the residence of defendants.

8. Defendant Greenberg Traurig is counsel of record to the defendants in an action in Supreme Court, New York County, entitled *Melcher v. Apollo Management L.L.C. and Brandon Fradd*, Index No. 604047/2003 (Sup.Ct. N.Y.Co.)("the Apollo Management Action").

9. Defendant Corwin is partner/shareholder at defendant Greenberg Traurig, and the partner/shareholder responsible on behalf of defendant Greenberg Traurig for the Apollo Management Action, and his acts and omissions bind defendant Greenberg Traurig.

THE FACTS

A. Summary of the Deceit Which Gives Rise To This Case

10. As set forth below, defendants both engaged in deceit themselves, and consented to deceit by their client Brandon Fradd, first to try to prevent plaintiff and the Supreme Court from learning that their client Brandon Fradd had burned a crucial piece of "evidence" to frustrate forensic chemical testing that would have established to a scientific certainty that the "evidence" was a back-dated forgery, and to obtain the dismissal of the Apollo Management Action without plaintiff or the Supreme Court ever discovering either the burning, or that the files of the law firm that supposedly prepared it had no evidence that it ever existed, or that the lawyers who

supposedly prepared it had no knowledge of it; and second, when that effort was unsuccessful, to present a false cover-up that the law firm which supposedly prepared it had "gone out of existence," and that the lawyer who supposedly drafted it was "unavailable" to provide evidence and had "resisted" all attempts by defendants Greenberg Traurig and defendant Corwin and their client to communicate with him.

11. Defendant Corwin personally swore falsely on two separate occasions that the lawyer who supposedly drafted the document was "unavailable" to provide evidence and had "resisted" all attempts at communication. It has now been shown by both the testimony of that witness, and a letter written by defendant Corwin himself to that witness, that defendant Corwin's statements were knowingly false.

12. Defendants either knew or had reason to know, or it was obvious, that the "evidence" in question was fabricated and back-dated, but consented to their client's repeated presentation of it as genuine, under oath, to every court defendants appeared before.

13. Defendants either knew or had reason to know, or it was obvious, that their client intentionally tampered with the evidence he had fabricated, in order to conceal that the evidence was fabricated and back-dated, but consented to their client's repeated presentation of a false story under oath, to every court defendants appeared before, that the evidence had been burned "accidentally" while their client was "making tea."

14. Defendants knew or had reason to know, or it was obvious, either at the time they filed a motion to dismiss on behalf of their clients in the Apollo Management Action at the outset of the case, or at the time they filed their client's Answer and Counterclaim, or at the various times of the acts and omissions set forth herein, that the assertion made by their client that there was a genuine "amendment" to the written contract in the Apollo Management Action, and/or that such

"amendment" had been damaged "accidentally" by fire, was false.

15. By means of their deceit and consent to deceit, defendant Greenberg Traurig and defendant Corwin delayed resolution of the Apollo Management Action by more than five years, and prevented plaintiff from obtaining relief based on the fabrication and spoliation of this "evidence."

16. When plaintiff moved for relief based on the defendants' client's fabrication and spoliation of evidence, defendants prevented plaintiff from obtaining relief by both standing on their client's statements that the document was genuine and had been destroyed "accidentally," and demanding the right to a jury trial on the issues raised by plaintiff's motion. After presenting their client's false story for five and a half years, on the day of the commencement of the jury trial, defendants on their client's behalf withdrew the "evidence," and withdrew all claims that it ever existed.

17. After spending more than a $1.5 million in legal fees and expenses, plaintiff has finally refuted all aspects of defendants' deceit and consent to deceit.

B. Defendants' Outset-of-the-Case Deception Regarding The Authenticity of a Supposed Contract "Amendment"

18. From the outset of the case, defendant Greenberg Traurig and defendant Corwin tried to deceive Mr. Melcher that the "evidence" in question, a forged, back-dated contract "amendment," was genuine, and they thus demonstrated their willingness to engage in active deceit.

19. Plaintiff commenced the Apollo Management Action on or about December 30, 2003. In his Complaint, plaintiff alleged that he was not paid the contractual share of the profits of Apollo Management that was guaranteed to him under the 1998 written contract, and plaintiff set forth the facts suggesting the recent forgery and back-dating of a purported "May 21, 1998

amendment" to that written contract, which defendants' client Brandon Fradd asserted drastically cut plaintiff's share of the profits of the company. *Exhibit 1 (Complaint).* The purported "May 21, 1998 amendment" had first made its appearance on December 18, 2003, the day after Mr. Melcher informed Brandon Fradd that he was prepared to sue to enforce his rights under the 1998 written contract.

20. On the morning of January 27, 2004, defendant Corwin and his client Brandon Fradd attended a meeting at the offices of one of plaintiff's counsel to discuss the Apollo Management Action. *Exhibit 2 (1/27/2004 ltr).* Attending for plaintiff were plaintiff himself, plaintiff's counsel of record in the Apollo Management Action, and plaintiff's long-time corporate counsel. The meeting was held in a conference room at the offices of plaintiff's corporate counsel.

21. At the meeting, defendant Corwin stated that Mr. Melcher had no case in the Apollo Management Action, because of the purported "amendment" supposedly done on "May 21, 1998," which drastically reduced Mr. Melcher's contractual rights to the profits of the company. *See Exhibit 3 (purported amendment).*

22. Defendant Corwin stated to plaintiff and to plaintiff's two lawyers that defendant Corwin had <u>personally</u> confirmed the authenticity of the "May 21, 1998 amendment" with the lawyer for Apollo Management who had drafted it. *Exhibit 4 (Melcher 1/2/2006 Aff.).* Plaintiff's counsel recorded that statement in a letter sent by fax a few hours later:

> This follows up on our meeting this morning . . . at which <u>you stated that you had confirmed with Jack Governale, Esq. the authenticity of the Amendment</u> to the Apollo Management Operating Agreement, purportedly executed on May 21, 1998, which is described at Section C, para. 19 et seq of the complaint herein. *Exhibit 2 (1/27/2004 ltr)(Emphasis added.)*

23. The statement by defendant Corwin at the meeting on January 27, 2007 that

he had confirmed the authenticity of the "amendment" with the lawyer who drafted it was an outright lie.

24. Only two lawyers have ever been suggested by the defendants' client Brandon Fradd as possible drafters of the "amendment:" Jack Governale, Esq. and James E. Beckwith, Esq. Neither such lawyer could have "confirmed" to defendant Corwin that he was the draftsman.

25. Defendant Corwin did not "confirm" the authenticity of the "amendment" with Jack Governale:

A. Mr. Governale has testified that he knows nothing of the "amendment." *Exhibit 5 (Governale 12/7/2005 depos.).*

B. Discovery has shown there is no trace of the "amendment" in Mr. Governale's files, though a different, genuine amendment done as of May 13, 1998 is present and accounted for in such files. *Exhibit 5 (Governale depos); See Exhibit 6 (Decision of Hon. Beverly Cohen, 8/15/2006).*

26. Defendant Corwin did not "confirm" the authenticity of the "amendment" with James Beckwith, Esq. Defendant Corwin personally swore on two separate occasions that neither he nor his clients had ever been able to contact Mr. Beckwith. *Exhibit 7 (Corwin 12/28/2005 Aff.); Exhibit 8 (Corwin 1/13/2006 Aff.).*

27. Although defendant Corwin's statement that he never contacted Mr. Beckwith has now been shown to be another outright lie, defendant Corwin did not in fact contact Mr. Beckwith until a week after the January 27, 2004 meeting at which he represented that he had "confirmed" the authenticity of the "amendment."" *Exhibit 9 (Corwin 2/4/2004 ltr).* Mr. Beckwith has since testified that he has no knowledge of the document, and that he did not draft it. *Exhibit 10 (Beckwith depos.)*

28. At the January 27, 2004 meeting, defendant Corwin falsely stated that he had confirmed the authenticity of the forged, back-dated "amendment"with the lawyer who drafted it, with intent to deceive Mr. Melcher, in order to get him to either drop the case, or to settle it for a nominal amount. While this deceit was unsuccessful, it was the first part of a long series of misleading representations and outright lies that were intended to deceive plaintiff and the Supreme Court, and which succeeded in preventing plaintiff from obtaining relief based on Brandon Fradd's fabrication of this document and then burning of it to frustrate forensic chemical testing from establishing, to a scientific certainty, that it was a back-dated forgery.

C. <u>The Burning Of The Forged Back-Dated "Amendment" To Frustrate Forensic-Dating</u>

29. The chemicals contained in ink are known to deteriorate at certain rates. Using readily available testing equipment, a forensic chemist is able to determine with reasonable accuracy the date that the ink was applied to a document, if the document is tested within approximately two years of its creation. *Exhibit 11 (2/18/2004 report to defendants), Exhibit 12 (2/3/2004 Lyter Aff).* However, heating the document hot enough to scorch it or to melt plastic drives off the chemicals in the ink, and renders it impossible to perform forensic ink-dating. *Exhibit 37 (Lyter 4/13/2004 Aff.).*

30. At the January 27, 2004 meeting, plaintiff's counsel requested that defendant Corwin and defendant Greenberg Traurig make the original "amendment" available for forensic testing, to determine when it actually had been created, and followed up this request with the above-mentioned letter sent by fax the same day:

> This follows up on our meeting this morning . . . at which <u>you stated that you had confirmed with Jack Governale, Esq. the authenticity of the Amendment</u> . . . . Mr. Fradd stated that <u>he possessed a signed copy of it.</u>

> I believe we can all agree that the authenticity of the Amendment is an important issue in the case, and it was after all you who raised its authenticity at our meeting.
>
> If the document is authentic, we would be grateful if you would make the original signed copy of it available for inspection and forensic testing. *Exhibit 2 (1/27/2004 ltr).(Emphasis added.)*

31. The foregoing letter was re-transmitted by defendant Greenberg Traurig and defendant Corwin on the same day, January 27, 2004 to their client Brandon Fradd. *Exhibit 13 (Fradd 5/19/2004 Aff. at 5).*

32. On the afternoon of the same day, January 27, 2004, Brandon Fradd was personally served with the Summons and First Amended Complaint in the Apollo Management Action. *Exhibit 14* (*Aff of service*).

