

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs,

against

LEWIS PERDUE,

Defendant.

Civil Action No.

Index No. 04 CV. 7417 (GBD)

ECF CASE

-----X
LEWIS PERDUE,

Counterclaim-Plaintiff,

against

DAN BROWN, RANDOM HOUSE, INC., COLUMBIA
PICTURES INDUSTRIES, INC., SONY PICTURES
ENTERTAINMENT INC., SONY PICTURES
RELEASING CORPORATION, and IMAGINE FILMS
ENTERTAINMENT, LLC,

Counterclaim-
Defendants.

-----X
**DEFENDANT AND COUNTERCLAIM PLAINTIFF LEWIS PERDUE'S
MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF/COUNTERCLAIM DEFENDANTS' MOTION
FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE,
SUMMARY JUDGMENT ON PLAINTIFF'S DECLARATORY JUDGMENT CLAIM
AND IN SUPPORT OF PLAINTIFFS' AND COUNTERCLAIM DEFENDANTS' MOTION TO
DISMISS THE COUNTERCLAIMS, OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS**

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PRELIMINARY STATEMENT

The Defendant and Counterclaim Plaintiff, Lewis Perdue ("Perdue"), is an extremely successful author, having had nineteen of his books published,¹ twelve of which are fiction² and seven of which are non-fiction. Although exact sales figures of Perdue's books are not known because of the bankruptcy of his earlier publisher, Pinnacle Books, approximately 2.5 million of his books have been sold according to Pinnacle documents. In contrast, Plaintiff Dan Brown ("Brown") was an almost completely unknown author until the publication of *The Da Vinci Code* ("*Da Vinci Code*") in 2003.³

In 1985, Publisher Donald I. Fine, Inc. published a Perdue novel entitled *The Linz Testament* ("Linz"). In 1988, *Linz* was again published by Pinnacle/Kensington Publishing. Thereafter, Perdue extensively re-worked *Linz* into *Daughter of God* and in 2000 *Daughter of God* was published by Tom Doherty Associates LLC. *Daughter of God* has received extensive critical acclaim, some critics being of the opinion that it is considerably superior to *Da Vinci Code*, which was published three years later.

One of the many other novels authored by Perdue is *The Da Vinci Legacy* ("Legacy"), which was published by Pinnacle Books in 1983. Although Perdue's copyright infringement claims in this action are based primarily on *Daughter of God*, *Legacy* is mentioned because Brown also plagiarized many of the elements of *Legacy* in writing *Da Vinci Code*.⁴

¹ The 20th book is scheduled to be published in September 2005.

² The 13th work of fiction will be published in September, 2005.

³ During an interview conducted on May 8, 2004, Jason Kaufman, Brown's editor, indicated that Brown's earlier three novels had sold only 20,000 copies prior to the publication of *Da Vinci Code*.

⁴ For example, on page 18 of *Legacy*, Perdue made a mistake by stating that Leonardo's Codex was written on parchment. In fact, it was written on linen. In *Da Vinci Code*, page 300, Brown made the same mistake. According to *Nimmer on Copyright* § 13.03 [C], p. 13 – 78.8 "the courts have regarded the existence of common errors in two similar works as the strongest evidence of copying as a factual matter." Realizing that, Elizabeth A. McNamara, one of Plaintiff's attorneys, includes as Exhibit "F" to her affidavit ("Exhibit 'F'") an obscure page from a website of LabView and FieldPoint that also indicates that the Codex was written on parchment. Because of the obscure nature of the website page, it is extremely unlikely that Brown ever even saw that page before writing *Da Vinci Code*. Absent an affidavit from Brown, there is no basis for the Court to conclude that Brown ever saw Exhibit "F."

In a rush to end this action almost before it has begun, Plaintiffs⁵ have asked that a motion for judgment on the pleadings and one to dismiss be converted to a motion for summary judgment. In cases of copyright infringement involving novels, Plaintiffs contend that all that is required in virtually every case is for the Court to simply read the novels to determine whether there is any basis upon which a jury could find "substantial similarity" of the "protected elements" contained in the competing novels. Relying upon *no admissible evidence whatsoever*, and instead based solely upon their unsubstantiated shoot-from-the-hip "say-so," Plaintiffs wrongly contend that, by mistaken and misrepresented descriptions of Brown's own work, and unassisted by evidence of any kind, the Court can determine the genre of the novels, can determine the scenes typically found in novels of that genre, can distinguish historical facts from those that are simply "made up," and can effectively "throw away" the use of significant and important ideas that are essential elements of the plots of each story. Plaintiffs, struggling to show that the novels have nothing in common, rip out the guts of *Daughter of God*, thus misrepresenting what the novel is really about and focus exclusively on dissimilarities, while ignoring the substantial similarities shared by both novels.

Both novels tell the same story. They are stories about religion and religious discovery. They both involve anthropomorphic notions as to the sexuality of God. They both involve the belief that predominated in earlier times, which belief still exists today, that God is a union of the male and female. They both involve the efforts of the Roman Emperor Constantine and the Catholic Church in the fourth century to change the notion of God from one having both male and female components to one that is male only. Both novels involve a woman who is a symbol of the Great Goddess, also presented as the lost female component of God. Both novels involve

⁵ All references to "Plaintiffs" in this memorandum are intended to include the Counterclaim Defendants who have joined in the motion.

physical evidence that proves the existence of the Great Goddess. In both novels, the discovery of that physical evidence will rock the foundations of the Catholic Church. In both novels, the Catholic Church is aware of the existence of that physical evidence and seeks to keep the world from learning of its existence. In both novels, rival groups or organizations seek to obtain possession of the physical evidence for different reasons. In both novels, one of the two rival organizations is part of the Catholic Church. In both novels, the organizations that are part of the Catholic Church seek to obtain the physical evidence in order to blackmail or coerce the Pope. Both novels involve a remarkably similar hero and heroine possessing remarkable abilities who unwittingly and unwillingly become caught up between the rival organizations seeking to obtain possession of the physical evidence. In both novels, the lives of the hero and heroine are threatened as a result of the quest for the physical evidence. In both novels, the hero and heroine are guided by obscure, artistic, historically based and other clues and are called upon to solve mysteries in furtherance of the quest for the physical evidence. Works of art are very important in both novels. In both novels, a gold key is hidden in or behind a work of art. In both novels, the gold key, which does not turn a lock, can be used to open a box in either a bank in Zurich or a branch of a Zurich bank. In both novels, the hero and heroine find combination-locked objects in the Zurich bank boxes that will help them locate the physical evidence. In both novels, the heroine expresses the belief that the object of the quest has found her and not the other way around. Early in both novels, a man in control of a treasure trove of art is murdered. In both novels, the hero and heroine are forced to rely upon the assistance of a person who first appears to be their friend, but who later turns out to be their mortal enemy. In both novels that so-called friend threatens the lives of the hero and heroine. In both novels, the heroine is at first unaware that God was once considered as having both male and female attributes. In both novels, once

the heroine becomes aware of the male/female nature of God, she undergoes a personal transformation. In both novels, the physical evidence is either not found or is lost. Towards the end of both novels, there is an expression of the belief that actual possession of the physical evidence is not as important as is the belief in what the physical evidence represents. All of these events happens in substantially the same order and context. The substantial similarities between the two novels, including actual dialogue, go on and on and will be discussed later in this brief.

In deciding this motion, it should be remembered that Brown and Random House are the ones who fired the opening salvo by suing Perdue for a declaratory judgment. It was only after Plaintiffs commenced this action that Perdue counterclaimed for copyright infringement. If the novels are really as dissimilar as Plaintiffs contend, and if they have absolutely nothing in common, one must wonder why Plaintiffs have elected to go to the time, trouble and expense of bringing this lawsuit. As Perdue demonstrates in this brief, Plaintiffs commenced this action because the novels are substantially similar. Once discovery is commenced and completed, the evidence will show that Brown plagiarized *Daughter of God* when he wrote *Da Vinci Code*.

STATEMENT OF FACTS

In their rush for summary judgment, Plaintiffs have sped right past the heart and substance of both *Daughter of God* and *Da Vinci Code*. Consistent with their approach, Plaintiffs would undoubtedly call Homer's *Odyssey* a boating story, Dostoyevsky's *Crime and Punishment* a crime story, or Kafka's *Metamorphosis* a mystery/thriller about a giant bug. While offered tongue-in-cheek, the foregoing illustrates that a party's unilateral use of labels to pigeon hole a novel into a genre to which it may or may not belong can lead to false results. Based upon nothing more than their unilateral use of a "genre" label such as "thriller," "mystery," "mystery/thriller," or "murder mystery," Plaintiffs set into motion a series of conclusions and observations that cannot be justified by the novels themselves.

The inclusion of certain themes in both novels is anything but typical of such genre. Simply stated, notions of a divine feminine, the unity of the male and female in pagan worship, the importance of Sofia, the "Great Goddess" of the Gnostic Gospels, the fact that history is relative and is controlled by victors, not losers, the importance of the Roman Emperor Constantine in requiring a transition from a female to a male dominated religion, as well as to create a unified religion having a common dogma, the quest not only for physical objects, but for spiritual fulfillment as well, are not the type of things that are common to the mystery/thriller genre. Lewis Perdue first incorporated those elements in a novel when *Linz Testament* was published in 1985. Perdue later extensively re-worked *Linz Testament* into *Daughter of God*, which was published in January 2000.⁶ Dan Brown was the second to incorporate those elements in 2003 when Random House published *Da Vinci Code*. That is a chronological fact that cannot be disputed by the Plaintiffs in this action.

Plaintiffs have also woefully overlooked the important use of symbols in both novels. Based both on a reading of *Da Vinci Code* itself, as well as statements by Brown and his publisher, Brown has constructed a novel that rejects the sort of literal interpretation given to it by Plaintiffs in this action.⁷

⁶ The novel was actually on store shelves in December 1999.

⁷ For example, the surname of Brown's heroine, Sophie Neveu, is translated as meaning "New Eve." Likewise, the name "Zoe" of Perdue's heroine, Zoe Ridgeway, means "Eve." And, of course, Sophie and Sophia are the same name meaning "wisdom" and also names of the Great Goddess. Furthermore, the names of a number of the other characters in *Da Vinci Code* have a symbolic meaning. Jonas Faukman is Langdon's editor in Brown's novel. Faukman is an anagram of Kaufman. Jason Kaufman is Brown's real-life editor. Bezu Fache, is the top police investigator in Brown's novel. Bezu is a name taken from Holy Blood, Holy Grail. Fâche, in French, means "angry." Fache is constantly portrayed as angry. "Fache carried himself like an angry bull." (DVC:21). Similarly, Marie Chauvel, Sophie Neveu's grandmother, is named for an actual historical figure, Marie Chauvel de Chauvigny, a bishop and head of the Église Gnostique Apostolique, the French Church of Gnostic Apostles (<http://www.gnostique.net/ecclesia/succession.htm>). Jacques Sauniere, the murdered Da Vinci Scholar was an actual priest interested in occult and Grail. [Taken from Holy Blood, Holy Grail.] Andre Vernet was head of Swiss Bank in Brown's novel. In real life, Vernet was Emeritus French professor at Exeter and was one of Brown's teachers.

The elements of both *Daughter of God* and *Da Vinci Code* that are discussed below are used in both novels to achieve the same results in the same way. The basic plots involve the unwitting and unwilling search by a remarkably similar hero and heroine to locate extraordinary documents and relics that prove the divinity of the identical sacred woman who had been wronged by the church and who is a symbol for the Great Goddess. The documents will shake the foundations of the Catholic Church. Key to the documents is proof that the church has conducted a spin campaign to smear the Goddess in order to support the male-domination in church ranks. The actions are called a cover-up. The cover-up is necessary because Jesus was a feminist.

The quests are launched by the murders of art experts who are curators of fabulous collections. Immediately before their deaths, the art experts, through various clues, gave the hero and heroine cryptic and puzzling clues to find the things they were looking for. The message is an awesome religious puzzle that provides the heroine a clue leading to a painting that was painted on wood. The painting provides the heroine with a gold key. Gold keys are rare in the real world because of their impracticality due to gold's softness. The golden key provides access to a safe deposit box in a Zurich Bank. The contents of the container from the safe deposit box are another puzzle that sends them on a quest for a container of religious relics and documents.

The Quest is further complicated by a secretive brotherhood with a contentious relationship with the Vatican headed by a man of the cloth who believes the Catholic Church has strayed and that his Brotherhood's way is the true faith. The hero and heroine are stalked by people who are intent on killing them and who are seeking the religious relics and documents themselves. The hero and heroine need help for the journey and turn to a shapeshifter who joins the Quest. The Shapeshifter manipulates the hero and heroine. The shapeshifter has no

compunction about killing those close to him. The shapeshifter has an intense emotional relationship with the Catholic Church and is motivated by that. The shapeshifter almost wins but ultimately loses the prize. In the end, the hero and heroine realize that faith in the ideas behind the physical objects of their quest is more important than the physical objects themselves.

The elements used by both authors are virtually the same, if not identical. The following are elements that are common both to *Daughter of God* and *Da Vinci Code*.

A. The Role of the Female

Da Vinci Code and *Daughter of God* tell essentially identical stories. The conceptual starting point of both novels involves the notion that in the so-called pagan religions, as well as in early Christianity, the female played a much more important role than today. Significantly, *Da Vinci Code* is not so much about the marriage of Jesus and Mary Magdalene as it is about the larger issue of the suppression of the divine feminine in Christianity. The marriage of Jesus and Mary Magdalene is merely symbolic of that suppression. The issue of symbolism is vital in understanding the substantial similarity between the novels. Brown has plagiarized Perdue's symbolism time after time. And both authors have clearly stated their use of symbolism in the characters, the names chosen, etc.

In antiquity, the female was believed to have been the ultimate Creator or to have shared in the divinity of God. This Goddess was considered as being a part of the deity by ancient peoples. In addition, the sexual union between man and woman had religious overtones and was anything but prurient. That changed and both novels explore the identical ways in which that change came about. References to "DOG" mean *Daughter of God*. References to "DVC" mean *Da Vinci Code*. The items in the tables are taken *verbatim* from the novels. The foregoing represent themes that are common both to *Daughter of God* and to *Da Vinci Code*.

1. Discussion of the Sexual Union of Man and Women in the Novels

<p>Most sex laws control the behavior of women and not men. Men transgress with a wink and a nod; women get pilloried, shunned or burned at the stake. Over the ages, the male-centric religious spin doctors couldn't handle the incomprehensibly sensual nature of the Great Goddess Creator, so they gradually marginalized her into a local fertility deity and turned sex from a pleasurable, spiritual experience into a dirty little act. It was about the only way their big heads could exercise any control over their little heads. DOG, p. 110</p>	<p>Women, once celebrated as an essential half of spiritual enlightenment, had been banished from the temples of the world. There were no female Orthodox rabbis, Catholic priests, nor Islamic clerics. The once hallowed act of Hieros Gamos—the natural sexual union between man and woman through which each became spiritually whole—had been recast as a shameful act. Holy men who had once required sexual union with their female counterparts to commune with God now feared their natural sexual urges as the work of the devil, collaborating with his favorite accomplice . . . <i>woman</i> DVC, p. 125</p>
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B. The Great Goddess is Re-cast as Being Evil

Both novels discuss how the early church re-cast the Great Goddess into something that was evil.

<p>The serpent and leaf of the sycamore fig - that's what that is -- "Thalia pointed to the stone "Are two of the most potent symbols of the Great Goddess. That's why the authors of Genesis represented Satan as a snake - they were saying the Great Goddess was evil. They had to make her look as bad as possible so that they could close her temples and forbid her worship. DOG, p. 204</p>	<p>As part of the Vatican's campaign to eradicate pagan religions and convert the masses to Christianity, the Church launched a smear campaign against the pagan gods and goddesses, recasting their divine symbols as evil. DVC, p. 37</p>
<p>Thalia nodded. "I think the conference at Nicea was really as much about Sophia as it was Christ. The orthodox Christians had changed Wisdom to the male word, Logos. The real fight, the real heretics were those who argued that the church should return to its roots - to Sophia and not Logos - and acknowledge that she was an original and inseparable part of the Creator. They argued that it was wrong to try and restrict God to one sex or one form or as the God</p>	<p>The Priory believes that Constantine and his male successors successfully converted the world from matriarchal paganism to patriarchal Christianity by waging a campaign of propaganda that demonized the sacred feminine, obliterating the goddess from modern religion forever. DVC, p. 124</p>

of just one people. They said this set a human limit on the limitless and that was blasphemy.” “They obviously lost.” DOG, p. 205	
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C. The Role of the Emperor Constantine

The Emperor Constantine is central to both novels.⁸ While many historians dispute the contention, both novels state that the Roman Emperor Constantine, known as the first Christian Emperor, was not baptized a Christian until he was on his death bed. Before his baptism and death, Constantine convoked the Council of Nicea. At the time of the Council, unrest existed between the Romans, who worshiped many pagan gods, and the early Christians. In addition, there were disagreements among early Christians regarding certain pivotal religious issues. By importing some of the elements of the pagan religion into Christianity, Constantine made Christianity acceptable to the pagans and caused many to convert to Christianity. In addition, the Council of Nicea determined the acceptable boundaries of Christian dogma for the first time. Through his military might, Constantine enforced the dogma that had been promulgated by the Council.

In a nutshell, as a result of Constantine and the Council of Nicea, the following changes occurred:

- Christianity officially became a male dominated religion in which the female played little or no role.⁹ Religious texts arguing to the contrary were suppressed.
- The celebratory nature of the sexual union between man and woman in religious ritual was eliminated.

⁸ None of the exhibits to the moving affidavit of Elizabeth McNamara list a source to Constantine that was used by Brown in writing *Da Vinci Code*.

⁹ Christianity had grown increasingly male dominated as it moved away from its roots, something that was little known, but which Brown and Perdue wrote about.

- The divinity of Christ as a member of the Holy Trinity consubstantial to the Father and the Holy Spirit was declared to be a matter of dogma. Both Brown and Perdue assert this dogma and Christ's divinity was by a vote to be enforced by Constantine's military might. Many historians vociferously dispute this.

The stories in both novels are frontal assaults on Constantine and the determinations made by the Council of Nicea. That is hardly typical of the mystery/thriller genre. In addition, neither author sticks to the "party line" of historical consensus, but instead express identical interpretations of history in order to further the plots.

1. Discussion of Constantine In the Novels

<p>No, but I think he was the first true master at shaping religion to help consolidate governmental power. He saw that this new religion wasn't going away, and that over the previous three centuries it had been a destabilizing influence on the rule of the empire. He saw it as clearly a growing force so, instead of fighting it, he co-opted it. He controlled the Church for his own purposes and shaped theology for the sake of political expediency. DOG, p. 16</p>	<p>Historians still marvel at the brilliance with which Constantine converted the sun-worshipping pagans to Christianity. By fusing pagan symbols, dates, and rituals into the growing Christian tradition, he created a kind of hybrid religion that was acceptable to both parties. DVC, p. 232</p>
<p>So many things that people today think are divinely inspired were actually Constantine's political edicts enforced by the power of the sword."</p> <p>"Such as?"</p> <p>Seth thought for a moment. He sipped at his wine and turned toward the window to gaze at the setting sun. Finally, he turned back toward Zoe and said: "How about something that is about as fundamental to the Christian Church as you can get: The Trinity."</p> <p>Zoe frowned.</p>	<p>Constantine needed to strengthen the new Christian tradition, and held a famous ecumenical gathering known as the Council of Nicaea."</p> <p>Sophie had heard of it only insofar as its being the birthplace of the Nicene Creed.</p> <p>"At this gathering," Teabing said, "many aspects of Christianity were debated and voted upon—the date of Easter, the role of the bishops, the administration of sacraments, and, of course, the <i>divinity</i> of Jesus."</p> <p>"I don't follow. His divinity?"</p>

<p>"There was absolutely no agreement in the Christian Church that Jesus was to be worshipped on an equal basis as God. Indeed, you could find a lot of solid evidence that Jesus himself would not be happy with this. DOG, p. 16</p>	<p>"My dear," Teabing declared, "until <i>that</i> moment in history, Jesus was viewed by His followers as a mortal prophet. . . a great and powerful man, but a <i>man</i> nonetheless. A mortal."</p> <p>"Not the Son of God?"</p> <p>"Right," Teabing said. "Jesus' establishment as 'the Son of God' was officially proposed and voted on by the Council of Nicaea." DVC, p. 233</p>
<p>And so it is that the Trinity – the undisputed centerpiece the Christian religion – was legislated at the point of a sword by a fellow who wasn't even a Christian at the time and it was not for the faith <u>but to restore civil order</u>. DOG, p. 17</p>	<p>Hold on. You're saying Jesus' divinity was the result of a <i>vote</i>?</p> <p>"A relatively close vote at that," Teabing added. DVC, p. 233</p> <p>Nonetheless, <u>establishing Christ's divinity was critical to the further unification of the Roman empire</u> and to the new Vatican power base. By officially endorsing Jesus as the Son of God, Constantine turned Jesus into a deity who existed beyond the scope of the human world, an entity whose power was unchallengeable. This not only precluded further pagan challenges to Christianity, but now the followers of Christ were able to redeem themselves <i>only</i> via the established sacred channel—the Roman Catholic Church. DVC, p. 233</p>
<p>"But Constantine is known as the first Christian emperor," Zoe said.</p> <p>"Only on his deathbed," Seth said. "Sol Invictus, the Sun God was his main deity until the last hours of his life. For the most of his life, Christianity was a political power tactic for Constantine, a method of governing rather than a religion." DOG, p. 15-16</p>	<p>"I though Constantine was a Christian," Sophie said.</p> <p>"Hardly," Teabing scoffed. "He was a lifelong pagan who was baptized on his deathbed, too weak to protest. In Constantine's day, Rome's official religion was sun worship – the cult of <i>sol Invictus</i>, or the Invincible Sun – and Constantine was its head priest." DVC, p. 232¹⁰</p>
<p>But back in 324 or so A.D. the issue came to a head with a bishop named Arius, the presbyter of Alexandria, who was</p>	<p>Unfortunately for him, a growing religious turmoil was gripping Rome. Three centuries after the crucifixion of Jesus</p>

¹⁰ Note that the context is exactly the same in both segments.