33. On January 28, 2004, the very next day after the original of the "amendment" was requested for forensic chemical testing, and the very next day after being served with the Summons and Complaint, Brandon Fradd claims that he "accidentally" burned the original of the "amendment" on the stove in his apartment, supposedly "while making tea." *Exhibit 15 (Fradd 2/1/2004 email); see Exhibit 6 (Decision of Hon. Beverly Cohen 8/15/2006).*

34. The "accidental" burning supposedly occurred during lunchtime, when Fradd was alone in his apartment, during the time that Fradd's assistant, Jorge Guzman, was absent on his regular lunch hour, and when Fradd was the sole witness. *Exhibit 16 (Fradd 4/21/2004 depos. at 52).*

35. Mr. Guzman has sworn he was never made aware, at any time, of any burning of documents by Fradd during his absence. *Exhibit 17 (Guzman depos.).*

36. Brandon Fradd informed the defendants by email dated Sunday, February 1, 2004, addressed to defendant Corwin, that he had "accidentally" burned the "amendment." The

email stated as follows:

> You are scheduled to meet with Jack Governale about his recollection and records of 1998. I mailed my copy of the agreement changing the compensation in May 1998 to Jack last Wednesday [January 28, 2004].
>
> Unfortunately, I took the two pages of the agreement and the envelope with me into the kitchen to write out the envelope while I made some tea.
>
> Just as I put the kettle on, I heard a buzz at the door, went down to retrieve a FedEx package and came back to find the first page of the agreement on fire. (It appears it was too close to the gas stove and that there was some cooking oil from the previous night's dinner.) I poured some water on the fire, but the top page was destroyed.
>
> The bottom page got partly browned and to avoid smudging the signature, I dried it in the microwave oven. . . . *Exhibit 15 (Fradd 2/1/2004 email)(Emphasis added.)*

37. Defendant Greenberg Traurig and defendant Corwin thus knew at least by Monday, February 2, 2004 that Fradd had burned the "May 21, 1998 amendment," and that Fradd had done so on January 28, 2004, the very day after the "amendment" was requested for forensic chemical testing that would establish to a scientific certainty the date on which the document was actually created.

D. Defendants' Knowledge That Apollo Management's Law Firm's Files Contained No Evidence of the Phony "Amendment"

38. Brandon Fradd's February 1, 2004 e-mail stated that defendant Corwin was scheduled to meet with Mr. Governale regarding the "amendment." *Exhibit 15 (Fradd 2/1/2004 email).*

39. On information and belief, that meeting or telephone conversation between defendant Corwin and Mr. Governale took place during the first week of February. The basis for the information and belief is Fradd's email; the numerous documents created or exchanged during

this period involving Mr. Governale's firm and defendants and/or referring to the Apollo Management Action (listed on Mr. Governale's privilege-log), and the letter sent by defendant Corwin to James Beckwith on February 4, 2004 after defendant Corwin would have learned there was no evidence in the law firm's files that the "amendment" ever existed. *Exhibit 9 (2/4/2004 Corwin ltr), Exhibit 15 (Fradd 2/1/2004 email), Exhibit 18 (Governale priv. log).*

40. Defendants were thus able to learn directly from Mr. Governale in early February 2004, *i.e.*, at the very outset of the Apollo Management Action:

A. That the client files for Apollo Management had been in Mr. Governale's continuous custody from 1998 through the time of the meeting with defendant Corwin in February 2004, and that when Mr. Governale had changed firms in 2003, the client files for Apollo Management had been transferred intact to Mr. Governale at his new firm. *Exhibit 5 (Governale depos.).*

B. That although Apollo Management's law firm had been involved in a merger as of February 1, 1998, the merger had simply involved a change of name, with Mr. Governale and the other lawyers remaining at the same desks, and with the client files remaining in the same place. *Exhibit 5 (Governale depos.).*

C. That the client files of Apollo Management which had been in Mr. Governale's continuous custody from 1998 to the time of the meeting contained copies of a different, genuine amendment done in May 1998, together with the transmittal letter for such document; and <u>contained other documents</u> prepared for Apollo Management during 1998. *Exhibit 19*

(genuine May 13, 1998 amendment), Exhibit 20 (5/8/2004 transmittal letter); e.g., Exhibit 21 (1/28/1998 ltr.)

D. That the client files of Apollo Management which had been in Mr. Governale's continuous custody from 1998 to the time of the meeting contained no evidence whatsoever of the supposed "amendment" that Brandon Fradd burned. *Exhibit 5, Exhibit 22 (3/28/07 ltr.); See Exhibit 21 (Fradd 11/30/2005 Aff.).*

E. That Mr. Governale had no knowledge of the supposed "amendment." *Exhibit 5 (Governale depos.).*

F. That all the documents in the client files of Apollo Management contained a computer identification number in small type in the lower left-hand corner; whereas the document that Brandon Fradd burned contained no such number. *Exhibit 19 (genuine May 13, 1998 amendment), Exhibit 20 (5/8/2004 transmittal letter therefor), Exhibit 21 (1/28/1998 ltr.)*; *compare Exhibit 3 ("May 21, 1998 amendment").*

41. The defendants thus knew facts in early February 2004 that showed that the "amendment" was not in fact prepared by the law firm in May 1998 as Brandon Fradd had claimed, and in fact had not been prepared by the law firm at all.

42. Despite knowing these facts in early February 2004, defendant Greenberg Traurig and defendant Corwin consented to deceit by their client Brandon Fradd, to try to prevent these facts from coming to light, and to obtain the dismissal of the Apollo Management Action by passing off as genuine a pre-burning photocopy of the "amendment."

E. Defendants' Deception of Supreme Court That Defendant Corwin Held the Original "Amendment" Safely In Escrow.

43. Despite knowing the facts set forth above, and despite knowing that their client had burned the original of the "amendment" the day after it was requested for forensic chemical testing, defendant Greenberg Traurig and defendant Corwin drafted and filed a motion to dismiss the Apollo Management Action, based on a photocopy of the "amendment" made before the burning ("the Dismissal Motion"). The Dismissal Motion was expressly based on purported "documentary evidence," *i.e.*, the contract "amendment," without disclosing that the original had just been burned under extremely suspicious circumstances. *Exhibit 24 (2/17/2004 motion), Exhibit 25 (Fradd 2/13/2004 Aff).*

44. The Dismissal Motion based on the pre-burning photocopy did not disclose that the "amendment" had been burned, even though at the time the Dismissal Motion was made, there was pending before the same court a motion by Mr. Melcher to obtain the original of the "amendment" for forensic chemical testing, setting forth facts indicating that the "amendment" was in reality a forged, back-dated document. *Exhibit 26 (2/5/2004 motion for original).*

45. When Mr. Melcher's motion to obtain the original of the "amendment" for forensic testing came on to be heard before the Supreme Court, defendant Greenberg Traurig and defendant Corwin misled the Supreme Court to try to prevent the burning of the original from being discovered, in the hopes that the Dismissal Motion based on the pre-burning photocopy would be granted, and thus prevent the Supreme Court and plaintiff from ever discovering that the "amendment" had been burned under highly suspicious circumstance, that the files of the law firm that supposedly drafted it contained no evidence that it ever existed, and that the lawyers who supposedly drafted it had no knowledge of it.

46. When Mr. Melcher's motion to obtain the original came on to be heard on February 23, 2004, defendant Corwin misleadingly represented to the Supreme Court that the original of the "amendment" was safely in his custody "in escrow" and would remain so during the pendency of the motion to obtain the original. On that same day, February 23, 2004 plaintiff's counsel wrote to defendant Corwin stating:

> Since our discussions this afternoon Justice Cahn were not stenographically recorded, I want to confirm that you told Justice Cahn that the originals of the two documents which are the subject plaintiff's motion, and are Exhibits A and B thereto, were in the possession of your firm, and were being held in escrow, pending determination of the motion.
>
> If I have not correctly recorded your statement to Justice Cahn, please let me know immediately, so that I can bring the dispute to the attention of the court. *Exhibit 27 (2/23/2004 ltr.)(Emphasis added.)*

47. Defendant Corwin wrote back on February 24, 2004 stating: "I am in receipt of your letter of yesterday and confirm that the originals are in the possession of my firm." *Exhibit 28 (2/24/2004 ltr.*) Defendant Corwin subsequently confirmed in a letter dated March 19, 2004 that he had in fact represented to the Supreme Court on February 23, 2004 that "the originals were in my possession, in escrow." *Exhibit 29 (3/19/2004 ltr.)*

48. At the time defendant Corwin made the representation to the Supreme Court that he was holding the original safely "in escrow," defendant Greenberg Traurig and defendant Corwin knew that their client Brandon Fradd had recently burned the document. *Exhibit 15 (Fradd 2/1/2004 email)*. At the time defendant Corwin made the representation to the Supreme Court, defendant Greenberg Traurig and defendant Corwin were not holding the original in escrow, but only the scorched remnant thereof.

49. Defendants made the false and misleading statement to the Supreme Court

that they were holding the originals "in escrow" to mislead the Supreme Court that the document was safe and had not been tampered with, when the truth was the opposite. Defendants falsely and misleadingly represented to the Supreme Court that they were holding the originals "in escrow" with intent to deceive, to prevent the Supreme Court and plaintiff from ever discovering that the "amendment" had been burned under highly suspicious circumstance, that the files of the law firm that supposedly drafted it contained no evidence that it ever existed, and that the lawyers who supposedly drafted it had no knowledge of it.

50. By making the foregoing false and misleading representation to the Supreme Court that they were holding the originals safely "in escrow," the defendants succeeded in forestalling any decision by the Supreme Court on the plaintiff's motion to obtain the original for forensic testing, until well after the Dismissal Motion had been fully briefed and submitted for decision.

F. Defendants' Deception of Supreme Court On A Motion To Dismiss by Passing off A Photocopy As Genuine Without Disclosing the Burning of the Original

51. As noted, defendant Greenberg Traurig and defendant Corwin wrote and filed the Dismissal Motion based on the "documentary evidence" of the "amendment," without disclosing that the original had been burned by their client Brandon Fradd the very day after he was sued.

52. The affidavit drafted for Brandon Fradd on the Dismissal Motion by defendant Corwin and defendant Greenberg Traurig claimed that Brandon Fradd had a May 1998 "oral agreement" with plaintiff to dramatically reduce plaintiff's contractual share of the company's profits, which "oral agreement" was then embodied in the supposed "May 21, 1998 amendment." *Exhibit 25 (Fradd 2/13/2004 Aff).*

53. The affidavit drafted by defendants for Brandon Fradd further stated that the

"amendment" had been prepared by the law firm for Apollo Management. *Id.* This statement was of critical importance, because the written Operating Agreement of Apollo Management expressly required that any contract amendments had to be approved by the law firm. *Exhibit 30 (Operating Agreement at 27)*. The affidavit stated:

> [I]n the Spring of 1998, I had conversations with Plaintiff whereby we agreed to amend Article VII of the Operating Agreement * * * *
>
> I asked Apollo Management's law firm to prepare an amendment to the Operating Agreement reflecting this allocation of net profits ("Net Profits Amendment"), which they did. I received the Net Profit Amendment and eventually signed it on May 21, 1998. A copy of the Net Profit Amendment signed by me is attached hereto . . . . *Exhibit 25 (Fradd 2/13/2004 Aff at 4)(Emphasis added.)*

54. At the time they drafted this affidavit for Brandon Fradd to sign under oath in support of a motion to dismiss based on passing off a pre-burning photocopy of the "amendment" as genuine, defendant Corwin and defendant Greenberg Traurig had personal knowledge that Brandon Fradd had recently burned the original of the "amendment," and had done so the very day after plaintiff had requested the original for forensic chemical testing.

55. At the time they drafted this affidavit for Brandon Fradd sign under oath, in support of a motion to dismiss based on passing off a pre-burning photocopy of the "amendment" as genuine, defendant Greenberg Traurig and defendant Corwin Traurig knew of the complete absence of any evidence in the files of the law firm that supposedly prepared the "amendment" that such "amendment" had ever existed, and that the lawyer who had represented Apollo Management continuously since 1998, Jack Governale, had no knowledge of it, and that the other lawyer James Beckwith likewise had no knowledge of it. *Exhibit 5 (Governale depos.); Exhibit 9 (Corwin 2/4/2004 ltr), Exhibit 10 (Beckwith depos.)*

56. Defendant Corwin and defendant Greenberg Traurig nevertheless passed off

a photocopy of the burned "amendment" as genuine, and made the materially misleading omission of the facts known to them demonstrating that the document was not authentic, and that it did not exist in May 1998, but rather had been forged by Fradd in December 2003 and then back-dated by five and a half years.

57. Defendants passed off the photocopy of the burned "amendment" with intent to deceive the Supreme Court and the plaintiff, and to obtain dismissal of the Apollo Management Action on the basis of the "documentary evidence" of the "amendment," and thereby prevent plaintiff from ever obtaining the original, or ever learning that the "amendment" had been rendered untestable by means of burning, or from ever learning that the files of the law firm that supposedly prepared the "amendment" had no record of it, or that the lawyer(s) who supposedly drafted it had no knowledge of it.

G. Defendants' Concoction of A False Story About Apollo Management's Law Firm "Going Out of Existence," And An "Unavailable" Crucial Witness

58. Although at the time of the Dismissal Motion, Mr. Melcher did not know of the burning of the "amendment," Mr. Melcher categorically denied under oath that there was ever an "oral agreement" to change the 1998 written contract, and he swore that he never saw the supposed "May 21, 1998 amendment" until December 18, 2003, the day after he informed Brandon Fradd that he was prepared to sue. *Exhibit 31 (Melcher 3/7/2004 Aff at 15.)*

59. In response, defendant Corwin and defendant Greenberg Traurig then commenced the deceptive cover-up which they presented continuously for the next three and a half years, with intent to deceive the Supreme Court and the plaintiff.

60. Defendant Greenberg Traurig and defendant Corwin presented a cover up based on two false facts, known by defendant Greenberg Traurig and defendant Corwin to be untrue:

(a) that the law firm which had supposedly prepared the document "had gone out of existence," and (b) that a retired lawyer in Vermont was the draftsman of the "amendment," but that he refused to return any of their phone calls or provide evidence.

61. Both of those things were false.

62. In furtherance of this plan to deceive, defendant Greenberg Traurig and defendant Corwin drafted a reply affidavit for their client Brandon Fradd to sign under oath on the Dismissal Motion, which stated:

> I asked Apollo Management's law firm Lowenthal Landau Fischer & Bring, PC – **which has gone out of existence** with some of its attorneys joining the firm of Wolf, Block, Schorr & Solis-Cohen – to prepare an amendment to the Operating Agreement reflecting this allocation of net profits (the "Net Profit Amendment"), which they did.
>
> James Beckwith, the partner who prepared and handled the documents regarding Apollo Management . . . . retired from the practice of law subsequent to the events at issue in this case and no longer resides in the state of New York. I have been hampered in my attempts to obtain documents created, and documentation of the work done, by Lowenthal, Landau, Fischer & Bring, PC on behalf of Apollo Management in 1998 because **the firm no longer exists** and because **Mr. Beckwith is unavailable**. *Exhibit 32 (Fradd 3/12/2004 Aff. at 9). (All emphasis added.)*

63. The two material statements in the above affidavit were false, and were known by defendants to be false.

64. The statement that the law firm for Apollo Management had "gone out of existence" and that Brandon Fradd was thus "hampered" in obtaining its files was false, and was known by defendant Greenberg Traurig and defendant Corwin to be false, for the reasons previously stated herein.

65. The statement that James Beckwith was "unavailable" to provide evidence

was false, and was known by defendant Greenberg Traurig and defendant Corwin to be false.

66. On February 3, 2004, more than a month before drafting the foregoing affidavit for Brandon Fradd to sign under oath, defendant Corwin interviewed Mr. Beckwith by telephone, and was assured by Mr. Beckwith of his willingness to provide information on behalf of his former client. *Exhibit 9 (Corwin 2/4/2004 ltr).*

67. On February 4, 2004, defendant Corwin sent Mr. Beckwith a letter by Federal Express, which addressed Mr. Beckwith as "Jim Beckwith," and which stated:

> **I'd like to thank you for speaking with me** yesterday and also for taking the time to review the enclosed documents.
>
> As we discussed, I have enclose a copy of the complaint filed by James Melcher against Brandon Fradd and Apollo Management. * * * *
>
> Would you please review the Operating Agreement and the amendments and let me know **whether you recall drafting** any of these documents . . . . *Exhibit 9 (Corwin 2/4/2004 ltr)(All emphasis added.)*

68. Defendant Corwin and an associate lawyer actually interviewed Mr. Beckwith by telephone very shortly after he received the documents, as shown by the following questions put to Mr. Beckwith by that associate lawyer when Mr. Beckwith was finally deposed in Vermont on June 11, 2007:

> Q. Do you recall receiving a telephone call from me and Leslie Corwin in the beginning of the year 2004, approximately three and a half years ago?
>
> A. Can't say that I do. I know there was. I just don't remember when it was.
>
> Q. Do you recall a telephone call about three and a half years ago though?
>
> A. To be honest, no.
>
> [Greenberg Traurig associate]: I would like to mark Beckwith Exhibit 6 [2/4/2004 Corwin letter].

Q. Do you recognize this document?

A. I do.

Q. Do you recall receiving that letter?

A. I do.

Q. And the date on that letter is February, 2004?

A. It is.

Q. And do you recall receiving documents with that letter?

A. Yes.

Q. Do you recall receiving a telephone call about the time that you got that--after you got that letter?

A. That I don't recollect. *Exhibit 10 (Beckwith depos at 29-30)(Emphasis added.)*

69. Prior to putting those questions to Mr. Beckwith about his having had a phone call with the associate lawyer and defendant Corwin, the Greenberg Traurig associate had access to the files of Greenberg Traurig which showed the actual date of the phone conversation, including internal memos, time sheets, and communications involving the associate lawyer, defendant Corwin and Brandon Fradd.