<p>preaching that Jesus "The Son" had been created, begotten by God "The Father" and, therefore, was not quite as divine. Others disagreed and there were riots in the streets all over the Empire caused by this and maybe another half-dozen major theological issues. This doctrine spread like wildfire and with it more riots and bloodshed.</p>	<p>Christ, Christ's followers had multiplied exponentially. Christians and pagans began warring, and the conflict grew to such proportions that it threatened to rend Rome in two. Constantine decided something had to be done. In 325 A.D., he decided to unify Rome under a single religion. Christianity. DVC, p. 232</p>
<p>Riots in the streets are not something an Emperor likes to see. The whole thing truly baffled him. He called the issue 'truly insignificant' and was astounded when all the feuding parties ignored his directive to stop arguing. That's when he called the Nicean conference. Church theologians today put a spin on the conference as a divinely inspired gathering of holy men guided to a common decision by the Holy Spirit. In reality, it was Constantine's way of calling them all to a meeting behind the woodshed. DOG, p. 16-17</p>	<p>"It was all about power," Teabing continued. "Christ as Messiah was critical to the functioning of Church and state. Many scholars claim that the early Church literally <i>stole</i> Jesus from His original followers, hijacking His human message, shrouding it in an impenetrable cloak of divinity, and using it to expand their own power. I've written several books on the topic." DVC, p. 233</p>

D. Integration of Pagan Practices: Worship God on Sunday

Both novels contain a discussion about how Christianity adopted pagan practices into the Christian religion.

<p>For the church to prevail, it also needed to reach an accommodation with the pagan Romans. This is why the day set aside for worshipping Sol, the Sun god became our Sunday. And why the birth dates of the Roman god Mithra – December 25 – became the birth date of our Savior. There are scores and scores of such incorporation of pagan practices. DOG, p. 80</p>	<p>Nothing in Christianity is original. The pre-Christian God Mithras—called <i>the Son of God</i> and <i>the Light of the World</i>—was born on December 25, died, was buried in a rock tomb, and then resurrected in three days. By the way, December 25 is also the birthday of Osiris, Adonis, and Dionysus. The newborn Krishna was presented with gold, frankincense, and myrrh. Even Christianity's weekly holy day was stolen from the pagans. DVC, p. 232</p>
<p>"Just one of many things that Christianity and Judaism borrowed from the past. Incorporate enough of the old, forbidden religion to satisfy people's cravings for it...co-opt and conquer, only the Great</p>	<p>"Originally," Langdon said, "Christianity honored the Jewish Sabbath of Saturday, but Constantine shifted it to coincide with the pagan's veneration day of the sun." He paused, grinning. "To this day, most</p>

<p>Goddess has had the last laugh.” “How’s that?”</p> <p>“She was transmuted by the Greeks into Cybele and Artemis. But even after Constantine decreed an end to Goddess worship throughout his empire, the faithful simply converted those Goddess shrines into places to worship the Virgin Mary. This is one of the things that scares the ecclesiastical shit out of the old <i>schnorrers</i> in the Vatican. They <i>know</i> without a doubt that veneration of Mary is just thinly disguised Goddess worship.” DOG, p. 204-05</p>	<p>churchgoers attend services on Sunday morning with no idea that they are there on account of the pagan sun god’s weekly tribute—Sunday.” DVC, p. 232-33</p>
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E. The Divine Feminine in *Da Vinci Code* and *Daughter of God*

Both novels involve the existence of a divine feminine that stand in stark contrast to Constantine and the Council of Nicea. While the divine feminines have different names in each novel, they are essentially the same person. Furthermore, their existence plays an identical role in each novel. In *Da Vinci Code* the name of the divine feminine was Mary Magdalene. As discussed below, Mary Magdalene was really the Great Goddess of the Gnostic Gospels. According to *Da Vinci Code*, Magdalene was the wife of Jesus, with whom a child was born. According to *Da Vinci Code*, Mary Magdalene was to be the intended successor to Christ, a notion that was incompatible with dogmas proclaimed by the Council of Nicea.¹¹

The divine feminine in *Daughter of God* was Sophia. Sophia performed miracles and possessed many of the same attributes as Jesus Christ. It is a central thesis of *Daughter of God*

¹¹ Mary Magdalene also figures in *Daughter of God*. “You sounded like a lawyer when you talked about no women apostles as recognized by the orthodoxy. Does this mean there were women in this position, just not recognized? “Most certainly,” Braun said. “Chief amongst them was Mary Magdalene. She and Peter got into some pretty hot arguments.” “And you know this because of the Gnostic Gospels?” Braun nodded. “Those and other holy scriptures.” “And they are just as valid as the books that were included?” “Just as valid, but terribly inconvenient to Constantine and the man who defined the institution we have today. Peter, you see, won his power struggle with Mary Magdalene which is why women are relegated as adjuncts, secondary worshipers in every church. Christianity had borrowed from Judaism and institutionalized the doctrine of male dominance in its new religion, rationalizing the authority to do so on spiritual grounds.” DOG, p. 79

that Sophia was a second messiah, albeit a female one. In the Gnostic Gospels, Sophia was the Great Goddess. Furthermore, Zoe was Sophia's daughter. Hence, Zoe Ridgeway, the heroine of *Daughter of God*, is to be viewed as the daughter of the Great Goddess. Like in *Da Vinci Code*, the notion of Sophia being a female messiah was incompatible with the dogmas proclaimed by the Council of Nicea.

F. The Heroines and Constantine

Prior to the events of the two novels, neither heroine, each of whom are the symbolic offspring of the Great Goddess right down to their names, knew anything of their connection to the Goddess or had any knowledge of Constantine or his role in suppressing the role of the Great Goddess in religion. Learning of these things was an epiphany and represented a spiritual awakening for both heroines. In *Da Vinci Code*, Sophie first learns this from Teabing. In *Daughter of God*, Zoe first learns this from her husband, Seth, and later from Thalia. The scenes in which these epiphanies occur is almost identical in both novels because they were both didactic presentations. The foregoing is not typical of novels of this genre nor is it a scene a faire in such genre.

G. The Physical Evidence of the Divine Feminine

Physical evidence of the divine feminine is critical in both novels. In *Da Vinci Code*, the physical evidence consisted of the bones of Mary Magdalene and well as certain documents establishing the bloodline of Mary Magdalene and Jesus Christ. From *Da Vinci Code*:

"Holy Grail is the literal meaning of Sangreal. The phrase derives from the French *Sangraal*, which evolved to Sangreal, and was eventually split into two words, *San Greal*." DVC, p. 162

According to *Da Vinci Code*, its heroine, Sophie Neveu, is a product of the royal bloodline of Jesus and Mary Magdalene. Hence, the heroines in both novels are portrayed as being of divine ancestry.¹²

In *Daughter of God*, the physical evidence consisted of the burial shroud of Sophia bearing her image as well as Roman documents that establish the divinity of Sophia as a second Messiah.

H. The Keepers of the Physical Evidence

Both novels have keepers of the physical evidence. In *Da Vinci Code*, the keeper of the physical evidence was the Priory of Sion. The last mentioned grand master of the Prior of Sion was Jacques Sauniere, who was the grandfather of the heroine, Sophie Neveu.¹³ While Sauniere did not have actual possession of the physical evidence, the unspoken fact in *Da Vinci Code* is that he knew where the physical evidence was located and could tell someone how to find it.

In *Daughter of God*, the original keeper of the physical evidence was the Catholic Church, which hid the evidence known as the Sophia Passion in the ground underneath St. Peter's Basilica in Rome. Eventually, after the evidence was removed, it was discovered by Hitler and the Nazis. While some of the Sophia Passion was in a salt mine in Austria, a part was in the possession of Willie Max, a former Nazi. In addition, Willie Max, like Jacques Sauniere in *Da Vinci Code*, was in possession of the means to locate the rest of the physical evidence.

It was for the express purpose of learning the location of the physical evidence in both novels that Sauniere in *Da Vinci Code* and Willie Max in *Daughter of God* were murdered.

¹² It is a central thesis of both novels that men and women share equally in the divinity of God. Hence, were Christ divine, but Mary Magdalene not divine, Christ would be infinitely more powerful than Mary. On the other hand, if both Christ and Mary were human, but not divine, there would be nothing royal about the bloodline. The only thing that makes sense in the context of the novel is that both Christ and Mary were divine.

¹³ Which is literally translated as "new Sophia." As *Da Vinci Code* itself points out, Sophia was the Greek Goddess of Wisdom. In addition, the Gnostic Gospels, which figure very heavily in both novels, identify Sophia as being the Great Goddess.

I. The Role of the Catholic Church

The Catholic Church was aware of the existence of both the Mary Magdalene physical evidence (Holy Grail) as well as the Sophia Passion. Either set of physical evidence could rock the foundations of the Catholic Church because they could undermine the actions of the Council of Nicea. Hence, the goal of the Catholic Church in both novels was to prevent the disclosure of the physical evidence.

1. Discussion of How the Disclosure of the Physical Evidence Would Undermine the Catholic Church

A woman's secret containing, "Something, Mr. Ridgeway, that would undermine one of the Church's strongest foundations." DOG, p. 56	A woman who carried with her a secret so powerful that, if revealed, it threatened to devastate the very foundation of Christianity! DVC, p. 239
We must find the Sophia Passion and make sure the world never learns the secret of Sophia – or the possibility that she and our Lord Jesus Christ may be two of many Messiahs that God has sent to teach and to test us. Revealing this secret would tear our institutions apart and in the end open the door for the enemies of the Faith. For, once people begin to question even one part, they will question every part. If they believe they have been deceived before, the trust can never be recovered. It would create only misery and death. DOG, p. 81	<p>Teabing resisted the urge to reveal how he had brilliantly implicated Opus Dei in the plot that would soon bring about the demise of the entire Church. That would have to wait. Right now there was work to do. DVC, p. 412</p> <p>"What happens to <i>those</i> people, Robert, if persuasive scientific evidence comes out that the Church's version of the Christ story is inaccurate, and that the greatest story ever told is, in fact, the greatest story ever <i>sold</i>."</p> <p>Langdon did not respond.</p> <p>"I'll tell you what happens if the documents get out," Teabing said. "The Vatican faces a crisis of faith unprecedented in its two-millennium history." DVC, p. 266-67</p>

J. The Competition to Obtain Possession of the Physical Evidence

In both novels, there were two organizations or people who would stop at nothing, including murder, to obtain the physical evidence. Each of the two organizations or people in each novel had different reasons for wanting to obtain the physical evidence.

In *Da Vinci Code* the competitors were Opus Dei and Sir Leigh Teabing. Opus Dei was headed by a Bishop Aringarosa, founder of Opus Dei. Years earlier, Opus Dei had been made a prelature of the Catholic Church. However, the Catholic Church became disenchanted with some of the methods employed by Opus Dei. As a result, the Pope threatened to end the status of Opus Dei as a prelature. Bishop Aringarosa sought to obtain the Mary Magdalene physical evidence to blackmail or coerce the Catholic Church into allowing Opus Dei to remain a prelature of the Church. The antagonist of Opus Dei in *Da Vinci Code* was Sir Leigh Teabing. Teabing was an historian who hated the Catholic Church and wanted the Mary Magdalene physical evidence to destroy the Church.

One of the antagonists in *Daughter of God* was The Congregation for the Doctrine of the Faith ("CDF"), an actual part of the Catholic Church. Significantly, the CDF is the current name for the Holy Inquisition. The historical acts of the Inquisition play a prominent role in both *Daughter of God* and *Da Vinci Code*, serving as a symbolic antagonist in latter novel. The head of CDF was an archbishop named Neils Braun. Braun was an ultraconservative Cardinal who believed that the Church's liberalization had gone too far and that the only way to cure that and return the institution to its "true" roots was for him to become Pope. Thus, Braun needed the Sophia physical evidence in order to blackmail the Pope into resigning and having the College of Cardinals name him the new Pope. Hence, in both novels, the head of a religious organization of the Catholic Church sought to obtain the physical evidence to blackmail/coerce the Pope. In *Da Vinci Code* it was to allow Opus Dei to remain a prelature; in *Daughter of God* it was to allow

Neil Braun to become the new Pope. Braun's antagonist was the Russian KGB/Mafia, which wanted the Sophia physical evidence to blackmail the Church, as has been done by Hitler in World War II.

K. Similarities Between Opus Dei and the Congregation for the Doctrine of Faith

Both organizations felt that the Catholic Church had strayed from the "true path" as a result of the 20th Century Vatican Councils and wanted the Church to revert to its earlier conservative ways.

L. The Hero and Heroine as Unwilling Participants in a Contest that Is Not of Their Making

In both novels, the hero and heroine became unwilling participants in the struggle between the competitors to obtain the physical evidence. In *Da Vinci Code*, Robert Langdon is falsely accused of murdering Jacques Sauniere, grand master of the Priory of Sion and keeper of the Magdalene physical evidence. It was as much to clear his name and to avoid being arrested that Langdon unwillingly became enmeshed in the conflict between the competitors for the physical evidence. Likewise, Sophie Neveu became involved because Jacques Sauniere was her grandfather, because she knew that Robert Langdon was innocent and because she knew that her murdered grandfather wanted her to solve certain mysteries in order to preserve the secrets he guarded.

In *Daughter of God*, Seth and Zoe Ridgeway became involved in the struggle between the competitors for the physical evidence when Willie Max summoned them to Zurich to assess his art collection that had been stolen by Nazis in order to return the art to their rightful owners. Zoe is kidnapped by the Russian KGB/Mafia. Seth searches for her and, in the process, becomes a murder suspect like Robert Langdon of *Da Vinci Code* became a murder suspect.

As a result of their unwilling participation in the competition by third parties for the physical evidence of the divine feminine, the lives of the hero and heroine are repeatedly threatened. Ultimately, their lives are changed forever.

M. The Hero in Each Novel Could Accomplish Little Without the Heroine, and Vice Versa

The underlying theme of both novels is that the female had as much claim to divinity as the male and that, through their union, they become much more than the sum of their parts. That theme is expressed in the story line of both novels. That is a far cry from the usual mystery/thriller, where usually the male saves the female from a disaster. While sometimes the roles are reversed and it is the female who saves the male from a disaster, it is not common that neither the male nor the female can save even themselves from a disaster without the help of the other. Such mutual dependence is a throw back to ideas more prevalent in ancient times and symbolic of the divine feminine roles at the heart of both novels.

In *Da Vinci Code*, neither Neveu nor Langdon, acting alone, had the ability to unravel the clues left by Sauniere. Furthermore, Langdon probably would have been captured early in the novel, or possibly even been killed, were it not for the assistance of Neveu. Similarly in *Daughter of God*, by themselves neither Zoe nor Seth could have located the Sophia Passion were it not for the skills of the other. Likewise, as in *Da Vinci Code*, both Zoe and Seth would have been murdered were it not for the help of the other.

In short, the ancient view of the importance of the male/female union is lived out in the stories of the hero and heroine in each novel.

N. The Wolf in Sheep's Clothing

An important role is played in each novel by a character who, while first appearing to be a friend and an ally of the hero and heroine, later turns out to be a deadly enemy. In *Da Vinci*

Code, that character is Sir Leigh Teabing. In *Daughter of God*, that character is George Stratton. In Defendant's Answer in this action, that person is described as being a "shapeshifter." While shapeshifter is a standard archetype in some novels, they are expressed in very similar ways in both novels.

The hero and heroine in both novels join forces with the shapeshifter, not because they want to, but because they perceive no other alternative.¹⁴

In *Daughter of God*, the shapeshifter is George Stratton, an employee of the United States National Security Agency.¹⁵

The shapeshifters in both novels are used in the story in similar ways and in the same order and sequence, namely:

- They help the hero and heroine to escape those pursuing them.
- They help to save the lives of the hero and heroine.
- They appear to be the allies of the hero and heroine, but actually have their own agendas that are diametrically opposed to the hero and heroine.
- They attempt to kill the hero and heroine.
- They fail in their attempt to kill the hero and heroine.

¹⁴ In *Da Vinci Code*, Neveu and Langdon were on the run from the police and needed a place to hide. Because the home of Teabing was in the area, because he was known to Langdon and because he may have possessed knowledge regarding the mysteries created by Sauniere, Neveu and Langdon visit him at his home. At first, Teabing appears to be a friend. He helps Neveu and Langdon to flee to England on a private jet. He helps them to solve the clues left by Sauniere. However, as it later turns out, Teabing is actually one of the contestants for the physical evidence and was the mastermind behind the killings that occurred in the novel, including the killing of Sauniere. At one point, Teabing comes close to killing Neveu and Langdon.

¹⁵ After Stratton had saved Seth Ridgeway's life at least once, and after he had helped Zoe Ridgeway escape from the Russian KGB/Mafia, Seth realizes that he needs Stratton's protection from those who were trying to kill him and Zoe. Accordingly, Stratton joined Seth and Zoe in the search for the physical evidence. Unbeknownst to Seth and Zoe, Stratton was really working for Neil Braun, who, as mentioned above, wanted the physical evidence to blackmail the Pope. In the end, Stratton turns on Seth and Zoe, takes possession of the physical evidence, and attempts to kill Seth and Zoe.

- They either fail to obtain the physical evidence or the physical evidence is destroyed, thereby making it impossible for the evidence to be used to blackmail the Pope.

O. The Hero and Heroine Redefine the Meaning of Success

Both novels are similar, unusual and diverge greatly from the thriller genre in that the hero and heroine neither succeed nor fail in their quest, but rather come to a similar understanding that redefines the nature of success. In both novels, the hero and heroine are left understanding that it is not so much the actual possession of the physical evidence that is important as it is the understanding of what the physical evidence represents. Indeed, in the epilogue to *Da Vinci Code*, the author leads the reader to believe that Langdon has figured out the true location of the physical evidence. That fact becomes almost anticlimactic when Langdon makes no attempt to take actual possession of the physical evidence.

1. Discussion in the Novels of the Unimportance of the Physical Evidence

<p>Faith in the unseen is stronger than faith in things we can touch or see. The truest test of our faith in a supreme being is the willingness to believe without seeing. And in the long run, the Christian churches – all religions of all faiths, for that matter – are better off without such visible signs. Because there will always be those who will see and never believe. But God will especially bless those who believe without seeing. DOG, p. 415</p>	<p>"It is the mystery and wonderment that serve our souls, not the Grail itself. The beauty of the Grail lies in her ethereal nature." Marie Chauvel gazed up at Rosslyn now. "For some, the Grail is a chalice that will bring them everlasting life. For others, it is the quest for lost documents and secret history. And for most, I suspect the Holy Grail is simply a grand idea. . . a glorious unattainable treasure that somehow, even in today's world of chaos, inspires us." DVC, p. 444</p>
<p>"Maybe the mystery is the point." He shrugged. "Maybe the mystery has to remain because we're looking at the infinite through finite eyes. Maybe what God really wants is not blind acceptance of dogma, but a lifetime of searching...discarding what is obviously false, testing the rest." DOG, p. 18</p>	

P. The Quest Finds the Protagonists – Not the Other Way Around, Which Would Have Been Common

In both novels, the reader is lead to the unmistakable conclusion that the hero and heroine were themselves pursued by the quest for the physical evidence. The following quotes are breathtaking in their similarity to each other.