70. Prior to his telephone interview by defendant Corwin and the associate lawyer in February 2004 referred to above, Mr. Beckwith had actually spoken by telephone with his former client Brandon Fradd, and had agreed to his former client's request to speak by telephone with defendant Corwin. Mr. Beckwith testified as follows:

Q. You said Mr. Fradd called you within the last few years?

A. He did.

Q. What transpired?

A. Just-- Nothing other than indicating that, that there was this lawsuit, and that, I think at that point it was just Leslie was going to reach out and talk to me about some documents that were put together from prior life. * * * *

Q. Did you indicate you would take the call from Mr. Corwin?

A. I did.

Q. Did you take a call from Mr. Corwin?

A. I believe that I did. *Exhibit 10 at 34.*

Q. Was it about the lawsuit?

A. It was.

Q. Did they ask you any questions about the drafting of the documents regarding Apollo Management?

A. I don't recollect.

Q. Did you indicate that you'd be willing to speak with them?

A. I did.

Q. Did you indicate you'd be willing to provide an affidavit if requested?

A. I don't recollect.

Q. **Were you ever asked to do an affidavit**?

A. **No**. *Exhibit 10 (Beckwith depos. at 35)(All emphasis added.)*

71. Mr. Beckwith did not fail to return phone calls from defendant Corwin or defendant Greenberg Traurig. Mr. Beckwith testified as follows:

Q. Did you receive messages from Mr. Corwin that you failed to return?

A. I don't recollect.

Q. Is it your practice to return phone calls from people who are calling you

about former clients?

A. It is.

Q. I'm going to show you again Beckwith 6, the February 4th letter, 2004.

A. Yes.

Q. Is that approximately when the time frame was you had your phone call with Mr. Corwin?

A. I don't recollect.

Q. You don't recollect any other attempts by Mr. Corwin or Ms. Heller to speak with you other than recent ones for scheduling?

A. That's correct. *Exhibit 10 (Beckwith depos. at 36-37)(All emphasis added.)*

72. There is no evidence that defendant Greenberg Traurig or defendant Corwin ever again attempted to contact Mr. Beckwith after the foregoing February 2004 telephone interview, until defendant Corwin wrote to Mr. Beckwith two years later in February 2006, regarding the scheduling of his deposition. Defendant Corwin's February 6, 2006 letter sent by Federal Express stated:

> At your earliest convenience, could you please call [the associate lawyer] or me to confirm that you are available on those dates. *Exhibit 34 (2/6/2006 ltr).*

73. Mr. Beckwith telephoned defendant Greenberg Traurig the same day that he received the foregoing Federal Express letter, *i.e.*, on February 7, 2006. *Exhibit 35 (2/7/2006 email).* This documentary evidence corroborates that Mr. Beckwith did not fail to respond to attempts by defendants Greenberg Traurig or defendant Corwin to communicate with him.

74. On information and belief, the records of defendant Greenberg Traurig will further corroborate that defendant Corwin and defendant Greenberg Traurig's statements that Mr. Beckwith "resisted" all attempts at communication were outright lies:

A. In the years 2004 and 2005, and on information and belief continuing to the present, in order to make a long-distance telephone call from the offices of defendant Greenberg Traurig, it was necessary to enter the client code to which the call could be charged.

B. In the years 2004 and 2005, and on information and belief continuing to the present, the billing partners/shareholders for clients of defendant Greenberg Traurig received a "Pre-Bill Memo" or other such documents, which itemized each phone call charged to the client, and set forth the duration thereof, and the Greenberg Traurig extension from which the call had been placed.

75. On information and belief, there is no evidence in the foregoing records of defendants that they ever again attempted to reach Mr. Beckwith after their telephone interview of Mr. Beckwith in the time frame of February 2004, either for the rest of the year 2004, or any part of the year 2005.

76. Defendant Greenberg Traurig and defendant Corwin knew from their February 2004 telephone interview of Mr. Beckwith that he was not in fact the draftsman of the "amendment." Mr. Beckwith so testified at his deposition, and testified that he was not in fact the draftsman of any Apollo Management documents during Spring 1998, but had delegated that responsibility to Jack Governale. *Exhibit 10 (Beckwith depos. at 17-18, 21-23, 45).* Mr. Beckwith further testified:

Q. You previously stated that <u>the only document</u> that <u>you drafted</u> concerning Apollo Medical Fund Management was the <u>private placement memorandum</u>?

A. That's correct. *Exhibit 10 at 21(Emphasis added.)*

77. Because of the February 2004 telephone interview of Mr. Beckwith after defendants had sent Mr. Beckwith the "amendment" and other Apollo Management documents to

review, all of the foregoing information was available to defendant Greenberg Traurig and defendant Corwin at the time they drafted the March 12, 2004 affidavit for Brandon Fradd to swear to. *Exhibit 32 (Fradd 3/12/2004 affidavit).*

78. Defendant Greenberg Traurig and defendant Corwin both engaged in deceit, and consented to deceit by their client Brandon Fradd, with intent to deceive the Supreme Court and plaintiff, by presenting the false cover up that the law firm for Apollo Management "had gone out of existence" and that the draftsman of the "amendment" could not be presented to authenticate it because he was "unavailable" and refused to ever return any phone calls.

79. By such deceit and consent to deceit, defendant Greenberg Traurig and defendant Corwin intended to deceive the court and plaintiff, and to obtain dismissal of the Apollo Management Action based on a pre-burning photocopy of the "amendment," without the burning by their client Brandon Fradd of the original "amendment" ever coming to light, and without plaintiff or the court ever discovering that the law firm that supposedly prepared the "amendment" had no record of it, or ever discovering that the lawyers who supposedly drafted the "amendment" had no knowledge of it.

H. The Defendants' Successful Prevention Of Supreme Court's Consideration Of The Burning In Connection with the Dismissal Motion

80. After the Dismissal Motion based on the mere photocopy of the burned "amendment" was fully briefed, argued, and submitted for decision, the Supreme Court ruled on March 15, 2004 that the original of the "amendment" be disclosed to Mr. Melcher.

81. Defendant Corwin thereafter sent plaintiff's counsel the "original" of the "amendment" on March 18, 2004. *Exhibit 36 (3/18/2004 ltr.)* All that was enclosed, however, was the scorched remnant of the original that remained after Brandon Fradd's burning thereof. This was

the first time that plaintiff learned of the burning.

82. By the time that plaintiff learned of the burning, the Dismissal Motion had been fully briefed, argued, and submitted for decision.

83. After learning of the burning, and after obtaining custody of the scorched remnant, plaintiff transmitted the scorched remnant to a forensic chemist. The forensic chemist, who is a former instructor at the FBI Academy, determined that the scorching was "consistent in color and texture with oxidation of the paper through heat." *Exhibit 37 (Lyter report)*. The forensic chemist also determined that the left edge of the document had pieces of polyethylene or a mixture of polyethylene and polypropylene, and determined: "The appearance of the material indicates that the pieces were attached . . in the process of melting." Id.

84. The forensic chemist (and former FBI instructor) noted that the burning of the document had made it impossible to conduct forensic-dating of the document:

> The melting point for polyethylene is approximately 137.5°C, or about 280°F. Paper is expected to burn at about 425 to 450°F. It is apparent that Exhibit A-3 was exposed to temperatures in the range of 280 to 450°F in the area of the document that extends from the discoloration on the right side of the document, through the signature, to the polymer pieces on the left side of the exhibit. <u>This level of heating</u> would <u>render any analytical technique</u> that measures the changes to ball pen ink by exposure to environmental conditions over time, <u>useless</u>. *Exhibit 37 (4/13/2004 report)(Emphasis added.)*

85. By burning the "amendment" the day after he was sued, Brandon Fradd made it impossible to establish to a scientific certainty that it was a recent, back-dated fabrication.

86. However, the physical evidence that remained showed, from the face of the document, that the burning was not "accidental." The forensic chemist (and former FBI instructor) who examined it stated:

> [T]he <u>presence of melted polymer material</u> and the <u>alignment of the</u>

> discoloration with the signature **suggests something other than chance or accident**. *Exhibit 37 (All emphasis added.)*

87. On April 14, 2004, after the burning was discovered, the Supreme Court granted plaintiff's application for inspection of Brandon Fradd's apartment where the burning took place, and an expedited deposition of Fradd.

88. At this deposition, taken just weeks after the burning, Fradd claimed not to recollect virtually all the material facts regarding the burning. *Exhibit 16 (Fradd 4/21/2004 depos.)*

89. Plaintiff submitted to Supreme Court the transcript of the expedited Brandon Fradd deposition pursuant to affidavit dated May 11, 2004.

90. In response, defendant Corwin and defendant Greenberg Traurig drafted an affidavit for Brandon Fradd to sign under oath on May 19, 2004. In such affidavit drafted by defendants, Brandon Fradd claimed that the "amendment" was authentic, and expanded upon and renewed the deception about the law firm "going out of existence," and the supposedly "unavailable" witness that supposedly "hampered" him from showing its authenticity:

> As I stated in a previous affidavit, I have been hampered in my attempts to obtain documents created, and documentation of the work done, by Lowenthal Landau Fischer & Bring, PC on behalf of Apollo Management in 1998 **because the firm no longer exists** and because Mr. Beckwith is unavailable and outside the jurisdiction of this Court.
> * * * *
>
> I have tried to contact Mr. Beckwith, and my attorneys have tried to contact Mr. Beckwith, **but to no avail**. *Exhibit 13 (Fradd 5/19/2004 Aff. at 6)(All emphasis added.)*

91. Each of the material facts set forth above was false and was known by defendants Corwin and Greenberg Traurig to be false, for the reasons stated above.

92. Although the Supreme Court allowed plaintiff to submit the Fradd deposition and the plaintiff's forensic chemist's report and other documents in connection with the Dismissal

Motion, by the time the information could be submitted, the Dismissal Motion had already been submitted for decision several months before.