Zoe had loved art all her life with a passion that had driven her to make it her profession. But despite the satisfaction of spending her life surrounded by the world's most beautiful objects and historical antiquities, she had always dreamed of discovering buried treasure: unearthing a hitherto-unknown trove of priceless art that would be nearly impossible to value.

Instead, it had discovered her. DOG, p. 3 (emphasis added)

You do not find the Grail, the Grail finds you And tonight, incredibly, the key to finding the Holy Grail had walked right through his front door." DVC, p. 273-74 (emphasis added)

"Gentlemen," Sophie *said*, her voice firm. "To quote your words, "You do not find the Grail, the Grail finds you. I am going to trust that the Grail has found me for a reason, and when the time comes, I will know what to do." DVC, p. 295 (emphasis added)

The Grail found us all, and now she is begging to be revealed. We must work together. DVC, p. 410 (emphasis added)

He smiled. "Our paths together could not be more clear. The Grail has found us." DVC, p. 412 (emphasis added)

Q. Sophia, the Great Goddess

The heroine in *Daughter of God* is Zoe Ridgeway. As Lewis Perdue indicates in his Declaration, Zoe means "life" in Greek. The corresponding Hebrew name (also meaning "life") is Eve. Indeed, Zoe and Eve are common matching names for identical twins. In the Gnostic Gospels (also know as the Nag Hammadi manuscripts) Zoe is the daughter of Sophia and was known as Eve when sent by her mother to give life to Adam. "After the day of rest Sophia sent her daughter, Zoe being called Eve, as an instructor in order that she might make Adam, who had no soul, arise so that those whom he should engender might become containers of life." Nag

Hammadi text, *On the Origin of the World*, (115:31-35).) Zoe can thus be interpreted as either the daughter of wisdom or the daughter of God. Hence the title of Perdue's novel.

While *Da Vinci Code* is, on its face, about Mary Magdalene, and *Daughter of God* is about Sophia, the Declaration of Lewis Perdue establishes that Mary Magdalene is Sophia, the Great Goddess.

Furthermore, Brown writes in *Da Vinci Code*: "The Priory of Sion, to this day, still worships Mary Magdalene as the Goddess, the Holy Grail, the Rose, and the Divine Mother." (DVC:Ch60). The evidence is indisputable that Brown and Perdue were talking about the same person.

1. Discussion of Sophia from the Two Novels

That's also the reason the Romans and my people had to kill the man Jesus. He believed in women as equals; the Jewish and Christian Gnostics saw God as both male and female; the Essenes who wrote the Dead Sea Scrolls also believed that God was both man and woman. They couldn't even censor all the old religious scriptures to their liking. The Book of Proverbs and the Wisdom of Solomon are pretty clear when they refer to Wisdom as female. Sophia is the Greek word for wisdom." DOG, p. 205	Langdon was nodding enthusiastically. "Yes, <i>Sophia</i> literally means <i>wisdom</i> in Greek. The root of your name, Sophie, is literally a 'word of wisdom.'" DVC, p. 320
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R. History in the Two Novels

It is ironic that while the two novels besmirch history, Plaintiffs contend that many of the similarities between the two novels are unprotected historical facts.¹⁶ Indeed, the authors of both novels express a dim view regarding the accuracy of so-called historical facts. More

¹⁶ It is important to keep in mind that while historical facts are not protected, the way in which those facts are presented, the context of presentation by the same characters in the same way, the order in which the facts are presented and the manner in which the characters interpret their validity and significance are all protected expression and are virtually identical in both novels.

importantly, both authors interpret history in identically different variations from “accepted” historical and theological dogma and express those interpretations in astoundingly similar ways.

But like Constantine, we know very well that our holy Scriptures and the history of our faith and religion have been re-written, edited and altered to fit the exigencies of many different times DOG, p. 28

[H]istory is always written by the winners. When two cultures clash, the loser is obliterated, and the winner writes the history books—books which glorify their own cause and disparage the conquered foe. As Napoleon once said, ‘What is history, but a fable agreed upon?’ “He smiled. “By its very nature, history is always a one-sided account. DVC, p. 256

S. The Gold Keys

Although gold, because of its softness, is unsuitable for making keys, both novels feature gold keys. In both novels, the gold keys are hidden in or behind a painting. In both novels, the gold keys will be used to unlock a box in a Zurich bank. In both novels, the contents of the boxes in the Zurich banks will enable the hero and heroine to find the physical evidence. In both novels, the hero and heroine do find materials that tell them how to find the physical evidence.

In *Da Vinci Code* and *Daughter of God*, the following sequence of events takes place precisely as presented in BOTH books and are identical in events, pacing, tone and sequence in both books:

- A slain curator of art leaves a gold key,
- Concealed in a work of art,
- Painted on wood.
- That work of art is named for the divine feminine at the center of the book.
- The gold key is not a traditional key that opens a tumbler. Indeed, owing to gold's softness and malleability, a key made of it is patently impractical and, for that reason, not employed by banks, Swiss or otherwise.

- This unique gold key is left (with no instruction) for the book's heroine
- Who is, herself, a symbol of and related to the divine feminine.
- The gold key allows access (but does not turn a lock) to a safe deposit box in a Zurich bank.
- At the Zurich bank, the Protagonists are met by an elderly old world Banker and taken to a viewing room that is identical in appearance and appointments in both banks..
- While at the bank, the Protagonists make an error in behavior that could tip-off the bank officials they are not legitimate. But the moment passes.
- Finally, in a unique scene, seen in no other thriller, the Protagonists must break OUT of a bank
- The contents of the container holds additional clues to finding the object of their search that send the hero and heroine to a foreign country.
- The object of their search is a set of physical evidence and documents relating to the divine feminine at the heart of the book.

T. Women, The Goddess, Creation and How God Became a Male

In both novels, the subjects of women, the Goddess, Creation and How God became a male are critical.

The Goddess was about creation - the world, life. Procreation is sexual and from the earliest days it has been a woman's function, something men felt they had no control over. This was a problem. They needed to exert control and since they couldn't really control their own urges, they decided to control the object of the urge. DOG, p. 110

"I should add," Teabing chimed, "that this concept of woman as life-bringer was the foundation of ancient religion. Childbirth was mystical and powerful. Sadly, Christian philosophy decided to embezzle the female's creative power by ignoring biological truth and making *man* the Creator. Genesis tells us that Eve was created from Adam's rib. Woman became an offshoot of man. And a sinful one at

	that. Genesis was the beginning of the end for the goddess." DVC, p. 238
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U. Mother Earth

Both novels contain discussions of Mother Earth

<p>"What's more, women's bodies were in tune with nature, the moon and showed all the same sorts of mysterious cycles as the world around them."</p>	<p>Early religion was based on the divine order of Nature. The goddess Venus and the planet Venus were one and the same. The goddess had a place in the nighttime sky and was known by many names—Venus, the Eastern Star, Ishtar, Astarte—all of them powerful female concepts with ties to Nature and Mother Earth.. DVC, p. 36</p>
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"Which, I assume, is why we still have mother earth, mother nature."

"Absolutely. You can try to cover up the Great Goddess but you can't get rid of her. Also remember, these cultures were matrilineal – inheritance and the family name passed along the mother's side of the family since they had no idea that guys had anything to do with it." DOG, p. 161

Mother Earth had become a *man's* world, and the gods of destruction and war were taking their toll. The male ego had spent two millennia running unchecked by its female counterpart. The Priory of Sion believed that it was this obliteration of the sacred feminine in modern life that had caused what the Hopi Native Americans called *koyanisquatsi*—life out of balance—an unstable situation marked by testosterone-fueled wars, a plethora of misogynistic societies, and a growing disrespect for Mother Earth. DVC, p. 125-26

V. How People Created God

A theme of both novels is that people create their own gods.

<p>"So you're saying people create the god they need," Zoe said uneasily as the sounds of the previous night, her first prayer in years, echoed clearly in her mind. "According to that theory, God is a human creation devised for the expediency of explaining the unknown and they change him – her – to suit their needs." DOG, p. 202</p>	<p>"Constantine's Bible has been their truth for ages. Nobody is more indoctrinated than the indoctrinator."</p> <p>"What he means," Langdon said, "is that we worship the gods of our fathers."</p> <p>"What I mean," Teabing countered, "is that almost everything our fathers taught us about Christ is <i>false</i>. As are the stories</p>
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	about the Holy Grail." DVC, p. 235
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W. Origins of Communion - God eating

Both novels contain discussions about communion.

Worship and communion involved eating the fruit of the sycamore fig – fruit that was more like clusters of grapes than the figs we usually think of. When the devout consumed the fruit, they were partaking of the body of the Goddess. DOG, p. 204	And virtually all the elements of the Catholic ritual—the miter, the altar, the doxology, and communion, the act of "God-eating"---were taken directly from earlier pagan mystery religions. DVC, p. 232
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POINT I

**PLAINTIFFS HAVE NOT MADE THE EVIDENTIARY SHOWING
REQUIRED ON A MOTION FOR SUMMARY JUDGMENT**

A. Plaintiffs Should Not Be Awarded Summary Judgment Because of the Absence of an Evidentiary Basis.

The absence of an admissible evidentiary basis for many of Plaintiffs' arguments proves the motion is premature. No discovery has been had. In order for the rival parties to establish their cases, they must rely upon matters outside the novels themselves. The fact that Plaintiffs have relied upon matters outside the novels proves the point. Not only have Plaintiffs relied upon matters for which no admissible evidence has been presented, but they have failed to submit an affidavit of Plaintiff, Dan Brown, author of *Da Vinci Code*. Without an affidavit of Dan Brown, Plaintiffs may not argue, as they do, that *Da Vinci Code* was based on extensive research.¹⁷ Indeed, without such evidence, one would be equally justified in concluding that Dan Brown conducted no research and that all of his references to the Divine Goddess, to

¹⁷ Plaintiffs' Rule 56.1 Statement, ¶ 2.

Constantine, etc., were simply copied from Perdue's *Daughter of God*.¹⁸ Furthermore, there is no evidentiary basis in the record for concluding that the "historical facts" contained in *Daughter of God* were actually historical facts, or whether Perdue took artistic liberties with history and simply embellished on history to make his novel more interesting. Finally, Plaintiffs have no evidentiary basis for contending that Brown did not copy Perdue's historical embellishments that were "made up" by Perdue when he wrote *Daughter of God*.

Next, Plaintiffs contend that Brown's discussion of Mary Magdalene and her purported marriage to Jesus Christ, a Divine Goddess, or all of the other religious themes that parallel Perdue's *Daughter of God*, was taken from the Gnostic Gospels discovered at Nag Hammadi, Egypt in 1945.¹⁹ However, without an affidavit from Dan Brown attesting to the fact that he even read the Gnostic Gospels or used them as a basis for *Da Vinci Code*, there is simply no evidence to support such a contention. Copying from Perdue is just as plausible. This is particularly the case because the Gnostic Gospels reflect the religious views of different sects and Perdue's discussion of matters contained in those Gospels constitutes a "blend" of different Gnostic viewpoints, which blend was copied by Brown.

Furthermore, while Plaintiffs have bandied about words such as "genre" or phrases such as "scenes a faire," they have not provided an evidentiary basis for determining what is and is not common to "thriller" or "mystery" novels or what scenes one would expect to find in such novels. Instead, Plaintiffs have acted as if they expect the Court to rely solely upon their unsupported "say so."

¹⁸ More than a dozen books and innumerable articles, many by top academic scholars with no theological axes to grind, have extensively documented a large number of errors in *Da Vinci Code*. The existence of those errors cast substantial doubts on whether Brown actually conducted any research or whether he simply copied from Perdue.

¹⁹ "The idea of the 'sacred feminine' which plays a role in both books stems from historical research involving the Gnostic Gospels, an ancient collection of biblical texts which were unearthed in Nag Hammadi, Egypt in 1945 but not made accessible to the public until the late 1970's." Plaintiff's Rule 56.1 Statement, ¶ 94

A summary judgment motion must be denied where the movant fails to fulfill its initial burden of providing admissible evidence of the material facts. *Giannullo v. City of New York*, 322 F.3d 139, 140-41 (2d Cir. 2003). "In passing on a motion for summary judgment, the Court may consider only admissible evidence, and it is obliged to view the evidence in the light most favorable to the non-moving party." *Clark v. Meyer*, 188 F.Supp. 416, 419 (S.D.N.Y. 2002). "[A] party seeking summary judgment is obliged to come forward with admissible evidence." *Griffin v. City of New York*, 287 F.Supp.2d 392 (S.D.N.Y. 2003).

Furthermore, in the Southern District, Local Rule 56.1 ("Rule 56.1"), requires that a party moving for summary judgment furnish the Court with a short and concise statement setting forth material facts as to which there is no genuine issue to be tried. "Statements in an affidavit or Rule 56.1 statement are inappropriate if they are not based on personal knowledge, contain inadmissible hearsay, are conclusory or argumentative, or do not cite to supporting evidence." *Epstein v. Kemper Insurance Companies*, 210 F.Supp.2d 308, 314 (S.D.N.Y. 2002). *See also Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 2005 WL 22833, at *5 (S.D.N.Y. Jan. 5, 2005). "[A] Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record." *Giannullo v. City of New York*, *supra*, at 322 F.3d 140. *See also General Elec. Co. v. Varig – S.A.*, 2004 WL 253320, at *2 (S.D.N.Y. Feb. 10, 2004).

Reference to statements in an unsworn pleading are not sufficient because such statements have no evidentiary value. *Versace v. Versace*, 2003 WL 22023946, at *1 (S.D.N.Y. Aug. 27, 2003). *See also General Elec. Co. v. Varig – S.A.*, *supra*, at 2004 WL 253320 *3; *Davis v. O-At-Ka Milk Products Cooperative, Inc.*, 2004 WL 2980757, at *2 (W.D.N.Y. Dec. 22, 2004).

Similarly, references to books, or newspaper or magazine articles, should also be disregarded. On a summary judgment motion, such materials are inadmissible hearsay and may not be considered. See *Taylor v. Polygram Records*, 1999 WL 124456 *18 (S.D.N.Y. 1999); *Eisenstadt v. Central Corporation*, 113 F.3d 738, 742 (7th Cir. 1997); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993).

Plaintiff's motion for summary judgment should be denied because their Rule 56.1 statement refers to matters that are not supported by admissible evidence and because the motion itself relies upon matters that are material but are not in evidence.

1. The 56.1 Statement

The statements contained in the following paragraphs are based solely upon the pleadings in this action and should therefore not be considered: 1, 4, 5, 6, 7, 8, 9, and 10. The statements contained in the following paragraphs are not based on anything at all: 1, 2, 3, 5, 21 and 135. The statements contained in the following paragraphs are based solely upon documents that have not been authenticated, are not in admissible form and the facts contained in those documents have not been shown to be true: 97, 98, 100 and 138.

Next, Plaintiffs' 56.1 statement contains numerous errors. The Court is respectfully referred to Perdue's response to Plaintiffs' 56.1 statement for a list of those errors. Plaintiffs also make repeated references to other matters for which no evidence is presented, namely:

- ¶101: "Swiss bank accounts. Any similarity in the use of this standard feature in international thrillers ends with the abstract concept 'Swiss Bank'."
- ¶114: "Such Characters [villains] are a standard literary ploy in mysteries and thrillers to build suspense."
- ¶124: "[B]oth works have the fast pace of thrillers."

- ¶129: *Da Vinci Code* is an “exhilaratingly brainy thriller” and “gleefully erudite suspense novel.”
- ¶130: The books “share nothing more than stock thriller elements.”
- ¶135: “Brown’s Opus Dei (a real organization) has headquarters in New York City and was founded in 1928 in Spain to promote a return to conservative Catholic values.”
- ¶137: “[M]essages in blood written by murder victims are a stock element in thrillers and mysteries.”
- ¶150: “Both books are fast-paced thrillers.”

Absent an evidentiary basis, those assertions should not be considered by the Court.

2. Plaintiffs’ Memorandum of Law

Plaintiffs’ memorandum of law far surpasses their 56.1 statement in relying upon matters for which no evidence has been offered.

- P. 1: The similarities between the two novels are “superficial similarities common to countless thrillers.”
- P.2: “[V]irtually all of the alleged similarities amount to nothing more than abstract ideas, stock elements common to mysteries and thrillers, or the use of similar factual theories.”
- P. 20: “In any thriller, the most critical structural aspect of the plot is, ‘Who is the ultimate villain and what are his/her motivations?’”
- P. 22: “[B]y definition murder mysteries begin with murders.”

- P. 23: "Although Brown's use of the Priory of Sion reflects his creative imagination, his discussion of Mary Magdalene's life and the sacred feminine are grounded in the Gnostic Gospels."
- P. 25: "[R]ival groups within the Church are highly commonplace in thrillers."
- P. 26: "The Gnostics were early dissidents from the dominant branch of Christianity."
- P. 27-8: "Chases, confrontations between good and bad characters, murders, mysterious clues, secret religious societies, Swiss banks, and hidden keys are obviously *scenes a faire* in thrillers, present in untold numbers of books."
- P. 33: In *Da Vinci Code* "There are no sex scenes, just a simple kiss."²⁰

While discussed in greater detail in the next point of this memorandum, Plaintiffs have presented no evidence to show that the novels in question actually are "thrillers." Likewise, they have presented no evidence to show what are the standard or stock elements of thrillers. Similarly, the Court has been given no evidence of *scenes a faire* in thriller novels. Furthermore, no evidence has been presented to distinguish ideas from inventions that have been made up by the authors. Finally, no admissible evidence has been presented to enable the Court to determine what is and is not an historical fact.

Finally, and perhaps most important of all, Plaintiffs have offered no explanation as to why Brown has told a story that, at its heart, is so similar to that told by Perdue. Time and again, Brown uses the same ideas, the same history, the same symbolism, the same literary devices, the same *scenes a faire* in the same context and the same order, the same basic conflicts, and the same plot resolution as Perdue. Here, what Plaintiffs have done is to dissect non-protected

²⁰ Plaintiffs have ignored the rather torrid sex scene observed by Sophie Neveu between her grandfather and a woman as part of the pagan ritual of Hieros Gamos.

matters from the novels and then presented them in a way that is isolated from all of the other elements of the story. However, stories are not about isolated people, events, ideas or *scenes a faire*. Rather, stories are about those things in combination with each other. Viewed in that light, *Da Vinci Code* is substantially similar to *Daughter of God*.

B. The Motion for Summary Judgment Should Not Be Decided Until Perdue Is Given the Opportunity to Conduct Discovery.

In deciding whether to convert the motion to one for summary judgment, the Court is “obligated ... [to] give the parties an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002). The reason for the rule is that “when a district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an incomplete record.” *Id.* at 282 F.3d 155.

Plaintiffs’ mantra that all the Court must do to decide a summary judgment motion is to read the novels is woefully oversimplified. In determining whether substantial similarity exists, the Court must have the tools available to distinguish matters that are protected from those that are unprotected. Plaintiffs have not given the Court those tools. What is the genre? What are the *scenes a faire* that are typical of that genre? What are the historical facts? How did Perdue weave together unprotected elements to create an original story that is entitled to protection? Did Brown conduct any original research or did he merely copy the original thought and expression of Perdue? At a minimum, Perdue needs to depose Brown and anyone else who contributed to the writing of *Da Vinci Code*, including Jason Kaufman, Brown’s editor, Blythe Brown, Brown’s wife, and everyone else credited by Brown in assisting him to write his novel. If Perdue is not given that opportunity, the Court “risks depriving [Perdue] of a fair adjudication

of the claims by examining an incomplete record.” *Chambers v. Time Warner, Inc.*, *supra* at 282 F.3d 155.

POINT II

THE MOTION SHOULD BE DENIED BECAUSE THE COURT CANNOT SAY, AS A MATTER OF LAW, THAT THERE IS NO BASIS UPON WHICH A JURY CAN FIND THAT THE NOVELS ARE SUBSTANTIALLY SIMILAR

A. The Role of the Court on This Motion

“[A] district court may determine noninfringement as a matter of law on a motion for summary judgment either when the motion concerns only noncopyrightable elements of plaintiff work, or when no reasonable trier of fact could find the works substantially similar.” *Walker v. Time Life Films*, 784 F.2d 44, 48 (2d Cir. 1986). Here, because matters involving the copyrightable elements of Perdue’s novel are involved and because a reasonable trier of fact could find that the works are substantially similar, Plaintiffs’ motion should be denied.

B. By Not Discussing What the Novels Are Really About, Plaintiffs Cannot Contend They Are Not Substantially Similar

Plaintiffs’ approach on their motion is to isolate from the novels matters that are not to their liking. First and foremost, they have ignored the heart and soul of both novels by failing to acknowledge what they are really about. Despite both authors’ public acknowledgement of deep and frequent symbolism and its foundational importance to both novels, Plaintiffs neglect to mention it at all. And by ignoring the importance in the sequence of events of the Divine Feminine, the role of Constantine, the importance to the Catholic Church of suppressing notions of the Divine Feminine, the existence of physical evidence of the Divine Feminine, the existence of rival organizations seeking to obtain possession of the physical evidence for their own motives, etc., Plaintiffs have sought to portray the novels as mere “thrillers” that are devoid of

any meaningful substance. However, those are elements that cannot be ignored because they are what drive the plot in each story.²¹

Next, Plaintiffs have sought to isolate the “unprotected” elements of the novels. By viewing those elements in isolation of one another, rather than the creative decisions of the authors to include those elements in their novels and to use them in the way in which they are used, Plaintiffs have, once more, missed the point of the novels themselves. While it is all well and good for Plaintiffs to argue that any similarities that may exist are only with respect to matters that are not protected by our copyright laws, they have disregarded Perdue’s creative decisions to combine those elements in the way in which he did, many of which decisions were copied by Brown in *Da Vinci Code*.

The isolationist approach taken by Plaintiffs on their motion was rejected in *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003):

Essentially, the total-concept-and-feel locution functions as a reminder that, while the infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, infringement analysis is *not simply a matter of ascertaining similarity between components viewed in isolation*. For the defendant may infringe on the plaintiff’s work, not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in plaintiff’s work of art – the excerpting, modifying, and arranging of public domain compositions, if any, together with the development of wholly new motifs ...(emphasis added)

The practical reason for the rule is self-evident. Distilled to their most basic elements, almost every aspect of every creative work is unprotected. The melody of a song uses notes, which are not protected. Yet, there cannot be a melody without notes. In a written work, neither

²¹ Recently, an Italian Roman Catholic Cardinal, Tarcisio Bertone, broadcasting on Vatican Radio, urged Catholic faithful to neither read nor buy *Da Vinci Code*. Such a condemnation would be shocking if the novel were simply another member of the class of “thriller” novels.

the letters of the alphabet nor the words of the language are protected. But without them, there could be no story. Without them almost nothing could be copyrighted "because original works broken down into their component parts would usually be little more than basic unprotectible elements like letters, colors and symbols." *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001).

To varying degrees, all printed works have elements that are not protected. In some cases, such as fact compilations, the vast majority of the work is not protected. However, even telephone books may be entitled to some protection. "The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data, so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws." *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* 499 U.S. 340, 348, 111 S.Ct. 1282, 1289 (1991). "What is protectible then is the author's original contributions, the original way in which the author has selected, coordinated and arranged the elements of his or her work." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1995)(citations and quotations omitted). In the case of novels, copyright protects "plaintiff's development of the plot, of characters, of sequences of scenes and incidents, and of the interplay of characters". *Breffort v. I Had a Ball Co.*, 271 F.Supp. 623 (S.D.N.Y. 1967)

"Where plot is ... properly defined as 'the sequence of events' by which the author expresses his 'theme' or idea' it constitutes a pattern which is sufficiently concrete so as to warrant a finding of substantial similarity if it is common to both plaintiff's and defendant's works." 4 *Nimmer* §13.03[A][1][b] at 13-40.2 quoting *Shipman v. RKO*, 100 F.2d 533, 537 (2d

Cir. 1938). Thus, in *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F.Supp. 518, 525 (E.D.N.Y. 1965), the court held that the copyright in a novel includes not “only the form of communication or the mechanism employed” but also “the pattern of the story,” adding that “[t]he essence of a novel or any other story for that matter, is the plot, plan, arrangement, characters and dialogue therein contained and not simply its form of articulation”. See 4 *Nimmer* §13.03[A][1][b] at 13-40.2 and 13-40.3. Additionally, the Second Circuit has accepted the definition of “story” in its “broadest sense” as “any account of actions in a time sequence, any narrative of events in a sequential arrangement; ...the collection of things that happen in the work.” See 4 *Nimmer* §13.03[A][1][b] at 13-40.3 quoting *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 628 (2d Cir. 1982), quoting from C. Holman, *A Handbook on Literature* 428 (4th ed. 1980).

In both novels, certain common elements drive the plots. The common elements are the Divine Feminine, the suppression of the Divine Feminine by Constantine and the Catholic Church, the existence of physical evidence of the Divine Feminine, the desire of the Catholic Church that the physical evidence never be found, the existence of two rival groups that seek the physical evidence, the desire of one of the groups to use the physical evidence to blackmail or coerce the Pope, etc. In discussing those things, both novels say the same things, sometimes using language that is almost identical and place those events and elements in identical or nearly identical positions. In both novels, there are mysteries, clues, priceless works of art, gold keys, Zurich banks etc. In both novels, the heroine undergoes significant learning experiences and is transformed spiritually as a result. In both novels, the object of the quest find the actors, not the other way around. In both novels, the physical evidence is either not found or is destroyed. Both

novels end on the common note that faith in what the physical evidence represents is much more important than the physical evidence itself.

Even if it is determined that none of the elements in the preceding paragraph are protected under the copyright laws, many of them are quite unusual and the way Perdue used them to tell his story is entitled to copyright protection. Given the substantial similarities, many of which are highly unusual, Perdue is entitled to a trial by jury. The common elements of the novels are so uncannily similar, that Brown could not have independently stumbled upon them in 2003 when *Da Vinci Code* was published, three years after *Daughter of God*.

C. Here, the Similarities Are Much More Important than the Differences

Plaintiffs have sought to distance *Da Vinci Code* from *Daughter of God* by noting the dissimilarities that exist between the novels. Indeed, by presenting the novels in a distorted, incomplete and most superficial way by ignoring the common substance of each of them, Plaintiffs have robbed each novel of their true heart and soul. That approach should be disregarded because in determining whether there is substantial similarity, the key is the similarities rather than the differences in the two works. *Attia v. Society of the New York Hospital*, 201 F.3d 50, 57 (2d Cir. 1999). “[I]t is immaterial that the vast majority of material in defendants’ book is not similar to plaintiff’s book.” *Churchill Livingston, Inc. v. Williams & Wilkins*, 949 F.Supp. 1045, 1055 (S.D.N.Y. 1996). It is well settled that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). See also *United Feature Syndicate, Inc. v. Koons*, 817 F.Supp. 370, 377 (S.D.N.Y. 1993). “If a defendant copies substantial portions of a plaintiff’s sequence of events, he does not escape infringement by adding original episodes somewhere along the line.” *Warner Bros., Inc. v. American Broadcasting Companies*, 720 F.2d 231 (2d Cir. 1983).

While it cannot be disputed that there are differences in the two stories, neither can it be disputed that there are also the substantial similarities that have been noted repeatedly in this memorandum, but which have been ignored by Plaintiffs. Not only do those same elements drive the plots in both novels, but the methods of expressing those elements is so similar as to virtually rule out the possibility that they were accidental or were independently created by Brown. Whether a person does or does not have a nice office, the kind of clothes a character wears, the particular school the heroine attended, the country in which the events of the novels take place, or the fact that the different names are used for the Divine Goddess, both of whom are symbolic of the divine feminine in any event, are not the sorts of differences that can excuse Brown's extensive plagiarism of the works of Lewis Perdue.

CONCLUSION

For the foregoing reasons, Defendant and Counterclaim-Plaintiff Lewis Perdue respectfully requests that this Court deny Plaintiff/Counterclaim Defendants' motion pursuant to Fed.Civ.P. Rule 12(b)(6) and Fed.R.Civ.P. Rule 12(c) for judgment on the pleadings, *or in the alternative*, pursuant to Fed.R.Civ.P. Rule 56 for summary judgment dismissing Perdue's counterclaims, in its entirety.

Dated: New York, New York
April 7, 2005

Respectfully submitted,

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,

W.D. New York.

Eric DAVIS, Plaintiff,

v.

O-AT-KA MILK PRODUCTS COOPERATIVE,

INC., Defendant.

No. 02 CV 936.

Dec. 22, 2004.

Jennifer A. Coleman, Siegel, Kelleher & Kahn,
Buffalo, NY, for Plaintiff.Robert C. Weissflach, Harter, Secrest and Emery
LLP, Buffalo, NY, for Defendant.**Report & Recommendation**

SCOTT, Magistrate J.

*1 This matter has been referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(C) (Docket No. 6). The instant matter before the Court is defendant's motion (Docket No. 19) for summary judgment.

BACKGROUND

Plaintiff, an African-American man, was employed by defendant O-AT-KA Milk Products Cooperative, Inc. ("O-AT-KA"). In his Complaint (Docket No. 1), plaintiff alleges that he lost his job due to his race, in violation of Title VII and New York State Human Rights Law. O-AT-KA, however, contends that plaintiff was terminated for cause and not due to his race and now moves for summary judgment.

Facts

Plaintiff began working for O-AT-KA in May 1997 and, until his termination on November 9, 2001, he held various positions with that company. He was represented by a Teamsters local and governed by a collective bargaining agreement. (Docket No. 22, Def. Statement of Material Facts, "Def. Statement," ¶ 11; Docket No. 20, Decl. of Gary Wadams ¶ 8; Docket No. 30, Pl. Aff. ¶ 8) Prior to his termination, plaintiff was a pan & dryer operator in the O-AT-KA plant. (See Docket No. 30, Pl. Aff. ¶ 8.)

O-AT-KA elaborates the processes that plaintiff was responsible for operating that ultimately led to his termination. (See, e.g., Docket No. 25, Def. Memo. of Law at 3-4.) This job involves operating O-AT-KA's evaporator, the device that converts raw milk into condensed product. The operator has to properly route the milk, including redirecting milk into storage tanks when other tanks are full. (See Docket No. 22, Def. Statement ¶ 20; Docket No. 32, Pl. Rule 56.1 Response/Statement ¶ 1.) When there is no outlet for milk, pressure and heat builds up and the product recirculates the system, becoming superheated; this is called "dead heading." (See Docket No. 25, Def. Memo. of Law at 4.) If not remedied, dead heading would damage the product and equipment and create a safety risk, with failure to follow proper procedure leading to discipline up to discharge (Docket No. 22, Def. Statement ¶ 28; see Docket No. 25, Def. Memo. of Law at 4).

Prior to the incident that led to that termination, plaintiff brought two grievances claiming that he alone was being hassled and treated differently from other employees (Docket No. 30, Pl. Aff. ¶¶ 10-16, Ex. 2-5). O-AT-KA, however, contends that plaintiff was disciplined for damaging equipment and was warned against dead heading. (See Docket No. 25, Def. Memo. of Law at 6-7.) In November 2001, milk pressure was allowed to build up in one tank in the evaporator. Plaintiff, who was

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monitoring this equipment, failed to transfer that milk product to a storage tank. This resulted in milk spraying from a broken valve and shorting out the control panel. The motor of the homogenizer in that system then burned out and had to be replaced and several hundred pounds of milk product spilled on the floor. Plaintiff had the equipment repaired but did not report the incident to his supervisors. But following an investigation by plaintiff's supervisor of that incident, plaintiff was terminated. (*See id.* at 7-12.)

*2 Pursuant to the collective bargaining agreement, plaintiff filed a grievance challenging the termination. There, he did not allege that the termination was due to his race. The arbitrator upheld the facts leading to plaintiff's termination and found that O-AT-KA had good and sufficient cause for terminating plaintiff. (Docket No. 24, Def.'s Ex. Y, at 9-11.)

Summary Judgment Motion

O-AT-KA moved for summary judgment (Docket No. 19, *see also* Docket Nos. 20-26), arguing that plaintiff was terminated for cause and not for his race. It points to plaintiff's admissions to the facts that lead to his termination (that the system deadheaded for thirty minutes, that milk sprayed and eventually spilled).

Through several amendments, the Court ordered responses to be filed by September 30, 2004, and replies by October 20, 2004 (Docket Nos. 27, 28, 29, 34), with argument set for November 30, 2004 (Docket Nos. 27, 34, 38). Plaintiff filed his response on September 30 (Docket Nos. 30-33), and O-AT-KA replied on October 20, 2004 (Docket Nos. 35-37). The motion was argued on November 30 and deemed submitted on that date.

DISCUSSION

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Ford v. Reynolds*, 316 F.3d 351, 354 (2d Cir.2003); Fed.R.Civ.P. 56(c). The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. *Ford, supra*, 316 F.3d at 354. "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1535 (2d Cir.) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), *cert. denied*, 522 U.S. 864 (1997). While the moving party must demonstrate the absence of any genuine factual dispute, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the party against whom summary judgment is sought, however, "must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (emphasis in original removed); *McCarthy v. American Intern. Group, Inc.*, 283 F.3d 121, 124 (2d Cir.2002); *Marvel Characters v. Simon*, 310 F.3d 280, 285-86 (2d Cir.2002).

B. Local Civil Rule 56.1

Under this Court's Local Civil Rule 56.1, the movants and opponents are each to submit "separate, short, and concise statement of the material facts" that they contend either does not or does need to be tried. W.D.N.Y. Local Civ. R. 56.1(a), (b). Each such statement is to be followed by a citation to the evidentiary record with the evidence relied upon in support of the statement to be separately filed with the Court unless such evidence has been previously filed. *Id.* R. 56.1(d). Failure of movants to file a statement may constitute

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grounds for denying their motion, *id.* R. 56.1(a), and failure of opponent to file an opposing statement risk having the Court deem "all material facts set forth in the statement required to be served by the moving party" to be admitted unless controverted by a required opposing statement. *Id.* R. 56.1(c). This rule is consistent with Federal Rule of Civil Procedure 56(e) requirement that an opponent to a summary judgment motion must submit evidentiary material beyond the pleadings to show a genuine issue of material fact exists to oppose the motion. The reason for this local rule is to assist the Court in determining whether issues of fact exist, whether they are material to the claims or defenses asserted, and the evidentiary bases for the statements in the record.

*3 O-AT-KA submitted an extensive Statement (Docket No. 22) with exhibits (Docket Nos. 22, 23, 24). Plaintiff objected to the length of this Statement (Docket No. 31, Pl. Memo. of Law at 2) arguing that the statement was neither short nor concise and contained excessive material. He then submitted a two-paragraph Response in Opposition to Summary Judgment (Docket No. 32) generally disputing the facts alleged in O-AT-KA's statement. The first paragraph admitted the facts alleged in certain of O-AT-KA's Statement (Docket No. 32 ¶ 1). O-AT-KA argues that plaintiff's response does not comply with Local Civil Rule 56.1 and those facts not controverted by plaintiff in this manner have to be deemed admitted (Docket No. 36, Def. Reply Memo. at 2-3, citing *Covelli v. National Fuel Gas Distribution Corp.*, No. 99cv500, Docket No. 25, 2001 U.S. Dist. LEXIS 23932, at *4-6 (W.D.N.Y. Dec. 6, 2001) (Elfvig, J.)). Plaintiff, however, also submitted his affidavit with exhibits (Docket No. 30). Regardless of the regard for this Court's procedures by either party, on the merits of O-AT-KA's motion summary judgment should be granted to O-AT-KA.

II. Title VII Standard

For a Title VII claim (as well for an equivalent New York State Human Rights Law violation claim) plaintiff first must establish the existence of a *prima facie* case of discrimination. He needs to

show (a) that he is a member of a protected group under Title VII, (b) that he was qualified for the position, (c) that he suffered an adverse employment action, and (d) that the circumstances give rise to an inference of discrimination. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The only element at issue here is the final one, whether the circumstances give rise to the discriminatory inference. Once plaintiff establishes the *prima facie* case, the burden shifts to defendant to show a legitimate, nondiscriminatory reason for the action. *Id.* Plaintiff has the ultimate burden of proving that defendant's nondiscriminatory reason is pretextual. *Id.*

III. Application of Title VII Standard

O-AT-KA contends that plaintiff fails to make a *prima facie* case, namely by failing to show that his termination occurred under circumstances that give rise to an inference of discrimination. Plaintiff, however, alleges he was singled out for discipline by Gary Wadams due to his race, and that similarly situated white employees were not so disciplined, and O-AT-KA did not address plaintiff's complaints of disparate treatment. (Docket No. 30, Pl. Aff. ¶¶ 10, 46, 13.) But O-AT-KA establishes that, from plaintiff's admissions about the damage to O-AT-KA's product and equipment, there was no fact to support any inference of discrimination in plaintiff's termination. (See Docket No. 25, Def. Memo. of Law at 16-17.) O-AT-KA also distinguishes plaintiff from the alleged similarly situated employees because plaintiff was warned about dead heading and damage to product and O-AT-KA's equipment prior to the November 2001 incident and the magnitude of damage resulting from the November 2001 incident. (See *id.* at 20.)

*4 O-AT-KA finally relies upon the arbitrator's decision that found that it had good and sufficient cause to terminate plaintiff and ratified the facts that lead to that termination. (*Id.* at 20-25.) The arbitrator's finding is entitled to great weight as the decision of a neutral, independent and unbiased adjudicator. *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir.2002). The arbitrator's

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decision is highly probative of the absence of discriminatory intent, *id.*, and "a decision by an independent tribunal not itself subject to a claim of bias will attenuate plaintiff's proof of the requisite causal link" under the Title VII standard, *id.* Plaintiff thus would have to show either that, with strong evidence, that the arbitrator's decision was wrong as a matter of fact, or that it was a product of bias or lack of impartiality. *Id.*

Plaintiff argues that the arbitration was irrelevant to this action since plaintiff's race was never raised as an issue in his union grievance. (Docket No. 31, at 2-4 n. 1.) But the arbitrator evaluated the factual, nondiscriminatory reasons for the termination that O-AT-KA advances here for plaintiff's termination, even if claims of retaliation were not presented to the arbitrator. *See Roemer v. Board of Educ.*, 290 F.Supp.2d 329, 332-33 (E.D.N.Y.2003); *Collins, supra*, 305 F.3d at 119.

For the reasons of either plaintiff failing to establish the element of the prima facie case of circumstances that give rise to an inference of discrimination or O-AT-KA establishing a legitimate, nondiscriminatory reason for its action, plaintiff fails to prove racial discrimination in his termination. Therefore, O-AT-KA's motion for summary judgment should be granted and the Complaint dismissed.

CONCLUSION

Based upon the above, it is recommended that defendant's motion (Docket No. 19) for summary judgment be granted.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy of the Report & Recommendation to all parties.

ANY OBJECTIONS to this Report & Recommendation must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. § 636(b)(1), Fed.R.Civ.P. 72(b) and W.D.N.Y. Local Civil Rule

72.3(a).

FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION WITHIN THE SPECIFIED TIME OR TO REQUEST AN EXTENSION OF SUCH TIME WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT DISTRICT COURT'S ORDER ADOPTING THE RECOMMENDATIONS CONTAINED HEREIN. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *F.D.I.C. v. Hillcrest Associates*, 66 F.3d 566 (2d Cir.1995); *Wesolak v. Canadair Ltd.*, 838 F.2d 55 (2d Cir.1988).

The District Court on *de novo* review will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. *See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985 (1st Cir.1988).

*5 Finally, the parties are reminded that, pursuant to W.D.N.Y. Local Civil Rule 72.3(a)(3), "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." *Failure to comply with the provisions of Rule 72.3(a)(3) may result in the District Court's refusal to consider the objection.*

SO ORDERED.

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• 1:02CV00936 (Docket)

(Dec. 27, 2002)

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C

Motions, Pleadings and Filings

United States District Court,
S.D. New York.
GENERAL ELECTRIC COMPANY Plaintiff,
v.
VARIG--S.A. (Viacao Aerea Rio-Grandense)
Defendant.
No. 01 Civ. 11600RJHJCF.

Feb. 10, 2004.

Background: Airplane engine manufacturer filed a complaint seeking declaratory judgment decreeing that an agreement entered into with a buyer of the engine was enforceable as to its limited liability and choice of law provisions.