93. On information and belief, because they were filed months after the Dismissal Motion was fully briefed and submitted for decision, the papers about the burning never caught up with the motion papers on the Dismissal Motion, and the Supreme Court decided the Dismissal Motion without having seen the papers regarding the burning. The basis for the information and belief is that letters about the burning that should have been in the case file in the County Clerk's office were not in the County Clerk's files. Defendants in the Apollo Management Action actually moved to strike those letters from the record on appeal of the Dismissal Motion, by submitting an affidavit attesting that the documents were not in the County Clerk's files. *Exhibit 38 (Corwin 7/29/2005 Aff.), Exhibit 39 (Edmunds 7/29/2005 Aff.)*.

94. In addition, it is unlikely that Supreme Court would have made no mention whatsoever of such an important issue in its 13-page decision, if the papers regarding the burning had been in the Court's actual possession at the time it rendered its decision.

95. By successfully concealing the burning of the "amendment" until after the Dismissal Motion was fully briefed, defendant Greenberg Traurig and defendant Corwin thus prevented consideration of the burning by the Supreme Court in connection with the Dismissal Motion. Although the Dismissal Motion was denied on other grounds, defendant Greenberg Traurig and defendant Corwin thereafter used their successful deceit and delay to contend that the Supreme Court had rejected the evidence of the burning of the forged, back-dated document, or had treated the issue as so unimportant as to merit no mention.

I. Defendants' Continued Deception about Supposedly Disrupted Law Firm Files and Mr. Beckwith's Supposed Refusal to Talk

96. Although the Dismissal Motion was denied on other grounds, defendant Greenberg Traurig and defendant Corwin continued the deception continuously thereafter, and continuously presented the false cover up that the files of the law firm that should have contained the "amendment" had been disrupted, and most of all, that the lawyer who was the supposed draftsman of the "amendment" and who supposedly could authenticate it was "unavailable" to provide evidence and had "resisted" all attempts at communication. By consenting to deceit and engaging in deceit in presenting this cover up, defendant Greenberg Traurig and defendant Corwin successfully prevented plaintiff from obtaining relief based on Brandon Fradd's destruction of this crucial piece of "evidence," which had frustrated forensic chemical testing that would have proven to a scientific certainty that the "amendment" was a back-dated forgery.

97. Depositions in the Apollo Management Action did not commence until Fall 2005.

98. After the December 2005 deposition of Mr. Governale revealed that the law firm files regarding Apollo Management had not been disrupted, but rather had been in Mr. Governale's continuous custody, and that Mr. Governale had represented Apollo Management continuously from 1998, plaintiff moved to obtain communications between defendants and Brandon Fradd regarding the burning of the amendment, based on among other things the crime-fraud exception. *Exhibit 40 (12/20/2005 notice of cross-motion) Exhibit 41 (12/20/2005 Aff.).*

99. By affidavit of defendant Corwin dated December 28, 2005, in an attempt to intimidate plaintiff, and in a successful effort to prevent disclosure of documents in the possession of defendant Greenberg Traurig and defendant Corwin regarding the burning, defendant Corwin

asserted his own unimpeachable personal integrity, asserted that plaintiff and plaintiff's counsel were indulging in false *ad hominem* attacks against him, asserted that the factual presentation in plaintiff's motion papers was slanderous, and demanded sanctions against plaintiff and his counsel. *Exhibit 7 (Corwin 12/28/2005 Aff.).*

100. After attacking plaintiff's good faith, defendant Corwin then personally swore to the deception about the "unavailable" witness who would never return phone calls:

> The likely reason documents are missing, or Mr. Governale cannot recall certain events, is because the law firm that represented defendant Apollo Management . . . went through a number of changes since January 1998, and the attorney primarily responsible for defendant Apollo Management in the first half of 1998, James Beckwith, **has unfortunately been unavailable to talk and has resisted all prior attempts to do so.** *Exhibit 7 at 9 (All emphasis added.)*

101. That statement was an outright lie, for the reasons already set forth.

102. Defendant Corwin and defendant Greenberg Traurig presented that deceit to the Supreme Court, to deceive the Supreme Court and the plaintiff that the document was authentic but that their client Brandon Fradd could not present evidence from the supposed draftsman, because the supposed draftsman would never return their phone calls. Defendants Greenberg Traurig and Corwin thereby succeeded in preventing disclosure of the communications in possession of such defendants regarding the burning of the document.

J. Defendants' Continued Deception That Mr. Beckwith Was "Unavailable" To Prevent Plaintiff From Obtaining Relief Based on the Burning of the Document

103. Not long after the December 2005 Governale deposition confirmed that there had been no disruption of the law firm files, plaintiff obtained by subpoena to Apollo Management's former law firm Wolf Block the billing records and records of professional time for the period

February 1 to December 31, 1998, *i.e.*, the time when the supposed "May 21, 1998 amendment" had supposedly been prepared by such law firm.

104. The Wolf Block time and billing records showed no evidence whatsoever that the forged, back-dated "May 21, 1998 amendment" ever existed. *Exhibit 42 (Wolf Block records).* As Hon. Beverly Cohen subsequently determined:

> The bill from Wolf Block gives descriptions of other documents prepared during the invoice period. It does not show preparation of this amendment. *Exhibit 6 (Order 8/15/2006) (Emphasis added.)*

105. After obtaining the Wolf Block time and billing records, plaintiff relied on them in a motion before the Appellate Division, First Department, to stay an order requiring plaintiff to produce privileged documents.

106. In response to that motion, defendant Corwin again attacked plaintiff's good faith, and then again personally swore to the deception about the supposed draftsman of the "amendment" being "unavailable" and resisting all efforts at contact. In an affidavit sworn to January 13, 2006 and submitted to the Appellate Division, First Department, defendant Corwin falsely stated:

> As is his typical litigation tactic, Mr. Jannuzzo [plaintiff's counsel] attacks the veracity of Defendants in his affirmation. * * * * Defendants' counsel . . . when the Net Profits Amendment was created, was James Beckwith . . . .
>
> To date, Mr. Beckwith has been unavailable to talk to us and has **resisted all prior** attempts to do so. *Exhibit 8 (Corwin 1/13/2006 Aff at 9-10)(All emphasis added.)*

107. Those statements were outright lies, for the reasons previously set forth. Defendant Corwin had interviewed Mr. Beckwith nearly two years before, after sending Mr. Beckwith the "amendment," and as a result of what defendant Corwin learned in the interview, he never even asked Mr. Beckwith to submit an affidavit.

108. On January 17, 2006, based on the Wolf Block time records showing no evidence that the "amendment" ever existed, plaintiff moved in Supreme Court by Order to Show Cause to strike the Answer of defendants in the Apollo Management Action. *Exhibit 43 (O/S/C entered 1/17/2006), Exhibit 44 (JAJ 1/12/2006 aff.)*

109. While the motion to strike was pending, defendant Greenberg Traurig represented to plaintiff on January 23, 2006 that Mr. Beckwith had been served with a deposition subpoena in Vermont, and defendant Corwin confirmed this in a subsequent letter. *Exhibit 45 (Corwin 1/26/2006 ltr).*

110. On the basis of the representation by defendant Greenberg Traurig and defendant Corwin that the deposition was now imminent of this supposedly "unavailable" witness who was the supposed draftsman of the "amendment," plaintiff withdrew the motion to strike without prejudice to renewal after the deposition of Mr. Beckwith. *Exhibit 46 (1/25/2006 ltr).* The motion to strike was withdrawn by order dated January 31, 2006. *Exhibit 47 (1/31/2006 order).*

111. The deposition of Mr. Beckwith was scheduled for March 20 and 21, 2006 in Vermont. *Exhibit 35 (Greenberg Traurig 2/7/2006 email).*

112. However, having obtained the withdrawal of plaintiff's motion to strike based on the imminency of the Beckwith deposition, just two weeks before the Beckwith deposition was to take place, defendant Greenberg Traurig and defendant Corwin prevented it from taking place on pretextual grounds.

113. Defendants asserted to the Supreme Court that the Beckwith deposition should be indefinitely stayed pending plaintiff's appeal of an order requiring plaintiff to disclose privileged documents from plaintiff's counsel, on the pretextual grounds that in order to take the Beckwith deposition regarding the events of Spring 1998, defendants in the Apollo Management Action

"required" the invoices from plaintiff's counsel for the time period beginning in the year 2004, *i.e.*, six years after the events about which Mr. Beckwith would be deposed. *Exhibit 48 (Corwin 3/8/2006 ltr)*.

114. That the grounds were pretextual is shown by the prior letter of defendant Corwin, in which defendant Corwin contended only that the depositions of the two persons with actual knowledge of the foregoing 2004 invoices should be stayed pending the appeal, not Mr. Beckwith. *Exhibit 49 (Corwin 1/17/2006 ltr).*

115. Nevertheless, the Supreme Court relied on the defendants' representation, and granted the stay of the Beckwith deposition ex parte. *Exhibit 50 (O/S/C 3/8/2006).* The stay obtained on pretextual grounds resulted in the delay of the Beckwith deposition from March 20, 2006 to June 11, 2007, a period of one year and three months.

116. The Beckwith deposition finally took place in Brattleboro, Vermont on June 11, 2007. At that deposition, Mr. Beckwith gave the testimony previously quoted, showing that the statements by defendant Greenberg Traurig and defendant Corwin that Mr. Beckwith was "unavailable" and had "resisted" all attempts at contact, were outright lies. *Exhibit 10 (Beckwith depos.)*

117. However, by means of the deceit and consent to deceit described above, defendant Greenberg Traurig and defendant Corwin succeeded in delaying plaintiff for three and a half years from obtaining relief based on the burning of the crucial piece of "evidence," which prevented plaintiff from proving to a scientific certainty that the document was a back-dated forgery.

K Defendants' Reliance On Their Successful Deceit As Grounds for a Baseless Motion for "Sanctions" Against Plaintiff

118. By Order To Show Cause entered July 16, 2007, plaintiff moved to strike the

Answer in the Apollo Management Action on grounds of the deceit and/or destruction of evidence committed by the defendants's clients in that action. *Exhibit 74 (7/16/07 OSC).*

119. In response to that motion, defendants signed a baseless motion for "sanctions" against plaintiff and his counsel for allegedly "asserting material factual statements that are patently false and misleading." *Exhibit 75 (8/7/07 Corwin aff).* The allegedly false statements were that because of defendants' deceit in concealing the burning, until long after submission of the motion to dismiss in the Apollo Management Action, the "evidence about the burning never caught up with the papers on defendants' motion to dismiss." *Exhibit 75 at 6 (Corwin Aff. 8/7/07).* In other words, defendants relied on their own deceit, set forth above, as grounds for "sanctions" against the party who was injured by defendants' deceit.

120. The IAS court, Hon. Herman Cahn, was the one knowledgeable about whether the "late" submitted evidence of the document burning had been considered in deciding the motion. Neither in his decision on the plaintiff's July 16, 2007 motion to strike, nor in any other decision either orally or in writing, did Justice Cahn ever suggest that plaintiff was incorrect in his statements that the evidence of burning had not actually reached the court in connection with the decision of the motion to dismiss. Justice Cahn not only considered the merits of plaintiff's July 16, 2007 motion to strike, but his decision recited in detail plaintiff's contentions that defendants' client had burned the document intentionally to frustrate forensic testing. *Exhibit 64 (9/17/07 Dec); see also Exhibit 65 (12/18/08 Dec).*

121. The IAS court, Hon. Herman Cahn, denied the motion to strike by decision and order dated September 17, 2007, on grounds that a jury trial was necessary, stating:

> Fradd's credibility regarding when he signed the Net Profits Agreement, the circumstances surrounding the burning of the document and his statements regarding the attorneys who allegedly

drafted it, are issues of fact to be submitted to a jury. *Exhibit 64 (Emphasis added.)*

122. In opposing the plaintiff's July 16, 2007 motion to strike pleadings, the defendants included in their motion papers the report of a forensic ink chemist, Dr. Valerie Aginsky, whom defendant Corwin asserted in an affidavit had tested the document in 2004 and found it to be genuine. *Exhibit 75 at 6 (Corwin Aff. 8/7/07)*. As shown below, the documentary evidence shows that defendants obtained the report of Dr. Aginsky by fraud.

L. Defendants' Deception of An Expert Witness and Obtaining of His 2004 Report And His 2007 Affidavit by Deceit

123. In preparation for the jury trial, defendants on behalf of their clients in the Apollo Management Action submitted on November 9, 2007 an exhibit list which included as "Exhibit B" (*i.e.*, the second exhibit), a pre-burning photocopy of the purported "contract amendment." *Exhibit 76 (Defs. 11/9/07 exhibit list).* Defendants thus still consented to their client's presentation to the court as genuine of a document that was a back-dated fabrication, which their client burned in order to frustrate forensic testing, during the time defendants represented him.

124. In preparation for the jury trial that Justice Cahn had ruled was required, plaintiff obtained forensic evidence from an arson expert, which showed that the "accidental" burning sworn to by defendants' client, and presented as truthful by defendants in response to the motion to strike, was physically impossible, and that the only way the document could have obtained its scorch marks was by intentionally holding it over a clean burning flame such as a residential gas stove. *Exhibit 77 (11/20/07 Jannuzzo ltr).*

125. The trial of the Apollo Management Action was scheduled to commence jury selection on November 26, 2007. On that day, defendants in the Apollo Management Action escaped trial, by an oral motion made by defendant Corwin to "clone" plaintiff's home and office computers,

because of alleged deficiencies in the search for documents three years earlier in 2004. The order of the IAS court for "cloning" was stayed, and then reversed, by the First Department. *Exhibit 63 (6/5/08 Dec).*

126. Deprived of the opportunity to go to trial in November 2007 with the forensic evidence that showed that the "accidental" burning was physically impossible, by Order to Show Cause entered December 5, 2007, plaintiff renewed his motion to strike pleadings for deceit, based on the prior evidence, plus the forensic evidence referred to above. *Exhibit 52 (O/S/C). Exhibit 53 (Malanga Aff), Exhibit 54 (Malanga video CD).*

127. Plaintiff's renewed motion to strike pleadings was further supported by the affidavit of a forensic ink chemist, which noted that the 2004 report of Dr. Valerie Aginsky obtained by defendants did not state that Dr. Aginsky was informed that the document had been heated just prior to it being sent to him for examination; and opining that no reputable ink chemist would have given an opinion on the document, if he had been informed it had been recently heated. *Exhibit 55 (Lyter 11/30/08 Aff).*

128. On behalf of their clients in the Apollo Management Action, defendants opposed the renewed motion to strike with a December 2007 affidavit of Dr. Aginsky; however Dr. Aginsky never denied that he had not been informed, prior to his testing it, that the document had been recently heated. *Exhibit 56 (Aginsky aff.) and Exhibit 57 (Aginsky 2004 report).*

129. Study of the 2004 Aginsky report attached to his affidavit revealed that Dr. Aginsky had in fact been deceived by the defendants when they presented the document to him in 2004. Aginsky's 2004 report states that he was presented with a two-page document for examination. *Exhibit 57 at 1.* Aginsky's report is addressed to defendant Corwin, and states that he received the document from defendants. *Id.*

130. However, at the time the document was presented to Dr. Aginsky, the first page no longer existed; it had been purportedly burned and discarded by Brandon Fradd on January 27, 2004. *Exhibit 16 at 18, 22-23 (Fradd 4/21/04 dep.), Exhibit 58 (Fradd dep video CD)*; *Exhibit 59 at 6 (Resp. Req for Admission).*

131. Dr. Aginsky tested the document two weeks later, on February 12, 2004. *Exhibit 57 at page 2.* The first page of the document thus did not exist at the time of Dr. Aginsky's testing. That means that defendants substituted a photocopy for the original of that page, and presented Dr. Aginsky with a purported "original" two-page document, without telling him they had switched the pages.

132. Defendants did so to conceal from Dr. Aginsky that their client had in fact subjected the document to heating. Dr. Aginsky's report said nothing about any heating or burning; it stated only that there is a "diffuse spot of brown color" on the second page of the document. *Exhibit 57.*

133. In addition to the above deceit to obtain his 2004 report, on information and belief defendants committed additional deceit regarding Dr. Aginsky, when the defendants solicited his affidavit in December 2007 to oppose plaintiff's renewed motion to strike pleadings. On information and belief, defendants did not disclose to Dr. Aginsky the existence of the forensic evidence showing that it was scientifically impossible for the document to have been heated accidentally. The basis for the information and belief is that the Aginsky affidavit recites the information presented to him in connection with his affidavit, and there is no mention of the affidavit of plaintiff's arson expert, Robert Malanga, P.E., nor any indication that Aginsky knew there was forensic evidence on how the burning actually occurred. *Cf. Exhibit 56 with Exhibit 53 (Malanga Aff).*

134. The basis for the information and belief is further that Dr. Aginsky's affidavit assumes that the document was only briefly and accidentally exposed to heat of a type like a candle flame, whereas the Malanga Affidavit and video shows that the document could only have obtained its marks by intentional heating over a high intensity clean burning heat source like a residential gas stove. *Cf. Exhibit 56 (Aginsky Aff) with Exhibits 53 and 54 (Malanga Aff and video*).

M. Defendants' Deceit Before The Appellate Division On The Appeal Of The Renewed Motion To Strike

135. Defendants placed the Aginsky report and affidavit in the record on the motion to strike, knowing that they had deceived Aginsky. Defendants then relied on the Aginsky report and affidavit on the appeal to the Appellate Division, First Department of the denial of the motion to strike.

136. On the appeal, plaintiff stated that the timing of defendants' obtaining the Aginsky report showed that it was obtained to determine whether any still-testable ink on the document had survived their client Brandon Fradd's heating of it over his gas stove, so that Brandon Fradd could sign an affidavit swearing that the document was genuine, having been assured by an ink chemist that his evidence-tampering had succeeded in destroying the ink. *Exhibit 60 (Appl. Brief at 8-9, 43, fn. 8).* Dr. Aginsky did his tests on February 12, 2004, and Brandon Fradd swore to the affidavit the next day, February 13, 2004. *Cf. Exhibit 25 with Exhibit 57.*

137. Defendants misled the First Department by representing that Aginsky's report was not written until five days after Brandon Fradd signed the affidavit. *Exhibit 61 (Resp. Br. at 12-13).* In fact, on information and belief, defendants were informed by telephone (or fax or other means of communication) by Aginsky, on or shortly after he tested the document on February 12, 2004, that he had found no recent ink on it The basis for the information and belief includes:

A. The fact that Aginsky received the document on February 11, 2004 and tested it on February 12, 2004 which indicates that he was paid an extra fee to expedite the testing within approximately 24 hours. *See Exhibit 57.* Such haste and expense was unnecessary, unless defendants intended to have the results prior to the time when defendant Brandon Fradd had to sign the affidavit.