Holding: On the manufacturer's motion for summary judgment, the District Court, Holwell, J., held that a limitation of liability provision was enforceable.
Motion granted.

West Headnotes

Aviation ⇐14

48Bk14 Most Cited Cases

Under New York law, a limitation of liability provision in a contract for the purchase of an airplane engine, which allegedly malfunctioned, was enforceable; the contract was a commercial contract for the sale of goods, such that it was governed by the Uniform Commercial Code (UCC), and the UCC provided two independent methods for parties to agree to limit liability, both of which were used in the contract. McKinney's Uniform Commercial Code § 2-719.

Louis R. Martinez, Richard Ritorto, Martinez & Ritorto, P.C., New York, N.Y., for plaintiff.

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Christopher D. Kelly, Joanna L. Geraghty, Holland & Knight, LLP., New York, N.Y., for defendant.

MEMORANDUM OPINION AND ORDER

HOLWELL, J.

*1 Plaintiff General Electric Company ("GE") filed a complaint seeking declaratory judgment decreeing that an agreement entered into with defendant VARIG--S.A. (Viacao Aerea Rio-Grandense) ("VARIG") is enforceable as to its limited liability and choice of law provisions. GE now moves for summary judgment. VARIG has chosen not to oppose GE's motion. For the reasons stated herein, GE's motion for summary judgment is granted.

BACKGROUND

GE filed its complaint on December 19, 2001, and the matter was initially assigned to the Honorable Sidney H. Stein, United States District Court for the Southern District of New York. VARIG filed an answer on May 15, 2002. The parties then engaged in discovery and participated in several mediation sessions before the Honorable James C. Francis IV, United States Magistrate Judge for the Southern District of New York.

On September 3, 2003, GE moved for summary judgment. In accordance with Local Civil Rule 56.1, GE submitted a Rule 56.1 Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment (hereinafter "Statement").

By letter dated October 3, 2003, VARIG asked Judge Stein for an extension of time in which to file its opposition brief so that it could properly consider whether it wanted to oppose the motion. Judge Stein granted VARIG's requested extension. By letter dated October 14, 2003, VARIG informed the Court that, "after due consideration," it had decided not submit opposition papers to GE's motion for summary judgment.

This case was transferred to the Honorable Richard J. Holwell, United States District Court for the Southern District of New York, on December 18, 2003. Below are this Court's findings of fact and conclusions of law.

FACTS

The following facts are supported in the record provided by GE and are thus deemed admitted for purposes of this summary judgment motion. *See Gianmulo v. City of New York*, 322 F.3d 139, 140 (2d Cir.2003) ("If the opposing party then fails to controvert a fact so set forth in the moving party's Rule 56.1 statement, that fact will be deemed admitted.").

GE is a New York corporation with its principal place of business in the State of New York. (Statement ¶ 1.) GE manufactured a GE Model CF6-80C2B2 airplane engine bearing the serial number 690-165 ("Engine"). (*Id.* ¶ 5.)

VARIG is a Brazilian corporation that is registered to do business in New York and operates flights out of John F. Kennedy International Airport in New York City, among other places. (*Id.* ¶¶ 2-3, 12.) In 1987, VARIG entered into an agreement, titled General Terms Agreement 6-5969 ("GTA"), with GE to buy the Engine. (*Id.* ¶ 6.)

The GTA's choice-of-law provision stated that "[t]his Agreement shall be construed, interpreted and applied in accordance with the law of the State of New York." (Aff. of Louis Martinez in Supp. of GE's Mot. for Summ. J., Ex. H at 9.) After defining VARIG as "Airline," the GTA further stated:

***2 "Article XIII Limitation of Liability"**

The liability of GE to Airline arising out of, connected with, or resulting from the manufacture, sale, possession, use or handling of any Product (including Engines installed on Airline's aircraft as original equipment) whether in contract, tort (including negligence) or otherwise, shall be set forth in the Product Support Plan included in Exhibit B hereof, and shall not in any event exceed the purchase price of the Product giving rise to Airline's claim. The foregoing shall constitute the sole remedy of

Airline and the sole liability of GE. In no event shall GE be liable for special or consequential damages. THE WARRANTIES AND GUARANTEES SET FORTH IN THE PRODUCT SUPPORT PLAN ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES AND GUARANTEES WHETHER WRITTEN, STATUTORY, ORAL OR IMPLIED (INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANT ABILITY OR FITNESS FOR PURPOSE)." (*Id.* at 1, 7.)

The Product Support Plan, Exhibit B to the GTA, contained a series of warranties and schedules for service and replacement of Engine parts. (*Id.* at B-1 to B-20.) In addition, the Plan repeated that this "Product Support Plan set[s] forth the maximum liability of GE with respect to claims of any kind, including negligence, arising out of manufacture, sale, possession, use or handling of the Products or Parts thereof or therefore, and in no case shall GE's liability to Airline exceed the purchase price of the Product giving rise to Airline's claim." (*Id.* at B-17.)

In 1997, VARIG and GE amended the products and parts delivery terms of the GTA. (*Id.*, Ex. H; Statement ¶ 11.) However, the amendment stated: "Except as set forth herein, all other provisions of the GTA remain unchanged and in full force and effect." (Aff. of Louis Martinez in Supp. of GE's Mot. for Summ. J., Ex. H; Statement ¶ 11.)

On or about June 7, 2000, the Engine malfunctioned as the plane in which it was mounted (owned by VARIG) was preparing to take off. (Statement ¶¶ 9, 12- 14.) The pilots safely stopped the airplane on the runaway before take-off. (*Id.* ¶ 14.)

In October 2001, VARIG threatened GE with a lawsuit seeking damages allegedly incurred from the malfunctioning of the Engine, including alleged damage to the hull of the aircraft and indemnification for legal fees and awards that arose from passenger liability claims. (*Id.* ¶ 15.) In light of VARIG's threats, GE commenced this lawsuit for declaratory judgment to limit GE's liability to the scope of the liability provision in the GTA, which

was in full force on June 7, 2000. [FN1] (*Id.* ¶¶ 16, 18.)

FN1. VARIG originally asserted the GTA was not in effect on June 7, 2000, but later withdrew this assertion. (Statement ¶ 17.)

DISCUSSION

Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). It is the movant's burden to show that no genuine factual dispute exists and all reasonable inferences must be drawn in the non-movant's favor. *See Giannullo*, 322 F.3d at 140 (quotations omitted). Furthermore, though facts in an unopposed statement pursuant to Rule 56.1 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York are deemed admitted, "[t]he local rule does not absolve the party seeking summary judgment of the burden of showing that it is entitled to judgment as a matter of law, and a Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record." *Id.* A court may grant summary judgment only when "no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir.1995) (quotations omitted).

*3 Generally, after the movant has shown the absence of any genuine issue of material fact, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts", *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Rather, a non-movant must support their claims with admissible facts and "may not rest upon the mere allegations or denials of the adverse party's pleadings". Fed.R.Civ.P. 56(e). Here, however, the non-moving party has chosen not to oppose the motion. Thus, the question is whether plaintiff is entitled to judgment as a matter of law given the supported facts presented.

The interpretation of an unambiguous contract is a question of law for the court, and a dispute on such

an issue may properly be resolved by summary judgment. *See Omni Quartz, Ltd. v. CVS Corp.*, 287 F.3d 61, 64 (2d Cir.2003). The Court begins by examining what law to apply in interpreting the GTA and then whether that law would support the enforcement of the parties' choice-of-law and limitation of liability provisions.

In diversity cases, courts look to the law of the forum state for guidance on contract interpretation. *See Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir.1996). Since this suit was brought in the Southern District of New York, New York law is applicable here and "New York law gives full effect to parties' choice-of-law provisions". [FN2] *Id.* In this case, the parties' choice-of-law provision also specifies New York law. Having determined that New York law is properly applicable here, the Court now turns to consider the limitation of liability provision under New York law.

FN2. Indeed, under New York law, even claims for tort arising incident to a contract can be covered by a contract's choice-of-law provision if the express language of the contract is sufficiently broad "as to encompass the entire relationship between the contracting parties." *Id.*; see also *Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC*, 223 F.Supp.2d 474, 489 (S.D.N.Y.2002) (finding language in choice-of-law provision together with forum selection clause sufficient to cover all disputes).

"It is axiomatic that parties to a contract must remain free to allocate risks and shield themselves from liability." *McNally Wellman Co. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1195 (2d Cir.1995). To that end, "New York has adopted the Uniform Commercial Code ("UCC"), under which parties to a commercial contract, absent any question of unconscionability, may agree to limit the seller's liability for damages." *Proto Constr. & Dev. Corp. v. Superior Precast, Inc.*, No. 99-CV-2851(NG), 2002 WL 1159593, at *7 (E.D.N.Y. May 28, 2002) (quotations omitted).

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"[T]he UCC displaces the common law when a particular section at issue produces a result that would be contrary to that obtained under ordinary contract law." *McNally Wellman Co.*, 63 F.3d at 1196. Parties can also agree to limit their liability to one another in tort actions related to the contract if their intention to limit tort liability is clearly expressed. See *O'Brien v. Grumman Corp.*, 475 F.Supp. 284, 289 (S.D.N.Y.1979) ("It is settled law in New York that an exculpatory clause in a contract intended to insulate one of the parties from liability for his own negligence is enforceable, absent certain limited public policy considerations.").

In deciding whether a contract is for the sale of goods, and thus plainly covered by the UCC, courts look to the main objective of the contract. See *Proto Constr. & Dev. Corp.*, 2002 WL 1159593, at *7. In the present case, although the Product Support Plan includes terms under which GE agreed to service, maintain, and supply spare parts for the Engine, the ultimate objective of the GTA was the sale of the Engine. Therefore, the Court finds that the GTA is a commercial contract for the sale of goods and is governed by the UCC.

*4 Under N.Y. UCC § 2-719, the "parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect." N.Y. UCC § 2-719, Official Comment 1. For contracts concerning the sale of goods, UCC § 2-719 provides two independent methods for parties to agree to limit liability: (a) limiting a buyer's remedies to repair and replacement costs, as long as doing so would not deprive a party of the substantial value of the bargain; and (b) excluding consequential damages, as long as such exclusion is not unconscionable. See *Proto Constr. & Dev. Corp.*, 2002 WL 1159593, at *8. Unconscionability generally requires a showing that one of the parties did not have a meaningful choice in the contract and that the contract terms are unreasonably favorable to one party. See *McNally Wellman Co.*, 63 F.3d at 1198.

The GTA, along with the Product Support Plan,

uses both methods for limiting GE's liability and both limitations are enforceable under the UCC. See, e.g., *Proto Constr. & Dev. Corp.*, 2002 WL 1159593, at *8. The provision does not deprive VARIG of the substantial value of the contract, as VARIG received and made good use of the Engine. The provision is also not unconscionable "because the contract is not the type of contract entered into by an unwary consumer, but rather was a complex and painstakingly negotiated commercial agreement between two highly competent parties". *Proto Constr. & Dev. Corp.*, 2002 WL 1159593, at *9 (quotations omitted).

In fact, the language of the GTA and Product Support Plan is similar to language in a limitation of liability provision considered and found enforceable in *Tulgar Contracting Corp. v. Star Bldg. Sys., Inc.*, No. 01 Civ. 6853(JSR), 2002 WL 986994 (S.D.N.Y. May 14, 2002). Like the parties in that case, VARIG and GE are sophisticated companies. They bargained for and agreed to this limitation of liability provision. This Court finds the limitation of liability provision of the GTA, and accompanying Product Support Plan, is enforceable.

CONCLUSION

For the reasons set forth above, this Court enters summary judgment, granting plaintiff's request for declaratory judgment. In particular, this Court decrees that: (1) the GTA between VARIG and GE is in full force and effect, and applies to the engine malfunction incident of June 7, 2000; (2) the GTA shall be construed, interpreted, and applied in accordance with the substantive law of the State of New York; (3) the sole remedy of VARIG and its representatives, successors, or assigns against GE for the June 7, 2000, incident is as set forth in the GTA; (4) under the GTA, GE is not liable in contract or tort (including negligence) to VARIG or its representatives, successors, or assigns for economic loss, including but not limited to, damage to the hull of VARIG's airplane, loss of use of that airplane, legal and surveyors' fees, interest, and/or amounts VARIG paid to settle passenger liability claims and expenses arising out of the June 7, 2000, incident. The Clerk is directed to close this case.

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H**Motions, Pleadings and Filings**

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

ROWE ENTERTAINMENT, INC., Leonard Rowe,
Sun Song Productions, Inc., Jesse
Boseman, Summitt Management Corporation, Fred
Jones, Jr., Lee King Productions,
Inc., and Lee King, Plaintiffs,

v.

THE WILLIAM MORRIS AGENCY, INC.,
Creative Artists Agency, LCC, Renaissance
Entertainment, Inc., Jam Productions, Ltd., and
Beaver Productions, Inc.,
Defendants.

No. 98 Civ. 8272(RPP).

Jan. 5, 2005.

Gary, Williams, Parenti, Finney, Lewis, McManus,
Watson & Sperando, Stuart, FL, By: Willie E. Gary
, Maria Sperando, William Campbell, Laura L. Mall
, Ali Gary, Jim Montalvo, Tricia Hoffler, Ivie,
McNeill & Wyatt, Citigroup Center, Los Angeles,
CA, By: Rickey Ivie, Kendall E. James, for
Plaintiffs.

Loeb & Loeb, LLP, New York, NY, By: Michael
P. Zweig, Helen Garvaris, Charles Miller, for The
William Morris Agency, Inc.

Weil Gotshal & Manges, LLP, New York, NY, By:
Jeffrey S. Klein, Pierre G. Armand, Andrea Berner,
Beverly R. Frank, Dewey Ballantine, LLP, New
York, NY, By: Jeffrey L. Kessler, for Creative
Artists Agency, LLC.

Manatt, Phelps & Phillips, LLP, New York, NY,
By: Steve M. Hayes, Greg Clarick, Orin Snyder,
for Renaissance Entertainment, Inc.

Piper Rudnick, Chicago, IL, By: James D. Roberts,
Peter M. Ellis, George L. Grumley, for Jam
Productions, Ltd.

Emmett, Cobb, Waits & Kessenich, New Orleans,
LA, James A. Cobb, Jr., for Beaver Productions,
Inc.

OPINION AND ORDER

PATTERSON, J.

*1 This opinion will address the motions of
Defendants William Morris Agency, Inc.
("WMA"), Creative Artists Agency, LLC ("CAA")
and Renaissance Entertainment, Inc.
("Renaissance") (collectively, the "Booking Agency
Defendants"), and Jam Production, Ltd. ("Jam")
and Beaver Productions, Inc. ("Beaver")
(collectively, the "Promoter Defendants"), for
summary judgment on the Amended Complaint
pursuant to Rule 56 of the Federal Rules of Civil
Procedure. [FN1] [FN2]

FN1. Rule 56.1 of the Local Civil Rules of
the Southern District of New York requires
parties moving for summary judgment to
submit "a separate, short and concise
statement of the material facts as to which
the moving party contends there is no
genuine issue to be tried." Local Civil Rule
56.1(a) (2003). The facts set forth in a
moving party's statement "will be deemed
to be admitted for purposes of the motion
unless controverted" by the opposing
party's statement. Local Civil Rule 56.1(c).
All statements "must be followed by
citation to evidence which would be
admissible" under the Federal Rules of
Evidence. Local Civil Rule 56.1(d).
The Booking Agency Defendants have
moved to strike all Plaintiffs' Local Civil
Rule 56.1 Statements as not in compliance

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with the Local Civil Rules, as well as Plaintiffs' affidavits not in compliance with Rule 56(e) of the Federal Rules of Civil Procedure. (Booking Agency Defs.' Mem. in Supp. of Mots. to Strike, dated May 23, 2003 ("Joint Mem. Supp. Mot. Strike").) The Court issued orders on May 30, 2003, and June 2, 2003, notifying Plaintiffs that their responses were not in compliance with Local Civil Rule 56.1, together with an instructing memorandum. Plaintiffs amended their Local Civil Rule 56.1 Statements on June 16, 2003. (E.g., Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Pls.' Opp'n to Booking Agency Defs.' Joint Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. Joint 56.1 Stmt.").) Because these statements are still argumentative and conclusory, and often not supported by citations to evidence, the Court will strike for failure to comply with Local Civil Rule 56.1 the portions of the Plaintiffs' Rule 56.1 Statements and supporting affidavits that constitute argument and conclusory statements not shown to be made on an affiant's personal knowledge. See *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir.1999). The Court will also disregard all statements in the affidavits that do not meet the standard of response required by Rule 56(e) of the Federal Rules of Civil Procedure. See *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir.2001) ("A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules.").

FN2. Plaintiffs move to strike the affidavit of Geraldine G. Papa, dated May 23, 2003. This affidavit by a paralegal consists of her itemization of misrepresentations contained in Plaintiffs' Response to the Defendants' Motions for Summary Judgment and her interpretation of the correct interpretation of the underlying deposition testimony. As Plaintiffs point out, the filing of the affidavit gave the

Defendants fifteen extra pages to reply to Plaintiffs' opposition papers, in violation of the Court's instructions on the length of memoranda to be submitted to the Court. On the other hand, Plaintiffs have used smaller type size, larger margins and different spacing than the Court's rules contemplate to comply with the page limitations. The Court has found that there have been numerous misrepresentations of testimony or half truths in the Plaintiffs' responsive papers, which would derogate from the Defendants' flow of argument and Defendants had little choice but to supplement their legal argument in this fashion. In point of fact, as one can discern from the length of this opinion and the time elapsed since argument, the Court has laboriously concluded an intensive review of the mountain of unorganized materials presented in those motions and did not rely on the Papa affidavit for its determinations. Nevertheless, because the Papa affidavit constitutes an unauthorized briefing, the Court grants the Plaintiffs' motion.

The action, filed on November 19, 1998, is brought by four African-American owned concert promoter companies and their owners: Rowe Entertainment, Inc. ("Rowe Entertainment"), Leonard Rowe, Sun Song Productions, Inc. ("Sun Song"), Jesse Boseman, Summitt Management Corporation ("Summitt"), Fred Jones, Jr., Lee King Productions, Inc. ("King Productions"), and Lee King. [FN3] (Pls.' Am. Compl., dated Aug. 9, 1999 ("Am.Compl."), ¶¶ 12, 14-16.)

FN3. Originally, BAB Productions, Inc. and Bernard Bailey were named as Plaintiffs (Am.Compl.¶ 13), but these Plaintiffs voluntarily discontinued their claims during discovery.

The Amended Complaint originally charged eight talent and booking agency defendants, [FN4] each controlled by white persons and doing business throughout the United States, and twenty-six concert promoter defendants, [FN5] each doing

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business in the United States and controlled by white persons, with violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and of the Civil Rights Act of 1866 and 1991, 42 U.S.C. §§ 1981, 1985(3) and 1986. (*Id.* ¶¶ 2-3, 5, 18-25, 29-55.) Due to stipulated orders of dismissal since the filing of the Amended Complaint, only two concert promoter companies, Jam and Beaver, and three talent and booking agencies, WMA, CAA, and Renaissance, remain in this action.

FN4. Three additional booking agencies are named as "talent agent conspirators" but are not named as defendants. (*Id.* ¶ 28.)

FN5. Three additional concert promoters are named as "concert promoter co-conspirators" but are not named as defendants. (*Id.* ¶ 57.)

I. BACKGROUND

A. General Nature of Claims in Amended Complaint

Plaintiffs allege "violations of antitrust and civil rights laws in connection with the promotion of live concert performances throughout the United States of pop, rock and urban music ('contemporary music') (hereinafter referred to as 'concerts' or 'contemporary music concerts')." (Am.Compl.¶ 1.)

The Amended Complaint also asserts:

[b]ecause of an all-white concert promotion fraternity, the black concert promoters are systematically excluded from the promotion of concerts given by white performers. No black promoter, including plaintiffs, has been able to contract to promote a contemporary music concert given by a white artist, or even been given the opportunity to bid on such promotion. In addition, plaintiffs are regularly excluded from the promotion of concerts given by top-drawing black performers.

(*Id.*)

The Amended Complaint states that the Booking Agency Defendants, "which are all controlled by

white persons, represent performers in booking concerts" and "engage promoters to promote concerts in the particular geographic areas in which concerts are to be presented." (*Id.* ¶ 2.) Additionally, it states that "[t]he selection of each promoter is within the discretion of the agent." (*Id.*) [FN6]

FN6. Plaintiffs have acknowledged that ultimate approval of the selection of a promoter rests with the artists and the artists' managers. (Dep. of Mario Gonzalez, dated Feb. 13, 2003 ("Gonzalez Dep."), in Booking Agency Defs.' J.A. in Supp. of Mots. for Summ. J., dated Feb. 28, 2003 ("J.A."), Vol. IV, at 233 (containing statement by Ms. Sperando, counsel for Plaintiffs, "agree[ing] that the final approval of a promoter rests with the manager ... [o]r the artist").)