B. The fact that Aginsky's report states that his method could not establish any date older than two years, which meant that there was no reason to test the document in the first place, unless defendants believed that the document was a recent forgery. *Id.* Five year old ink is no longer testable, and there is no scientific possibility that five year old ink can be confused with two month old ink. *E.g., Exhibit 57 (Aginsky rept), Exhibit 62 (Lyter 5/13/04 Aff).*

138. The denial of plaintiff's motion to strike was upheld by the First Department by decision dated June 5, 2008, which gave as its grounds that the jury would have to determine the question of willfulness of the burning. *Exhibit 63 (6/5/08 Dec.), see Exhibit 64 (9/17/07 Dec.)*

139. The record before the First Department contained the deceitful statements and expert affidavits and reports obtained by deceit, referred to above, which were intended by defendants create issues of fact in order to escape a decision on the motion papers striking their client's pleading.

N Defendants' Continued Presentation of The Fabricated Evidence As Genuine In the Face of Irrefutable Documentary Evidence That It Never Existed

140. The jury trial was then scheduled for jury selection on October 29, 2008.

141. Shortly before the trial, the former law firm for defendants' client in the Apollo Management Action produced pursuant to the parties' outstanding subpoenas, all their electronic files for Apollo Management, dating back to 1995, obtained from back-up tapes. *Exhibit 79 (10/28/08*

Wolf Block email), Exhibit 80 (list of Wolf Block documents). The production of the electronic files showed that the "contract amendment" never existed, for despite the production from the back up tapes of all client documents for Apollo Management, there is no evidence of the existence of the "contract amendment."

142. Counsel for plaintiff immediately wrote to defendants, with a copy to their counsel in this action:

> It is now beyond the peradventure of a doubt that Greenberg Traurig's client, R. Brandon Fradd, is perpetrating a fraud on the court. The attached list of documents from the computers of Fradd's law firm removes all doubt.
>
> The attached list of documents created by Wolf Block covers the period 1996 through 2003. There is no mention anywhere of the phony "amendment" that Brandon Fradd has repeatedly sworn was created by that law firm. * * * * Greenberg Traurig can no longer deny that if it continues its representation of this defendant, it will be assisting him in the perpetration of a fraud on the court. *Exhibit 81 (10/28/08 ltr.)*; *see also Exhibit 82 (10/31/09 ltr.)*

143. Defendants refused to withdraw. *Exhibit 83 (Corwin 10/31/08 ltr.)* Moreover, defendants continued to present the fabricated, back-dated "contract amendment" to the court as genuine, and continued to present it as "Exhibit B" on their trial exhibit list.

O. Defendants Continued Presentation Of the Fabricated Evidence As Genuine, Even After Their Own Arson Expert Informed Them Of The Results of His Forensic Examination

144. Plaintiff's arson expert, Mr. Robert Malanga, P.E. examined the original document on October 14, 2009, and observed that there was no evidence on the document of products of soot, particulates, aerosols or other evidence of combustion, which ruled out that it had been burned in the "accidental" manner sworn to by Brandon Fradd. *Exhibit 68 (10/24/08 pltf. expert disc.)*

145. Defendants retained Mr. Eugene West, a retired F.D.N.Y. Fire Marshall, as their arson expert. *Exhibit 69 (defs. expert discl.)*. On October 24, 2008, in the presence of plaintiff's counsel and plaintiff's arson expert, Mr. West conducted a forensic examination of the original of the supposed "contract amendment." Mr. West examined the document both with the unaided eye, and with a 20x magnifying instrument hooked up to a laptop computer, into which he uploaded the images from the 20x magnifying instrument.

146. On information and belief, on October 24, 2008, Mr. West likewise found no evidence of soot, particulates, aerosols or other evidence of combustion. The basis for the information and belief is that: (a) there in fact was no such evidence, (b) the expert designation signed by defendants included no mention of any disagreement by Mr. West with this finding, (c) defendants never provided plaintiff with the images uploaded by Mr. West to his laptop computer during his forensic inspection, and (d) defendants never presented any evidence from Mr. West to contradict the findings of Mr. Malanga that the document contained no evidence of combustion.

147. The concurrence by Mr. West with the results of the forensic examination meant that defendants knew that there was no scientific dispute that the document could not have obtained its marks in the "accidental" manner sworn to repeatedly by their client Brandon Fradd, including in affidavits which defendants prepared for him.

148. On information and belief, although Mr. West was designated by defendants as expert, Mr. West declined to testify as an expert. The basis for the information and belief is that in addition to his concurrence with the forensic examination results described above, Mr. West thereafter saw in court the video of the deposition of Brandon Fradd, at which Fradd swore to the alleged "accidental" burning, which video deposition on information and belief defendants previously

withheld from him; and further, that although Mr. West was present in court through the three non-consecutive days of a *Frye* hearing on the testimony of plaintiff's arson expert Mr. Malanga, and even though Justice Cahn inquired of defendants whether they would present expert evidence in support of their *Frye* motion, Mr. West did not testify even at the *Frye* hearings on plaintiff's arson expert evidence. *Exhibit 70 at 238, 273 (Frye trans. 11/24/08).*

P. The Apparent Refusal Of The Forensic Ink Expert To Testify After Disclosure Of The Previously-Withheld Facts and Fraudulent Switching of Pages

149. Defendants moved on behalf of their clients in the Apollo Management Action to exclude the expert of evidence of Mr. Malanga, and failed. *Exhibit 65 (12/18/08 Dec.).* The IAS court (Hon. Herman Cahn) retired shortly thereafter.

150. Defendants tried unsuccessfully to exclude Mr. Malanga's expert testimony before Justice Schweitzer, and failed again. *Exhibit 66 at 2 (2/17/09 Order); Exhibit 67 (2/5/09 trans. at 112 -115).* On February 5, 2009, Judge Schweitzer set jury selection for May 7, 2009. *Exhibit 66 (2/17/09 Order).*

151. On information and belief, prior to the trial defendants informed Dr. Aginsky of one or all of the following: (a) the existence of the Malanga forensic evidence, (b) that the arson expert they retained had in fact concurred with the findings of Mr. Malanga that there was no evidence on the document of products of combustion (such as soot, particulates and aerosols), which ruled out that that the document had acquired its scorch marks in the "accidental" manner sworn to by Brandon Fradd, and/or (c) that the defendants had secretly switched a photocopy of the first page of the "amendment" for the original when they presented the document to him in 2004.

152. On information and belief, despite notice on February 5, 2009 that jury selection would commence on May 7, 2009, defendants made no arrangements to have Dr. Aginsky

travel to New York for the trial, and/or Dr. Aginsky made no such arrangements.

153. On information and belief, either Dr. Aginsky declined to testify on behalf of defendants' client in the Apollo Management Action once he learned this information, or defendants knew that Dr. Aginsky would decline to testify if he learned this information, and despite defendants' presentation of the affidavit of Dr. Aginsky to Justice Cahn and the First Department to create an issue of fact so as to obtain a trial, never intended to call Dr. Aginsky to testify at a trial.

Q. The Defendants' Tacit Concession In the Apollo Management Action That the "Amendment" Was A Fabricated Back-Dated Document

154. As of the date of trial, May 11, 2009, defendants' trial exhibit list on behalf of their client in the Apollo Management Action, dated May 11, 2009, continued to list as "Exhibit B" the fabricated and back-dated "contract amendment." *Exhibit 84 (5/11/09 defs. exh. list).* This list was filed in the office of the County Clerk, New York County, on May 28, 2009.

155. As of the date of trial on May 11, 2009, the exhibit volumes presented by defendants in the Apollo Management Action on behalf of their client contained a photocopy of such "Exhibit B."

156. After repeatedly presenting to all courts before whom they had appeared the false statement under oath of their client Brandon Fradd that the "contract amendment" was genuine, and had been burned "accidentally," and after having escaped motions to strike pleadings by presentation of the affidavits and documents referred to above, on May 11, 2009, the day the jury trial in the Apollo Management Action was to commence, defendants suddenly moved orally on behalf of their client before the new trial judge, Hon. Donna Mills, to withdraw their client's sworn assertions that there had ever been a contract "amendment," to withdraw that portion of their First Affirmative Defense that expressly relied on the existence of such an "amendment," and to preclude

plaintiff from introducing any evidence that Brandon Fradd had ever sworn there was an amendment, and to preclude plaintiff from offering any evidence that the "amendment" was a back-dated forgery that Brandon Fradd intentionally tampered with to frustrate forensic chemical testing. Justice Mills improvidently granted this application, defying a decision and order of Justice Schweitzer denying such relief. *Cf. Exhibit 67 (2/5/09 trans.)*

157. After their escape from the motion to strike pleadings only by obtaining the right to a jury trial on the authenticity of the document, defendants' sudden withdrawal of the document is a tacit concession that they knew it was a fabricated piece of evidence.

R. The Collateral Estoppel Effect Of The Jury Verdict And Post-Trial Decision On The Issue of Fraud On The Court

158. In the jury trial, despite the refusal of the trial judge to allow plaintiff to present any evidence regarding the fabrication of, and subsequent evidence-tampering with, the phony "contract amendment," the jury rejected Brandon Fradd's story that there had ever been an "oral modification" of the written contract. *Exhibit 71 (5/27/09 jury verdict).*

159. In applying the jury's verdict, the trial court entered judgment for plaintiff on the law on the Sixth Cause of Action, for denial of indemnification to Brandon Fradd, on the basis of Fradd's commission of "any fraud, bad faith, wilful misconduct or gross negligence." Justice Mills determined that Fradd had sworn falsely under oath on material issues in the case, including the issue that concerned the fabricated and back-dated evidence. Justice Mills determined that Fradd had sworn falsely that there was an "oral modification" of the contract. On the basis of that determination, Justice Mills entered judgment for liability on the Sixth Cause of Action. *Exhibit 72 (8/31/2009 dec.)*

160. Justice Mills ruled as follows:

> [The jury verdict] further found that Fradd's sworn assertion there was an "oral modification" was false, and that Fradd's sworn assertion that Mr. Melcher had waived his rights by not objecting was false.
>
> As such, this Court finds that the jury verdict, as noted above, requires that judgment be entered for plaintiff on the Sixth Cause of Action. *Exhibit 72 at 3 (8/31/09 Dec.) (Emphasis added.)*

161. The foregoing decision was the basis for the Judgment signed by Justice Melvin Schweitzer on January 19, 2010, which determined the Sixth Cause of Action in favor of plaintiff. *Exhibit 78 (1/19/2010 Judgment).*

162. The jury verdict, the decision, and the Judgment, referred to above, are collateral estoppel/res judicata on the question of the commission by Brandon Fradd of a fraud on the court by the repeated assertion of false sworn testimony by defendants' client Brandon Fradd that the phony "amendment" was "genuine." The jury trial determined there was never any modification to the contract, and thus, there was never any "amendment."

P. The Recent Consequences of Defendants' Deceit or Consent to Deceit And The Effect On Plaintiff's Ability to Collect Damages In The Apollo Management Action

163. The numerous deceits and consents to deceit set forth above significantly delayed adjudication of the Apollo Management Action. One consequence thereof was that the trial of the Apollo Management Action was delayed until May 2009.

164. During approximately the first months of 2009, Brandon Fradd essentially bet the entire hedge fund which was the subject of the Apollo Management Action, and according to Fradd, his own personal assets, on a massive short sale of the stock of Dendreon, a biotech company. *Exhibit 73 (Fradd 5/1/09 aff.)* On April 14, 2009, the stock price of Dendreon at least tripled. *Id.* On the morning of April 15, Brandon Fradd's broker BNP Paribas made a margin call to cover the massive short position, and Brandon Fradd and Apollo Management defaulted on the margin call. *Id.*

165. On or about the morning of April 15, 2009, BNP Paribas seized all of the assets of Apollo Management, and all of the assets of Brandon Fradd in its control, and liquidated all the assets found therein. *Id.* The accounts of Apollo Management and Brandon Fradd personally did not contain enough assets to cover the loss. *Id*. As a direct result, Apollo Management is without assets and is judgment proof. *Id.*

166. BNP Paribas supervised the disposition of Brandon Fradd's personal assets. *Id.* On information and belief, based on the foregoing affidavit, Brandon Fradd lost most or all of his liquid assets.

167. In addition, counsel for Fradd represented to Hon. Melvin Schweitzer on January 19, 2010 at a hearing on plaintiff's motion for an order pursuant to CPLR 5229 in the Apollo Management Action, that as a result of the foregoing circumstances, Fradd had become indebted to BNP Paribas in the approximate amount of $4.5 million, of which Fradd had as of January 19, 2010 paid approximately $3 million.

168. Any sums that cannot be collected from Fradd are the result in whole or in part of the delay of the case by the deceit and consent to deceit by defendants, and defendants are liable to plaintiff in treble damages therefor.

169. Plaintiff has appealed the trial court's refusal to apply the jury verdict to the causes of action against Brandon Fradd personally that were reserved for the court, for money had and received and constructive trust; the jury finding of equitable estoppel in favor of Apollo Management, and the jury verdict that the written contract allowed the removal of plaintiff as a Member of Apollo Management. If judgment is entered against Apollo Management or Brandon Fradd after the appeal, any sums that cannot be collected are the result in whole or in part of the delay of the case by the deceit and consent to deceit by defendants, and defendants are liable to plaintiff in treble damages

therefor.

S. The Culture of Defendant Greenberg Traurig And Its Imprisoned or Disbarred Partners

170. The misconduct described herein is consistent with the pattern and practice of defendant Greenberg Traurig.

171. According to a report published in The American Lawyer, a large number of lawyers at defendant Greenberg Traurig have been imprisoned or disbarred for acts of dishonesty in the last five years, and the firm has paid substantial fines. *Exhibit 51 (Am.Law 3/1/2004).*

172. The firm "hired and nurtured Jack Abramoff, the Washington, D.C., lobbyist who engineered a scheme to defraud Native American tribes out of millions." *Id*. Mr. Abramoff is serving a ten-year sentence in federal prison.

173. The New York-based chair of defendant Greenberg Traurig's tax department, Jay Gordon, was subject to disbarment proceedings in New York for taking kickbacks related to tax shelters. The disbarment proceedings were resolved by Mr. Gordon resigning from the bar. *Id.*

174. Defendant Greenberg Traurig and/or individual lawyers have paid more than $8.5 million in fines to federal regulators for allegedly helping to cover up financial misconduct at Hamilton Bank, N.A. *Id.*

175. Philadelphia-based Greenberg Traurig lawyer Leonard Ross pled guilty to fraud and conspiracy charges in 2005, and was sentenced to 30 months in federal prison. *Id.*

176. Chicago-based Greenberg Traurig partner Victor Reyes was named as an unindicted co-conspirator in a federal prosecution for political corruption, and left the firm. *Id.*

177. As noted, Washington-based Greenberg Traurig Jack Abramoff is serving a 10-year sentence for defrauding Native American tribes. Prior to his indictment, he took in $15 million

in fees over a three-year period, at rates that were significantly in excess of industry norms, and engaged in shady accounting practices, but defendant Greenberg Traurig failed to investigate. *Id.*

178. According to the foregoing published report:

> [M]any former Greenberg lawyers say that the same qualities that yield great financial rewards-the emphasis on profit, the appetite for growth, the bureaucracy-free culture-have allowed rogue lawyers and lobbyists like Abramoff to join the firm and, until they're caught, thrive. *Id.*

FIRST CAUSE OF ACTION
Judiciary Law Sec. 487

179. All prior allegations are repeated herein.

180. Judiciary Law Section 487 provides, in pertinent part:

> An attorney or counselor who: (1) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent as to deceive the court or any party; * * * *
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action. *(Emphasis added.)*

181. Pursuant to the Court of Appeals recent decision in *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14, 903 N.E.2d 265, 268, 874 N.Y.S.2d 868, 871 (2009), it is irrelevant whether the deceit was successful: "The operative language at issue – 'guilty of any deceit' – focuses on the attorney's intent to deceive, not the deceit's success."

182. Because of their consent to deceit and deceit set forth above, defendant Greenberg Traurig and defendant Corwin are liable to plaintiff within the meaning of Section 487, and are liable to plaintiff for treble damages.

183. By reason of the deceit or consent to deceit by the defendants, plaintiff was damaged as follows:

A. Legal fees and disbursements plaintiff incurred or will incur in the Apollo Management Action, in an amount to be proven at trial, not less than $1.5 million, trebled pursuant to Section 487, together with statutory interest thereon.

B. Loss of the use of the money plaintiff is owed by Apollo Management and/or Brandon Fradd at issue in the Apollo Management Action, measured by statutory interest pursuant to CPLR 5001, in an amount to be proven at trial, trebled pursuant to Section 487, together with statutory interest thereon.

C. Legal fees and disbursements paid to defendant Greenberg Traurig by Apollo Management (of which plaintiff is a co-owner) pursuant to plaintiff's Sixth Cause of Action in such case, in an amount not presently known to plaintiff, trebled pursuant to Section 487, together with statutory interest thereon.

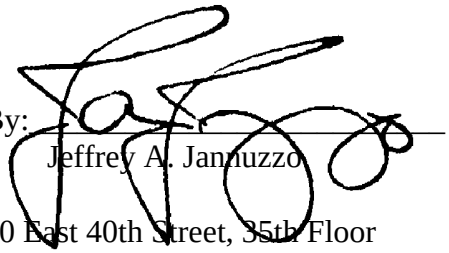
D. Any amounts which plaintiff is due in the Apollo Management Action from Apollo Management or Brandon Fradd, which is not readily collectible as a result of the delay occasioned by defendants' actions, in principal amount not less than $13 million as set forth above, trebled pursuant to Section 487, together with statutory interest thereon.

WHEREFORE, plaintiff JAMES L. MELCHER demands judgment against defendants GREENBERG TRAURIG, LLP and LESLIE D. CORWIN in the amounts stated above, and for such

other and further relief as the Court may deem proper, including costs, disbursements, interest and attorneys' fees.

Dated: New York, New York
January 22, 2010

JEFFREY A. JANNUZZO, ESQ.
Attorney for plaintiff James L. Melcher



By: _____
Jeffrey A. Jannuzzo

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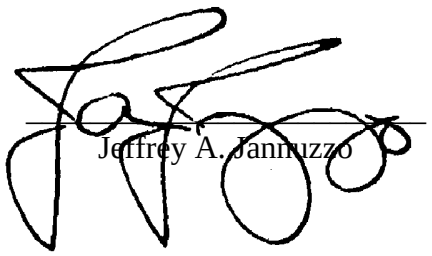
Complaint-2010-1-22-First Amend.wpd

Affirmation of Service

JEFFREY A. JANNUZZO, an attorney admitted to practice in this State, hereby affirms pursuant to CPLR 2106 that I served a copy of the foregoing FIRST AMENDED COMPLAINT upon counsel for defendants, by ELECTRONIC SERVICE on:

McCarter & English LLP
Counsel for defendants
245 Park Avenue, 27th Floor
New York, NY 10167
(212) 609-6800

this January 22, 2010



Jeffrey A. Jannuzzo