The Amended Complaint goes on to state that, as a product of an illegal conspiracy among the Defendants and others to boycott and exclude Plaintiffs and to discriminate against them on the basis of race in violation of section 1 of the Sherman Antitrust Act and the Civil Rights Acts of 1866 and of 1991, "[t]he booking agency defendants refer their promotion business of white acts exclusively to white promoters, predominantly to the promoter defendants," and "plaintiffs are often excluded from promoting concerts given by most popular black artists." (*Id.* ¶ 4.)

*2 The Amended Complaint contains six claims: (1) a conspiracy to restrain trade in violation of section 1 of the Sherman Act claiming damages; (2) injunctive relief for violation of section 1 of the Sherman Act; (3) intentional wrongful discrimination on the basis of race concerning Plaintiffs' right to make and enforce contracts in violation of 42 U.S.C. § 1981; (4) conspiracy to deprive Plaintiffs of the equal protection of the laws and equal privileges and immunities under the laws, including the right to make and enforce contracts, in violation of 42 U.S.C. § 1985(3); (5) injunctive relief for violation of 42 U.S.C. §§ 1981 and 1985(3); (6) violation of 42 U.S.C. § 1986 for each

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Defendant's failure to act or prevent the conspiracy to discriminate against Plaintiffs. (*Id.* ¶¶ 95-114.)

Unless stated otherwise, the facts that follow are undisputed.

B. Parties to the Litigation

1. Plaintiffs

Plaintiff Rowe Entertainment is a corporation organized and existing under the laws of Georgia since 1998. (*Id.* ¶ 12; Booking Agency Defs.' Joint Rule 56.1 Stmt. of Undisputed Material Facts, dated Feb. 28, 2003 ("Joint 56.1 Stmt."), ¶ 53.) Rowe Entertainment has its primary place of business in Atlanta, Georgia. (Am.Compl.¶ 12.) Plaintiff Leonard Rowe is its sole shareholder and president. (*Id.*) Mr. Rowe has been in the concert promotion business for twenty-six years. (Joint 56.1 Stmt. ¶ 52.)

Plaintiff Sun Song is a corporation organized and existing under the laws of New York since 1976. (Am.Compl.¶ 14.) Sun Song has its principal place of business in New York, New York, and has operated in New York and along the East Coast of the United States. (*Id.*) Plaintiff Jesse Boseman is its sole shareholder and chief executive. (*Id.*)

Plaintiff Summitt is a corporation organized and existing under the laws of Delaware since 1984. (*Id.* ¶ 15.) [FN7] Summitt has its principal place of business in Memphis, Tennessee, and promotes primarily in the Memphis metropolitan region. (*Id.*) Plaintiff Fred Jones is its sole shareholder and president. (*Id.*)

FN7. In Mr. Jones's declaration, dated February 25, 2003, he states that Summitt "has been in existence since 1986." (Decl. of Fred Jones, dated Feb. 25, 2003 ("Jones Beaver Decl."), attached as Ex. 1 in Exs. Pls. Resp. in Opp'n to Beaver's Mot. for Summ. J., dated Mar. 13, 2003 ("Pls.' Beaver Exs."), ¶ 2.) In Plaintiffs' other papers, however, they cite 1984 as the founding date. (Pls.' Am. Joint 56.1 Stmt.

¶ 122; Dep. of Fred Jones, dated May 7, 2001 ("Jones Dep."), in J.A., Vol. IV, at 19.) Accordingly, for the purposes of this opinion, the Court will consider 1984 as the correct date.

Plaintiff King Productions is a corporation organized and existing under the laws of Mississippi since 1976. (*Id.* ¶ 16.) King Productions has its principal place of business in Jackson, Mississippi, and operates primarily in the southern United States. (*Id.*) Plaintiff Lee King is the sole shareholder and chief executive. (*Id.*)

2. Promoter Defendants

Defendant Jam is an Illinois corporation with its principal place of business in Chicago, Illinois. (*Id.* ¶ 49.) Jam is owned and operated by Army Granat and Jerry Mickelson, who are both Caucasian. (Pls.' Rev. Local Rule 56.1 Stmt. of Disputed Facts in Supp. Opp'n to Jam's Mot. for Summ. J., dated Mar. 12, 2003 ("Pls. Rev. Jam 56.1 Stmt."), ¶ 1.) Plaintiffs assert that Jam has promoted an average of 600 to 700 shows or more per year and between 400 to 1,200 events in 2001 and 2002. (Pls.' Rev. Jam 56.1 Stmt. ¶¶ 3-4 (citing Dep. of Army Granat, undated ("Granat Dep."), attached as Ex. 2 in Exs. Pls.' Rev. Mem. in Opp'n to Jam's Mot. for Summ. J., undated (received Mar. 13, 2003) ("Pls.' Rev. Jam Mem. Exs."), at 25-26, 233-34.) Defendant Jam asserts that Plaintiffs' figures are nationwide figures that include events other than music concerts and that Jam promoted an average of 200 to 300 music concerts in Chicago each year. (Decl. of Jerry Mickelson, dated Mar. 13, 2003 ("Mickelson Decl. II"), attached as Ex. 1 to Decl. of James D. Roberts, dated Mar. 13, 2003 ("Roberts Decl."), ¶ 18.)

*3 Defendant Beaver is a Louisiana corporation with its principal place of business in New Orleans, Louisiana. (Am.Compl.¶ 29.) Beaver has promoted concerts for over thirty years. (Decl. of Don Fox, dated Feb. 14, 2003 ("Fox Decl."), attached as Ex. 1 in Exs. Beaver's Mem. in Supp. of Mot. for Summ. J., undated (received Feb. 20, 2003) ("Beaver Exs."), ¶ 3.) Don Fox is the

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president and sole shareholder of Beaver. (Beaver's Stmt. of Uncontested Material Facts Pursuant to Local Rule 56.1, dated Feb. 19, 2003 ("Beaver 56.1 Stmt."), ¶ 4.) [FN8] Barry Leff is the vice-president. (*Id.* ¶ 5.) Both Don Fox and Barry Leff are Caucasian. (Pls.' Revised Stmt. of Contested Material Facts Pursuant to Local Rule 56.1, dated Mar. 24, 2003 ("Pls.' Rev. Beaver 56.1 Stmt."), ¶ 7.) Beaver has promoted an average of 200 concerts per year throughout North America, the majority [FN9] of which have taken place in the Greater New Orleans area. (Fox Decl., Beaver Ex. 1, ¶ 3; Dep. of Barry Leff, undated ("Leff Dep."), Pls.' Beaver Ex. 4, at 104.)

FN8. Plaintiffs dispute Beaver 56.1 Stmt. ¶ 4 in part, but present no disagreement to this part of the paragraph. (Pls.' Resp. to Beaver's "Undisputed Facts", dated June 11, 2003 ("Pls.' Resp. Beaver 56.1 Stmt."), ¶ 4.)

FN9. Beaver uses the term plurality, but if majority is substituted for plurality, then this statement is undisputed. (*Id.* ¶ 6.)

3. Booking Agency Defendants

Defendant WMA is a privately held company founded in 1898, with its principal offices in Beverly Hills, New York City and Nashville. (WMA's Stmt. Undisputed Material Facts Pursuant to Local Civil Rule 56.1, dated Feb. 28, 2003 ("WMA 56.1 Stmt."), ¶ 1.) WMA represents clients in various entertainment fields, including music, television, books, theatre and movies. (*Id.* ¶ 2.) WMA's music division has approximately sixty agents and represents over 500 artists. (*Id.* ¶ 4.) When an agent in WMA's music department receives a bid or bona fide offer concerning an upcoming show or tour, WMA's policy is to transfer the bid or offer to the artist or the artist's manager. (*Id.* ¶ 5.) [FN10] The artist or the artist's manager makes the final decision as to whether to accept the bid or offer. (*Id.* ¶ 6.) [FN11]

FN10. Plaintiffs dispute WMA 56.1 Statement ¶ 5, citing the affidavit of

Richard Johnson, a former WMA employee, to refute WMA's assertion that it forwards all bona fide offers to artists or their managers. (Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Opp'n to WMA's Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. WMA 56.1 Stmt."), ¶ 4 (citing Aff. of Richard Johnson, dated Jan. 19, 2001 ("R. Johnson Aff."), attached as Ex. 9 in Exs. Pls.' Resp. in Opp'n to WMA's Mot. for Summ. J., undated (received May 5, 2003) ("Pls.' Resp. WMA Exs."), ¶ 3).) However, Mr. Johnson was employed in the music division of Defendant WMA as a booking agent from 1982 to 1986, twelve years before the filing of this complaint, and has been employed in an unrelated economic area ever since. (R. Johnson Aff., Pls.' Resp. WMA Ex. 9, ¶ 1.) The cited evidence is insufficient to controvert WMA 56.1 Statement ¶ 5, and this statement is considered as if undisputed.

FN11. Plaintiffs dispute WMA 56.1 Statement ¶ 6. However, the evidence cited by Plaintiffs does not controvert the statement that the artists or their managers make the final decision. (Pls.' Am. 56.1 Stmt. ¶ 6.) Thus, WMA 56.1 Statement ¶ 6 is considered as if undisputed. Additionally, Plaintiffs have admitted that this assertion is true. *See supra* note 6.

Defendant CAA was incorporated as a limited liability company under the laws of Delaware on or about August 18, 1995. (CAA's Stmt. of Undisputed Material Facts, dated Feb. 28, 2003 ("CAA 56.1 Stmt."), ¶ 1.) Its principal place of business is Beverly Hills, California. (Am.Comp. ¶ 19.) CAA's music department represents musical artists in the booking of live musical performances. (CAA 56.1 Stmt. ¶ 5.) CAA currently employs approximately twenty-eight music agents and represents over 200 musical artists. (*Id.*) CAA's music clients include artists "whose musical styles encompass many different genres of music, including pop, rock, urban, R & B, jazz, country and western, Latin,

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gospel and Christian music." (*Id.* ¶ 6.) Each year, CAA's music agents are involved in booking thousands of concert dates for its music clients, both nationally and internationally. (*Id.* ¶ 7.)

Defendant Renaissance was incorporated under the laws of New York in February 1996. (Renaissance's Stmt. Pursuant to Local Rule 56.1, dated Feb. 28, 2003 ("Renaissance 56.1 Stmt."), ¶ 1.) David Zedeck was the sole principal and president of Renaissance. (*Id.* ¶ 4.) On December 31, 1999, Renaissance ceased all business operations and sold its assets to Evolution Talent Agency, LLC, which was started by David Zedeck and a partner. (*Id.* ¶¶ 3-4.) [FN12] During its operation, Renaissance provided booking agent services to musical artists in connection with their live events. (*Id.* ¶ 5.) Before November 1998, when this action was filed, Renaissance employed no more than three booking agents and had booked fewer than 90 domestic concerts for its represented artists. (*Id.* ¶¶ 6-7.) After November 1998, Renaissance added three more agents. (*Id.* ¶ 6.)

FN12. Plaintiffs assert that Renaissance and Evolution are substantially the same companies. (Pls.' Resp. Renaissance's Stmt. Pursuant to Local Rule 56.1, dated June 13, 2003 ("Pls.' Resp. Renaissance 56.1 Stmt."), ¶¶ 3-4.)

C. The Contemporary Music Concert Promotion Business

*4 The concert promotion business evidently started in the late 1960s or early 1970s. (Dep. of Stephen Alexander Cooley, dated Mar. 20, 2002 ("Cooley Dep."), in Exs. Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Pls.' Opp'n to Booking Agency Defs.' Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. Joint 56.1 Stmt. Exs."), Vol. II, at 97.) Plaintiffs' claims are founded on disparities that have arisen since the beginning of this industry. As Plaintiffs' counsel asked at the argument on these summary judgment motions, why is it that all white and black promoters started out at the same time and "all of the white [dominant] promoters now have venues, megabucks, all of the

acts, and the vast majority of the blacks do not?" (Hrg. Tr. 10/16/03 at 191.)

1. Allegations in Amended Complaint

In the Amended Complaint, Plaintiffs assert, "Artists who perform live in concert generally engage booking agencies to procure their engagements. These agencies select and contract with promoters, functioning in particular geographic locations, to present the concerts." (Am.Compl. ¶ 59.) Furthermore,

[a] booking agent, acting on behalf of an artist, contacts a concert promoter in order to retain its services to produce a concert at a particular location, on an agreed date. Sometimes two or more promoters co-promote concerts, and share profits and losses.... The artist's fee is usually the greater of (a) 85% of net concert revenues (gross revenues less expenses, [FN13] which include rent, advertising, stage hands, sound, lights, security and the like), or (b) a minimum guaranteed fee. Major artists can command as much as 90% of net concert revenues. A booking agent typically receives between 5 and 10% of an artist's fee. A promoter generally receives the remaining 15% of net revenues, or the amount remaining after the artist's minimum guaranteed fee is paid.

FN13. Under the form contracts negotiated by the Defendant Booking Agency Defendants and submitted on these motions, the expense amounts are agreed upon and, if they exceed that amount, are born by the promoter. In accounting for the net concert revenues, the promoters are required to show that the agreed upon expenses were incurred in promoting the concert. (Report of Mario Gonzalez, Esq., undated ("Gonzalez Report"), in J.A., Vol. I, ¶ 10(d).)

(*Id.* ¶ 60.)

Under the contract between the artist and the promoter, the promoter is obligated [to] rent or otherwise secure the venue where the

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concert will take place. Venues include small clubs, large clubs, college gyms, auditoriums, outdoor amphitheaters (commonly called "sheds"), large sports arenas and stadiums. Some promoters own or have exclusive booking arrangements with specific venues. If another promoter wishes to promote a concert in such a venue, arrangements can be made with the promoter controlling the venue.

(Id. ¶ 61.)

Once the artist or artist's manager and promoter enter into a contract for a performance on a particular date at a particular venue, the promoter "advertises the concert, arranges security and performs other tasks to present the concert," including "sell[ing] tickets to the public, either directly or through ticket sales outlets." (Id.)

2. Role of Booking Agencies and Concert Promoters

It is undisputed that in the concert promotion business, the concert promoters are the buyers of the talent or artist, and the booking agencies are the sellers of the talent or artist. (Beaver 56.1 Stmt. ¶ 12; Pls.' Resp. Beaver 56.1 Stmt. ¶ 12; Jam's Local Rule 56.1 Stmt. Undisputed Facts in Supp. of Mot. for Summ. J., dated Jan. 29, 2003 ("Jam 56.1 Stmt."), ¶ 14; Dep. of Leonard Rowe, dated Aug. 14, 2001 ("Rowe Dep."), attached as Ex. 6 to Decl. of Monica Petraglia McCabe, Esq., dated Jan. 29, 2003 ("McCabe Decl."), at 1233; Dep. of Bernard Bailey, dated July 26, 2001 ("B. Bailey Dep.") attached as Ex. 7 to McCabe Decl., at 885; Dep. of Fred Jones, dated May 9, 2001 ("Jones Dep."), attached as Ex. 9 to McCabe Decl., at 685-86; Dep. of Lee King, dated May 2, 2001 ("King Dep."), attached as Ex. 10 to McCabe Decl., at 686-87.) The concert promotion business is built on relationships that develop over time among artists, managers, promoters, agents, vendors and radio stations. (Joint 56.1 Stmt. ¶ 1.) [FN14]

FN14. Plaintiffs state that Joint 56.1 Statement ¶ 1 is disputed. (Pls.' Am. Joint 56.1 Stmt. ¶ 1.) Plaintiffs' reply, however, is unresponsive and does not controvert the

statement of material fact provided by Booking Agency Defendants, as required by Local Rule 56.1(d). Joint 56.1 Statement ¶ 1 is considered as if undisputed.

*5 An artist's manager generally oversees all aspects of the artist's career and may also engage a booking agent to route and book concert tours for the artist. (Id. ¶¶ 2-3.) The booking agent reports to the artist either directly or, often, through the manager. (Id. ¶ 4.)

The artist or the artist's manager may designate the number of concerts, the period during which they would be performed, and the artist's preference for locale, for venue and for promoter, among other aspects. (Dep. of Ronald Weisner, dated Apr. 3, 2002 ("Weisner Dep."), in J.A., Vol. VI, at 21-26.) The agent at the booking agency then solicits and obtains offers to present to the artist or artist's manager, among other tasks. (Id. at 27.) As Plaintiffs admit, "One important part of an agent's job is to maximize opportunities to generate revenue for an artist and to promote the artist's career, while minimizing any potential downside risks." (Pls.' Local Civil Rule 56.1 Stmt. Resp. CAA's Mot. Summ. J., dated June 25, 2003 ("Pls.' Resp. CAA 56.1 Stmt."), ¶ 9 (admitting in part CAA 56.1 Stmt. ¶ 9) (quoting Decl. of Robert Light, dated Feb. 27, 2003, ("Light Decl. I"), ¶ 7).) Although the ultimate decision as to whether to enter into a contract with the concert promoter belongs to the artist or the artist's manager, it is Plaintiffs' position that most artists delegate this decision to their agents. (Pls.' Am. Joint 56.1 Stmt. ¶ 33.)

The concert promoter or co-promoter, as these terms are used by the parties, shares in the profits and losses of the concert. The concert promoter—sometimes referred to as the "lead promoter"—is the entity that acquires the act and contracts with the artist. (Joint 56.1 Stmt. ¶ 5.) [FN15] Generally, the promoter negotiates the terms of the concert with the agent, subject to the approval or direction of the artist or the artist's manager. (Gonzalez Dep., in J.A., Vol. IV, at 233.) The promoter is

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responsible for all financial obligations of the show, including the artist's guarantee, the building deposit, production cost and advertising. (Joint 56.1 Stmt. ¶ 6; [FN16] Rowe Dep., in J.A., Vol. VI, at 81-82.) This includes the obligation to pay for advertising and all show expenses, regardless of how much money is generated by ticket sales. (Joint 56.1 Stmt. ¶ 7.) Due to this obligation, a promoter can end up losing money on any concert, even when a concert was expected to be profitable. (*Id.* ¶ 8.)

FN15. Plaintiffs dispute this statement, but as their reply is non-responsive (Pls.' Am. Joint 56.1 Stmt. ¶ 5), Joint 56.1 Statement ¶ 5 is considered as if undisputed.

FN16. Plaintiffs' reply is non-responsive (Pls.' Am. Joint 56.1 Stmt. ¶ 6); Joint 56.1 Statement ¶ 6 is considered as if undisputed.

A lead promoter may retain the services of a "co-promoter" to assist the lead promoter with certain promotion tasks inside a particular market. (*Id.* ¶ 9.) [FN17] A promoter may be required to have a co-promoter by the artist, the manager, or the booking agent, or a lead promoter may retain a co-promoter because the co-promoter has particular knowledge of the territory in which the concert is performed. Promoters often select co-promoters based on previous relationships. (*Id.* ¶ 10.) [FN18] A co-promoter has a financial interest in the show and will share in the profits or losses. (Jones Dep., in J.A., Vol. IV, at 559.) A promoter also may retain "street promoters" or "consultants" who typically receive a flat fee for assisting in a local market with such tasks as advertising and poster and flyer distribution. (Joint 56.1 Stmt. ¶ 11.) Unlike co-promoters, street promoters and consultants do not share in the promotion risks. (*Id.*)

FN17. Plaintiffs' reply is non-responsive and relies on conclusory remarks included in Mr. Rowe's affidavit and deposition. Plaintiffs have submitted no evidence demonstrating that Mr. Rowe is an expert in the concert promotion business and when he speaks on matters beyond his

personal knowledge, these statements are inadmissible under the Federal Rules of Evidence. See Fed.R.Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); see also Fed.R.Civ.P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Accordingly, Joint 56.1 Statement ¶ 9 is considered as if undisputed.

FN18. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 10 is considered as if undisputed.

*6 In recent years, some artists or artists' managers have asked booking agencies to solicit bids from concert promoters to produce nationwide tours. A "national tour promoter" is a promoter that procures and promotes a tour across the entire country. (*Id.* ¶ 12.) In that situation, a concert promoter bids for the entire tour and pays the artist an up-front deposit or guarantee based on the number of concerts to be performed. The promoter also makes other payments based on the success of the individual concerts or the aggregated success of the individual concerts, a collateralized tour. (Gonzalez Report, in J.A., Vol. I, ¶ 10(a), (b).) The "national tour promoter" has exclusive rights to the artist's concert performances and may negotiate for specific concerts with "local promoters" instead of the artist or the agent. (*Id.*) In some cases, the "local promoter" will pay a guarantee versus a certain percentage of the profits of the concert, and in others, the "local promoter" is paid a flat fee. (*Id.*) The artist generally maintains the right to approve each "local promoter" and the terms granted that promoter. (*Id.*) Some artists have also chosen to contact a national tour promoter directly without using a booking agency, thereby avoiding the agency's commission. (Joint 56.1 Stmt. ¶ 13.)

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3. Genres of Music

Within the music industry, distinct genres of music are directed at different audiences. The Amended Complaint relates to contemporary music, which includes urban music (R & B, hip-hop and rap), pop music and rock music, but not Latin, Christian, gospel, or country and western. (*Id.* ¶ 15.) Additionally, the Amended Complaint refers to certain genres of music as "black music" and other genres of music as "white music." (*Id.* ¶ 14.) Promoters may specialize in a particular field of music. (*Id.* ¶ 16.) [FN19] Plaintiffs have specialized in R & B or "urban music," not pop or rock. (*Id.* ¶ 17.) [FN20] Booking agents at the Defendant Booking Agencies may specialize in a particular genre of music. (See Decl. of Cara Lewis, dated Feb. 27, 2003, ("Lewis Decl."), ¶ 3.)

FN19. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 16 is considered as if undisputed.

FN20. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 17 is considered as if undisputed. The Court does not rely on Defendants' citation to the Billboard Magazine article, "Black Promoters Say They're Excluded From Top R & B Gigs." Under the Federal Rules of Evidence, the article is inadmissible hearsay to prove the truth of the statements contained in it.

4. The Bidding Process

To obtain an act, a promoter must first make an offer. (Joint 56.1 Stmt. ¶ 18.) [FN21] To ensure that they participate in the bidding process, concert promoters "have to keep a line of communication with the agencies" "to know which artists are planning to tour. (*Id.* ¶ 19 (quoting Rowe Dep., in J.A., Vol. VI, at 114).) [FN22] The most important aspect of promoting is "to be up on the situation about who is coming, what artist is coming out, and to try to be a part of the bidding process." (*Id.* (quoting Rowe Dep., in J.A., Vol. VI, at 115).)

FN21. Plaintiffs' reply relies on conclusory

remarks and statements not based on personal knowledge; Joint 56.1 Statement ¶ 18 is considered as if undisputed.

FN22. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 19 is considered as if undisputed.

The evidence shows that the booking agencies are not the only sources of information about artists' plans to go on concert tours. There are a variety of sources which promoters use to learn whether an artist is going on tour, "including rumor, internet websites, television, periodicals, contact with other promoters and booking agents, contacts with record companies and radio [station] executives." (*Id.* ¶ 20.) [FN23] If a particular act interests a promoter, the promoter must call the booking agent to express that interest and to inquire about specific dates and the artist's availability to perform in certain areas. (*Id.* ¶ 21.) [FN24] Additionally, the artists, whose concerts are the subject of the Plaintiffs' complaint, have managers whose names and addresses are available in Pollstar directories. (See Dep. of Jonathan Edward Stoll, dated Apr. 10, 2002 ("Stoll Dep."), in J.A., Vol. VI, at 87 (noting that Amusement Business and Pollstar publish guides on artists' representation).)

FN23. Plaintiffs' reply is non-responsive and admits the facts asserted in Defendants' statement; Joint 56.1 Statement ¶ 20 is considered as if undisputed.

FN24. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 21 is considered as if undisputed.

*7 When seeking promotion opportunities, promoters must be proactive and assertive and cannot wait for agents to contact them. (Joint 56.1 Stmt. ¶ 22.) [FN25] Successful black concert promoters testify that they are proactive and aggressive in searching out concert opportunities, not only by calling agents, but also by calling the artists' recording studios and managers. (See Dep. of Al Haymon, dated Nov. 11, 2002 ("Haymon

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Dep."), in J.A., Vol. IV, at 211-13; Dep. of Jerome Williams, dated Apr. 30, 2002 ("Williams Dep."), in J.A., Vol. VI, at 39-40; Dep. of Daryll Brooks, dated Apr. 12, 2002 ("Brooks Dep."), in J.A., Vol. III, at 78-79; Dep. of Larry Bailey, dated Dec. 7, 2001 ("L. Bailey Dep."), in J.A., Vol. III, at 32-33; see also Stoll Dep., in J.A., Vol. VI, at 87.) [FN26]

FN25. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 22 is considered as if undisputed.

FN26. Other promoters testify that they have been aggressive and proactive in seeking out promotion opportunities. (Dep. of Brandon Phillips, dated June 19, 2002 ("Phillips Dep."), in J.A., Vol. V, at 168.)

At times, an agent may call a promoter with whom the artist, the manager, or the agent has a prior relationship to notify the promoter of an artist's plans to tour, but agencies do not contact all promoters, regardless of the race of the promoter, to inform them of every artist's tour. (Joint 56.1 Stmt. ¶ 23.) [FN27] The Booking Agency Defendants assert that they do not give advance notice to the Promoter Defendants of every tour of every major white artist. (*Id.* ¶ 24; [FN28] see also Dep. of Robert Light, dated Dec. 18, 2001 ("Light Dep."), in J.A., Vol. V, at 353 (stating CAA "didn't give any advance notice necessarily to black promoters" or other promoter groups in connection with a particular music tour.) The Independent Promoters Association, whose members are white, is rarely solicited by an agent or manager to submit an offer for a tour or a concert. (Dep. of Ben Liss, dated June 17, 2003 ("Liss Dep."), in J.A., Vol. V, at 129-130.) The evidence submitted in this case gives no indication that one promoter can prevent another promoter from submitting an offer or a bid to the agencies for a concert promotion opportunity. [FN29] (Haymon Dep., McCabe Decl. Ex. 11, at 48-49, 189-90, 252, 438.)

FN27. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 23 is considered as if undisputed.

FN28. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 24 is considered as if undisputed.

FN29. To the contrary, Alan Haymon, a successful black promoter, testified that "there is no barrier to submitting an offer that exists in our business" and that "it is impossible to my knowledge for anyone to prevent anyone from submitting a bid." (Haymon Dep., McCabe Decl. Ex. 11, at 189, 252.) In general, bids are submitted directly from the promoter to an agency. For this process, "you don't have to have anything other than a telephone and a fax machine." (*Id.* at 48-49.)

5. The Elements of a Bid

Although a promoter may discuss the terms of his bid over the telephone with a booking agent, the bid must eventually be in writing. (Joint 56.1 Stmt. ¶ 25.) [FN30] An artist or manager will only consider a bid when it is in writing and includes the amount of the guarantee, artist/promoter split and other information that is necessary for the artist or manager to assess the relative value of the bid. This information includes production costs, the cost of the building, participation in any ancillary revenue (such as merchandising or concessions) and projected costs for stagehands, rigging, limousines, catering and advertising. (*Id.* ¶ 26.) [FN31] Without this information, the manager will not be able to assess the offer. (*Id.*)

FN30. Plaintiffs' reply is non-responsive and cites to inadmissible evidence; Joint 56.1 Statement ¶ 25 is considered as if undisputed.

FN31. Plaintiffs' reply is non-responsive and cites to inadmissible evidence; Joint 56.1 Statement ¶ 26 is considered as if undisputed.

The artist's guarantee is the amount of money the promoter agrees to pay the artist for a particular performance. (*Id.* ¶ 27.) This guarantee is the

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minimum payment to the artist, who can negotiate a guarantee versus a percentage of the net receipts and, thus, earn more than the guarantee on a successful show. (*Id.* ¶ 28.) Many major artists rely on the percentage, also referred to as the "back-end split," to receive earnings substantially greater than the guarantee. (*Id.*) When promoters determine what guarantee to offer, they consider expected ticket sales and prices, expected expenses for the concert, and the amount the artist generally expects. (*Id.* ¶ 29.) [FN32]

FN32. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 29 is considered as if undisputed.

*8 After the agent receives a written bid from a promoter, the agent forwards the bid to the artist or the artist's management for consideration. (*Id.* ¶ 30.) [FN33] The artist then chooses whether to accept or reject the offer. (*Id.* ¶ 31.) [FN34] If the artist rejects the offer, the promoter then decides whether to submit a revised offer attempting to meet the artist's criteria. (*Id.* ¶ 32.)

FN33. Plaintiffs' reply admits the facts in question and relies on statements not shown to be based on personal knowledge; Joint 56.1 Statement ¶ 30 is considered as if undisputed.

FN34. Plaintiffs' reply admits the facts in question and relies on statements not shown to be based on personal knowledge; Joint 56.1 Statement ¶ 31 is considered as if undisputed.

The artist has the ultimate authority to accept or reject an offer by a concert promoter. (*Id.* ¶ 33.) [FN35] The artist may not make the decision itself, but may rely on the artist's manager or the booking agent to choose a promoter. (*Id.* ¶ 34 ("Artists handle decisions with respect to the selection of concert promoters in different ways.")). [FN36]

FN35. Plaintiffs' reply relies on statements not shown to be based on personal knowledge; Joint 56.1 Statement ¶ 33 is

considered as if undisputed.

FN36. Plaintiffs' reply misuses the King deposition, using it for a proposition it does not support. (*See* Pls.' Am. Joint 56.1 Stmt. ¶ 34; King Dep., in J.A., Vol. V, at 293 (agreeing that the artist, manager, or the booking agent can make the decision of which concert promoter to use).) Joint Statement ¶ 34 is considered as if undisputed.

Witnesses from non-party booking agencies and artist managers state that the artists and the artists' managers make the decision. (Dep. of Phil Casey, dated May 22, 2002 ("Casey Dep."), in J.A., Vol. III, at 77-78 (stating that the decision about what promoter will promote a particular event is made by either the artist or the manager in consultation with the artist, but not by the agent); Phillips Dep., in J.A., Vol. V, at 103 (explaining that as manager for Rod Stewart, Mr. Phillips and a partner made the final decision on which concert promoters to use); Weisner Dep., in J.A., Vol. VI, at 8, 12, 26-27, 29 (stating that in Mr. Weisner's fifteen to seventeen years as a manager for acts such as The Jacksons, Michael Jackson, Madonna, Earth Wind & Fire, Gladys Knight & the Pips, Steve Winwood and John Mellencamp, decisions about promoters have always been made by the manager and the artist--never the agent); Dep. of William Brown, dated Apr. 25, 2002 ("Brown Dep."), in J.A., Vol. III, at 23-29 (stating that as manager for Jill Scott and others, Mr. Brown makes the decisions with respect to the selection of concert promoters and that WMA sends all offers to him without recommendation and he then selects the promoter); Aff. of Irving Azoff, dated Dec. 15, 2000 ("Azoff Aff."), attached as Ex. 1 to Decl. of Peter Grosslight, dated Feb. 27, 2003 ("Grosslight Decl. I"), ¶¶ 2, 5 (stating, when he was the manager of the Eagles, Steely Dan, Journey and others, "[he was] directly involved in the organization of

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concert tours and the selection of concert promoters to promote [his] clients' tours and concert engagements. Once a tour has been planned, it [was] common for both [he] and the artists [he] represent[ed] to state preferences for particular concert promoters depending upon the local market place for each concert.... The final decision as to the acceptance of a particular concert promoter's offer [was] made by [him] and the artist.")

Many black promoters agree that the artists and artists' managers make the final decision on the selection of the promoter. (Dep. of Lionel Bea, dated Apr. 26, 2002 ("Bea Dep."), in J.A., Vol. III, at 24 (stating that the manager might discuss promoter selection with the artist or the agent, but then the manager and artist make a decision and tell the agent which promoter they want to use); Brooks Dep., in J.A., Vol. III, at 43-44 (stating that decisions as to what vendors or promoters to work with are made by the artist or the manager); Dep. of Fredrick Luster, dated May 6, 2002 ("Luster Dep."), in J.A., Vol. V, at 74-75 (stating that managers and artists choose whether to use a certain promoter or play a certain market); Dep. of William Sparks, dated Mar. 13, 2002 ("Sparks Dep."), in J.A., Vol. VI, at 129-130 (stating that managers have the final word and are "absolutely" the ones who pick the promoters and that it's always been that way); Haymon Dep., in J.A., Vol. IV, at 44-45 (agreeing that some artists decide themselves who their concert promoters will be, while some artists rely on their manager to be the primary decision-maker).) Some promoters are of the opinion that the booking agent may influence the selection of a concert promoter. (King Dep., in J.A., Vol. V, at 293 (stating that in some instances, agents may be a part of the selection process); Dep. of Jesse Boseman, dated Aug. 7, 2001 ("Boseman Dep."), in J.A., Vol. III, at 775-776 (stating that the decision on

which promoter to use may be made by a "combination" of people, including the artist, his or her manager and the agent); Haymon Dep., in J.A., Vol. IV, at 44-45 (stating that some artists are influenced by their agent or family members).) Non-defendant booking agencies and artists acknowledge that the agents' recommendations are often influential. (See Casey Dep., in J.A., Vol. III, at 346 ("On a scale of 1-to-10, ... [the influence of the agent's recommendation is] probably in the 7 range.").) Plaintiffs cite Mr. Cosby's deposition on page fifty-three, stating he "testified that his agency, [WMA], selected 90% of his promoters" (Pls.' Am Joint 56.1 Stmt. ¶ 37), but the Court could not find this page of Mr. Cosby's deposition in the excerpts submitted to the Court.

6. *Selecting a Concert Promoter*

Artists and artists' managers consider a variety of factors when selecting a concert promoter. (*Id.* ¶ 41 (stating factors include the promoter's "(a) experience with a genre of music; (b) relationship with the artist; (c) relationship with the manager; (d) financial wherewithal; (e) relationships within a particular market or region; (f) reputation; (g) production infrastructure; and (h) relationship with the agency"); [FN37] *see also* Rowe Dep., in J.A., Vol. VI, at 1234-35, 1237-38 (stating factors he would consider in selecting a co-promoter include familiarity with local area, ability of promoter, length of time in the business and previous shows promoted).)

FN37. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 41 is considered as if undisputed.

In selecting a concert promoter, the promoter's relationship and track record with the artist are considered. (See L. Bailey Dep., in J.A., Vol. III, at 28, 30.) There is a preference for promoters who have worked with the artist in the past. (See Casey Dep., in J.A., Vol. III, at 128, 139; Dep. of Bruce Kapp, dated Mar. 1, 2002 ("Kapp Dep."), in Dep.

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Tr. Exs. to Pls. Opp'n to CAA's Summ. J. Mot., undated (received May 5, 2003) ("Pls.' CAA Dep. Tr."), Vol. I, at 94; Weisner Dep., in J.A., Vol. VI, at 12-13.) Relationships and past experience with managers is also important in the selection of a concert promoter. (Luster Dep., in J.A., Vol. V, at 73-74; Light Dep., in J.A., Vol. V, at 515.) When agencies are asked to recommend a promoter, the promoter's relationship with the agency is also relevant. (Casey Dep., in J.A., Vol. III, at 139.) Similarly, when a promoter seeks to retain a co-promoter, the promoter's relationship with the co-promoter can be very important. (See Rowe Dep., in J.A., Vol. VI, at 1234-1235; Haymon Dep., in J.A., Vol. IV, at 251.)

A promoter's relationships within a market, e.g., with advertisers, venues or other suppliers, is another consideration in selecting a concert promoter. (See Casey Dep., in J.A., Vol. III, at 120; Weisner Dep., in J.A., Vol. VI, at 13 (considering important factors to include "relationships with the local people, [and] financially, to be able to support and advertise and promote the individual dates").)

*9 In addition to the personal relationships discussed above, the promoter's past experience and reputation in terms of venue, genre and financial stability are also relevant. A promoter's experience and familiarity with a specific genre of music is important in selecting a concert promoter. (Casey Dep., in J.A., Vol. III, at 119 ("We look for someone who understands the type of the music that the artist performs."); see also *id.* at 125 (stating that he would not look for a promoter who did Christian promotion to promote a rock and roll show because "[t]hat promoter may not be able to focus his advertising on a target demographic").) Additionally, a promoter with familiarity in a specific geographic area or venue is preferred. (*Id.* at 119-20 (stating that "we look for someone with a familiarity of the city or marketplace where they are promoting in"); Haymon Dep., in J.A., Vol. IV, at 217).)

A promoter's financial capabilities are also crucial. (Casey Dep., in J.A., Vol. III, at 120; Phillips Dep., in J.A., Vol. V, at 103-04 (stating that biggest issue

in choosing a concert promoter is whether the promoter is financially sound); Weisner Dep., in J.A., Vol. VI, at 13 (stating that when choosing a promoter, he considers, among other things, a promoter's financial ability "to be able to support and advertise and promote the individual dates").) A promoter cannot rely on ticket sales to cover financial obligations (Bea Dep., in J.A., Vol. III, at 21), but rather needs to be able "to not only promote the show, but in event of a loss, to sustain that loss without the show going sideways or canceling" (Casey Dep., in J.A., Vol. III, at 120). In that vein, a good credit history and professional reputation are important to assure an artist and the artist's manager of the promoter's financial stability. (L. Bailey Dep., in J.A., Vol. III, at 32-33; Bea Dep., in J.A. Vol. III, at 23.)

II. STANDARD OF REVIEW

A. Summary Judgment Standard

1. General Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is granted summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The summary judgment standard is "well-settled" in the Second Circuit. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 285 (2d Cir.2002). The Second Circuit holds:

The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant.... Summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party.

*10 *Id.* at 286 (citations omitted).

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However, as the Supreme Court has highlighted, "the issue of fact must be 'genuine.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must set forth "specific facts showing that there is a genuine issue for trial." Fed. Rule Civ. Proc. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

B. The Antitrust Standard

Plaintiffs argue that the Defendants have committed a per se violation of section 1 of the Sherman Act because they have "divided the markets into territories" and, "as a group, 'refuses to deal with a competitor,' 'like Plaintiffs. (Pls.' Mem. Opp'n Booking Agency Defs.' Joint Mot. for Summ. J., dated Apr. 24, 2003 ('Pls.' Joint Mem.),' at 33 (citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1959)). In *Klor's*, the plaintiff retail store alleged a group boycott and a refusal by defendant manufacturers to sell major household appliances to the plaintiff to the advantage of its competitor, defendant Broadway, which operated a chain of department stores, one of which competed with plaintiff. *Klor's*, 359 U.S. at 209. The defendants did not dispute this allegation, but rather sought summary judgment and dismissal of the complaint for failure to state a cause of action. (*Id.*) The lower court had dismissed the complaint as a "purely private quarrel ... which did not amount to a public wrong proscribed by the Sherman Act." *Id.* at 210 (internal quotations omitted). The Supreme Court reversed the lower court's dismissal of the complaint and remanded for trial because the allegations in the complaint plainly disclosed a concerted refusal to deal or group boycott in violation of the Sherman Act. *Id.* at 212.

This case concerns a motion for summary

judgment, and Plaintiffs have presented no evidence of any refusal to deal, group boycott, or division of territory by the Defendants. *See infra* pp. 30-36. Instead, the evidence reveals a long-standing scarcity of bids for contemporary music concerts by Plaintiffs even when the Booking Agency Defendants requested bids from them during the last few years. *See infra* pp. 48-49, 52, 54-56, 59-60, 155-57, 162-65. Thus, this case cannot be treated as a per se violation of section 1 of the Sherman Act. Accordingly, the case is evaluated under the rule of reason, which states that "defendants' conduct will be deemed illegal only if it unreasonably restrained competition." *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506 (2d Cir.2004) (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990)).

*11 Under the rule of reason, a plaintiff bringing a private action under section 1 of the Sherman Act bears the "initial burden to demonstrate the defendant's challenged behavior 'had an actual adverse effect on competition as a whole in the relevant market.'" *Geneva Pharmaceuticals*, 386 F.3d at 506-07 (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Ass'n, Inc.*, 996 F.2d 537, 543 (2d Cir.1993) (emphasis in original)). "[E]vidence that plaintiffs have been harmed as individual competitors will not suffice." *Id.* at 507 (citing *Atlantic Richfield*, 495 U.S. at 343-44). "The antitrust laws ... were enacted for 'the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

After a plaintiff has established that there has been an actual adverse effect on competition as a whole, a plaintiff "must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiff] to suffer a cognizable injury." [FN38] *Matsushita*, 475 U.S. at 585-86 (citations omitted). A plaintiff must establish both that there is a conspiracy in violation of the antitrust laws and that the plaintiff suffered an injury resulting from the illegal conduct. *Id.* at 586. Specifically, a plaintiff must provide evidence, not speculation, that: "(1)

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there was an agreement among ... [the defendants] in restraint of trade; (2) [the plaintiff was] injured as a direct and proximate result; and (3) its damages are capable of ascertainment and not speculative." *Vkk Corp. v. Nat'l Football League*, 244 F.3d 114, 131 (2d Cir.2001) (quotations and citations omitted).

FN38. A claim under section 1 of the Sherman Act must be "commenced within four years after the cause of action has accrued." 15 U.S.C.A. 15b. "In the context of a continuing conspiracy to violate the antitrust laws, ... each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and ... as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

In antitrust cases, courts have applied special standards to summary judgment motions due to their unique circumstances. Some courts have expressed reluctance to grant summary judgment motions in antitrust cases due to the complicated factual nature of their claims and the customary lack of explicit evidence of conspiracy. See, e.g., *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1012 (2d Cir.1989) ("Summary judgment has traditionally been granted sparingly in antitrust cases ... because the claims 'so integrally involve motive and intent to conspire and injure.'" (citations omitted)). "Indeed, antitrust conspiracies are rarely evidenced by explicit agreements, but must almost always be proven by 'inferences that may be fairly drawn from the behavior of the alleged conspirators.'" *Id.* (citations omitted).

Although a court deciding a summary judgment motion must view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588; see also *id.* at 594 (stating "mistaken inferences in cases such as this one are especially

costly, because they chill the very conduct the antitrust laws are designed to protect"). Thus, in order to withstand a summary judgment motion in an antitrust case, "plaintiffs must present evidence of an actual illegal combination, and such evidence must satisfactorily cast doubt on inferences of independent action or proper conduct by defendants." *Geneva Pharmaceuticals*, 386 F.3d at 507 (citing *Matsushita*, 475 U.S. at 588 (stating that these inferences must be reasonable "in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]")); see also *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir.2002). Additionally, "courts should not permit factfinders to infer conspiracies when such inferences are implausible." *Matsushita*, 475 U.S. at 593. "[I]f the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

*12 To survive a motion for summary judgment, a plaintiff seeking damages for a violation of section 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

III. ANTITRUST CLAIMS: SHERMAN ACT, 15 U.S.C. § 1

A. Plaintiffs Have Failed to Present Evidence to Support Their Antitrust Claims

1. Plaintiffs Have Failed to Establish Antitrust Standing

Plaintiffs have made a claim for damages and injunctive relief under section 1 of the Sherman Act, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

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the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The Amended Complaint alleges that the Defendants' market dominance "provides the promoter defendants and the booking agency defendants with the control and power, which they exercise, to purposefully exclude others, including plaintiffs, from competing in the concert industry." (Am.Compl.¶ 74.) The Amended Complaint asserts that the conspiracy has an "anticompetitive effect upon interstate trade and commerce" because it "eliminates competition among promoters and prevents concerts from being promoted at lower prices which would benefit the artists and public." (*Id.* ¶ 78; see also *id.* ¶ 80 (stating that "[i]f plaintiffs were permitted to compete with defendant promoters for the promotion of concerts given by major acts, white and black promoters' fees would decrease.... Reduced promoter fees would benefit the public through lower ticket prices, or artists, through greater net revenues, or both").) [FN39]

FN39. Plaintiffs also claim that this conspiracy creates a "negative ripple effect throughout the black community" because white promoters "rarely retain the services of black-owned businesses servicing concerts." (Am.Compl.¶ 83.) This allegation is not relevant to the determination of whether there is actual injury to competition in the relevant market under § 1. Additionally, Plaintiffs have provided no evidence relating to the use of black-owned businesses by white or black concert promoters.

To determine whether a market injury exists for standing under the Sherman Act, a plaintiff must first define the relevant market and provide some evidence supporting the definition. *Pepsico*, 315 F.3d at 105; see, e.g., *Ezekwo v. Am. Bd. of Internal Med.*, 18 F.Supp.2d 271, 278 (S.D.N.Y.1998). The relevant market for § 1 purposes must be for all contemporary music concerts that are "reasonably interchangeable" in use for consumers. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); see also *Pepsico*, 315 F.3d at 105.

The Amended Complaint alleges that the Defendants have market dominance in the market of live contemporary music concerts in venues with more than 3,000 seats throughout the United States (Am.Compl.¶¶ 65, 78) and that, for live concerts of contemporary music, the "entire United States is a single national market wherein promoters compete for the rights to obtain contracts to promote concerts" (*id.* ¶ 58). Plaintiffs also allege that "there are local regional markets, generally incorporating the metropolitan areas surrounding each major city, for the promotion of concerts within each such region." (*Id.*)

*13 Plaintiffs have offered no evidence to show that the alleged relevant product market for contemporary music concert promotions in venues with 3,000 or more seats is not reasonably interchangeable with concerts conducted in smaller venues. Thus, Plaintiffs have not provided any evidence to support their relevant market definition.

Even assuming there is a distinct market for contemporary concert promotions in the United States in venues with 3,000 or more seats, Plaintiffs have not provided evidence to support their allegation that the Booking Agency Defendants and the Promoter Defendants have control and power over that market. Plaintiffs rely on an extrapolation made by Plaintiffs' former counsel from Pollstar Magazine [FN40] data for the period from June 1998 to May 1999 for the claim that the total market share of the Booking Agency Defendants named in the Amended Complaint and *uncharged* booking agency co-conspirators was 71%, or 1,630 of the major concerts. [FN41] (*Id.* ¶ 71.) Plaintiffs state that: WMA artists gave approximately 11% of the major concerts; CAA artists gave approximately 26.4% of the major concerts; and Renaissance artists gave less than 4% of the music concerts. (*Id.*) Based on these calculations, the present Booking Agency Defendants together account for less than 42% of the concerts performed in the alleged market. Beaver and Jam, the only remaining Promoter Defendants, [FN42] are alleged to have engaged in, respectively, the promotion or co-promotion of 73(3%), and of 111 (4.5%) of the 2460 major concerts in Plaintiffs' test period.

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[FN43] (*Id.* ¶ 67.)

FN40. Pollstar Magazine is the "weekly industry periodical reporting concert and tour information." (Am.Compl.¶ 65.)

FN41. Defendants' expert, Dr. Williams, however, shows in Exhibit 7 to his expert report that "acts represented by non-defendant booking agencies performed 54 percent of all shows performed [at such venues] during 1993-2000." (Williams Report, in J.A., Vol. I, ¶ 31, Ex. 7.) Exhibit 7 shows also that "major acts represented by non-defendant booking agencies performed 40 percent of the shows performed by all major acts during 1993-2000." (*Id.*)

FN42. Most of the Promoter Defendants have been dismissed from the case or were acquired by SFX and, pursuant to agreement with Plaintiffs, the claims against them have been dismissed with prejudice. Although the Sherman Act claim against Jam was dismissed with prejudice by the Court, Plaintiffs were granted leave to amend the Amended Complaint pursuant to Rule 15(a) of the Federal Rules of Procedure, if during discovery they found evidence to support the dismissed claim and could make a showing that there was sufficient evidence to proceed with the claim. *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272(RPP), 2000 WL 896929 (S.D.N.Y. June 30, 2000)). Plaintiffs have not sought leave to amend the Amended Complaint. However, because Plaintiffs' arguments seem to assume that their antitrust claims against Jam are valid, the Court will address the lack of evidence against Jam on Plaintiffs' antitrust claims.

FN43. In the test period, there were 2,460 such concerts of which Plaintiffs claim

1,625 or 65% were concerts promoted or co-promoted by the originally named promoter defendants or *uncharged* promoter co-conspirators. (Am.Compl.¶¶ 66-67.) However, Exhibit 6 of Dr. Williams's expert report shows that "non-defendant promoters promoted 72 percent of all shows and 58 percent of shows by major acts during the 1993-2000 period." (Williams Report, in J.A., Vol. I, ¶ 31, Ex. 6.)

The extrapolation by Plaintiffs' former counsel is cited in the Amended Complaint but is not offered in evidence or supported by expert testimony. Thus, there is not evidence to support Plaintiffs' claim of Defendants' control of the market for contemporary music concerts in the United States in venues with 3,000 or more seats. [FN44] Plaintiffs provide no other evidence to support their claim of market control. [FN45] Thus, Plaintiffs have offered insufficient evidence from which a reasonable juror could infer that the Booking Agency Defendants, or Beaver or Jam, either individually or by concerted action with others, have the market power to exclude Plaintiffs from promoting concerts in the contemporary music concert market in the United States, the market alleged in the Amended Complaint.

FN44. Additionally, the Pollstar information is apparently incomplete as Mr. Haymon, a major concert promoter, testified he did not report his concert results to Pollstar. (Haymon Dep., in J.A., Vol. IV, at 38.)

FN45. The statistics calculated from the Pollstar data by Plaintiffs' former counsel do not show that Beaver or Jam are dominant in the national market. Plaintiffs rely on the data from Pollstar to conclude that in the test period Beaver promoted 72% of the major concerts in New Orleans and 81% in Memphis and that Jam promoted 85% of the major concerts in Chicago and 74% in Minneapolis. (Pls.' Rev. Jam Mem. Ex. 3 (Dominant Promoter

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Table); *see also* Aff. of Christine Lepera, dated Jan. 19, 2001 ("Lepera Aff."), in Pls.' Beaver Ex. 10, ¶ 6.)

Additionally, Plaintiffs rely on Mr. Rowe's declaration to assert that Jam has dominated Chicago since the late 1970s or early 1980s (Aff. of Leonard Rowe, dated Feb. 27, 2003 ("Rowe Jam Aff. I"), Pls. Rev. Jam Ex. 1, ¶ 11) and that Beaver has been dominant in New Orleans since at least the early 1980s (Decl. of Leonard Rowe, dated Feb. 27, 2003 ("Rowe Beaver Decl."), Pls. Beaver Ex. 6, ¶ 9). Mr. Rowe is not an expert, and Plaintiffs have not presented evidence of his particular familiarity with these markets. His assertions are not shown to be within the scope of his personal knowledge or supported by other evidence.

Because Plaintiffs have not presented any evidence raising an inference of any agreement among these allegedly dominant regional promoters and booking agencies, these claims of territorial dominance are irrelevant. Plaintiffs have not brought a section 2 claim under the Sherman Antitrust Act against any of the Defendants.

Even assuming that Plaintiffs' alleged market serves as the relevant market and that the Defendants have power and control of that market, Plaintiffs have presented no evidence to support the claim that competition among promoters in that market has been eliminated, other than by former defendant SFX's acquisition during the pendency of this action of a number of former defendant concert promoters, against all of whom Plaintiffs have dismissed their claims. No evidence has been submitted showing a division of markets by the Promoter Defendants even though the Plaintiffs have had full discovery, including emails retrieved from the hard drives of the Defendants. Nor is there evidence that any Promoter or Booking Agency Defendant prevented the Plaintiffs, or anyone else, from submitting bids on concerts.

*14 The Amended Complaint asserts that the alleged conspiracy among the Defendants "makes

entry into the booking agency market far more difficult." (Am.Compl.¶ 79.) Plaintiffs have not provided any evidence indicating that entry into the booking agency market is difficult. On the contrary, the evidence shows that one Booking Agency Defendant, Renaissance, entered the concert promotion market within a year prior to the filing of the complaint and was successful enough to attract top acts and be made a defendant in this action. [FN46]

FN46. Defendant Renaissance, formed in 1996, entered the booking agency market with top acts in 1997. (Declaration of David Zedeck, dated Feb. 27, 2003 ("Zedeck Decl. I"), ¶ 2.) Plaintiffs do not dispute Renaissance's entry with top acts or approximate date of entry. Additionally, the expert report of Dr. Darrell Williams contains two other examples of "successful entrants" into the promotion market, one of which, Magic Johnson Productions, is owned by an African-American. (Williams Report, in J.A., Vol. I, ¶ 66; *see also* Decl. of Earvin Johnson, Jr. (Magic Johnson), dated May 27, 2002 ("E. Johnson Decl."), attached as Ex. 3 to McCabe Decl., ¶ 4.)

Plaintiffs assert that there is an antitrust injury because the conspiracy prevents Plaintiffs from competing in the market, and if they were allowed to compete "concerts could profitably be promoted at rates of 5% of revenues, or even less," in contrast to the 15% of the net sales revenues they allege that Promoter Defendants currently receive. (*Id.* ¶ 80.) The Plaintiffs further allege that these reduced promoter fees "would benefit the public through lower ticket prices, or artists, through greater revenues, or both." (*Id.*) Not only have Plaintiffs provided no evidence to support this claim that concerts would be promoted at lower rates if they were "allowed" to compete, [FN47] Plaintiffs have not provided evidence showing that any change in promoter fees would affect competition among promoters.

FN47. In their Joint Memorandum,

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Plaintiffs cite the expert report of Dr. Gerald Jaynes to support the proposition that promotion costs could be 5% if competition existed. (Pls.' Joint Mem. at 14.) Dr. Jaynes's report, however, does not discuss whether promotion costs could be lowered. (Expert Report of Dr. Gerald Jaynes, dated July 31, 2002 ("Jaynes Report"), attached as Ex. 36 to Pls.' Joint Mem. Exs., Vol. II.) The Jaynes Report calculated damages to Plaintiffs from racial discrimination based on data, which was found to be unreliable, provided by Plaintiffs. (*Id.* at 5-7; *see also* *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272(RPP), 2003 WL 22124991 (S.D.N.Y. Sept. 15, 2003).) Dr. Jaynes also testified that he was offering no opinion on the alleged conspiracy's effect on competition. (Dep. of Professor Gerald Jaynes, dated Sept. 13, 2002 ("Jaynes Dep."), in J.A., Vol. IV, at 12, 15-16.)

Additionally, Defendants have presented the expert report of Dr. Williams to show that the total exclusion of the four plaintiffs would not have any impact on competition in the market. (William Report ¶ 45 (stating Plaintiffs constituted less than 0.3% of the combined market share during 1994 to 2001).)

In short, no evidence has been presented to suggest market injury and, accordingly, antitrust standing has not been established.

2. Plaintiffs Have Provided No Evidence of a Conspiracy in Restraint of Trade

Even if the Plaintiffs could show an antitrust injury to the relevant market, their claim under § 1 would fail on the merits. Plaintiffs allege that the conspiracy "is conducted by defendants in order to benefit white promoters, particularly the promoter defendants, by eliminating black promoters as competitors, and to maintain a market for the promotion of concerts which can be controlled and ordered by the conspirators." (*Id.* ¶ 78.) The

alleged conspiracy consists mainly of two purported agreements. [FN48] The Amended Complaint first alleges that "[a]s a part of the conspiracy, the promoter defendants are designated specific territories and venues, allowing them great dominance and control in these areas, to the exclusion of plaintiffs and others." (*Id.* ¶ 76.) Second, it states that the Booking Agency Defendants "assur[e] the promoter defendants that they will always be given the opportunity, to the exclusion of all others, of promoting the defendant booking agents' top acts in the promoter defendant's assigned territory, at highly profitable rates," in exchange for agreeing to promote lesser talents at possible loss. [FN49] (*Id.* ¶ 79.)

FN48. Plaintiffs also allege that as part of the conspiracy, the Promoter Defendants receive more favorable contract terms (Pls.' Joint Mem. at 8-9) and that Booking Agency Defendants gave the Plaintiffs inaccurate, misleading, and false information about different concerts and tours (*id.* at 11). These allegations are discussed in the discrimination section. Although the Promoter Defendants often receive more favorable terms than those initially offered in contracts on booking agency forms, Defendants' have presented evidence supporting their contention that these favorable terms are the result of bargaining between the booking agencies and Promoter Defendants. *See infra* pp. 83-86, 104-07. Additionally, Promoter Defendants do not consistently receive these more favorable terms. *See infra* pp. 83-86, 104-07. This conduct is at least as consistent with permissible competition as with an illegal conspiracy and is insufficient standing alone to support an inference of an illegal conspiracy in restraint of trade. *See Matsushita*, 475 U.S. at 588.

FN49. The Amended Complaint also alleges that Beaver, Jam and the Booking Agency Defendants committed specific overt acts in furtherance of the conspiracy.

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(Am. Compl. ¶ 87; *see also* Pls.' Joint Mem. at 4-6, 8-11, 24-26 (alleging overt acts involving an exclusive contract at Mud Island and certain concert tours of Janet Jackson, Kenny G, Toni Braxton, Maxwell, Lauryn Hill and Erykah Badu).) These specific overt acts are reviewed in the discrimination section. Plaintiffs have provided no evidence to support their claims that these alleged acts were in furtherance of any conspiracy in restraint of trade.

(i) The Alleged Territory Allocation Conspiracy

Plaintiffs assert that each of the dominant promoters is a member of a horizontal conspiracy to exclude Plaintiffs and restrain competition by honoring each others' market areas, which the Booking Agency Defendants also honor. (Hrg. Tr. 10/17/03 at 64-72.) The Amended Complaint sets forth the market areas each of the promoter defendants are allegedly designated to dominate. (Am. Compl. ¶¶ 29-54.) Plaintiffs have submitted no evidence that supports the allegation that the promoter defendants are "designated" specific areas as opposed to being physically located in specific areas. Plaintiffs make their claims of dominance based on Plaintiffs' former counsels' extrapolation, not offered in evidence, which is based on Pollstar's published information for the period June 1998 through May 1999, [FN50] but offer no evidence, including inferential evidence, of the alleged horizontal conspiracy agreement between concert promoters named in the Amended Complaint to divide these markets. Review of the evidence Plaintiffs have offered follows.

FN50. As stated *supra* p. 27, this extrapolation is not supported by expert testimony and apparently contains incomplete information.

*15 Plaintiffs cite to the January 19, 2001, affidavit of Richard Johnson to support their claim that each of the current and former Promoter Defendants in the Amended Complaint has a territorial monopoly. (Pls.' Joint Mem. at 7.) Mr. Johnson was employed

in the music division of Defendant WMA as a booking agent from 1982 to 1986, twelve years before the filing of this complaint, and has been employed in an unrelated economic area ever since. (R. Johnson Aff., Pls.' Beaver Ex 9, ¶ 1.) Mr. Johnson does not identify Beaver or Jam as the dominant promoters in any particular territory. Mr. Johnson states in his affidavit that the highly competitive industry described by the Defendants (in supporting their unsuccessful motion opposing the disclosure of certain documents on the grounds of exposure of trade secret information to competitors) simply did not exist. (*Id.* ¶ 3.) Mr. Johnson states:

On the contrary, each major market in the United States was controlled *essentially* by one primary or dominant promoter, whose identity is well known among all the major booking agents.... When a white artist represented by WMA wanted to have a concert in one or more cities, or stage a nationwide tour, there was no competitive "bidding" process, in which WMA engaged in arms length bargaining with several promoters in each major venue in order to get the best deal for themselves and their artists. [The booking agents of WMA], who were also organized by territory, instead were instructed to book their artists through the dominant promoter in his or her market. Agents would *typically* not reach out to any promoter other than the one that controlled his respective territory, and if any unsolicited offer or bid came to an agent from a secondary promoter, it would *very likely* never leave his or her desk.

(*Id.* (emphasis added).)

Mr. Johnson's affidavit about WMA's practice of selecting primary or dominant promoters in each major city contains no evidence of the existence of an agreement among the "dominant concert promoters" to divide the market, to exclude competition, or to restrain trade in the United States. Nor does he state that WMA was party to an agreement with any concert promoter or booking agency to direct concerts to a single promoter in a market area. Indeed, Mr. Johnson's knowledge is limited to WMA's procedures for booking agents for the period of 1982 to 1986 and to his personal

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knowledge of WMA's internal practices. [FN51] Mr. Johnson's affidavit does not demonstrate that he has knowledge of how other booking agencies, both defendants and non-defendants, selected concert promoters. Furthermore, little other evidence before the Court relates to the time period cited by Mr. Johnson.

FN51. Plaintiffs did not depose Mr. Johnson. He is not an expert witness designated pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure and his affidavit does not comply with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure. It is accepted only insofar as the statements contained in it are based on his personal knowledge of actions taken by booking agents of WMA from 1982 to 1986. WMA operates out of offices in New York, California, and Tennessee. Mr. Johnson does not state which office he was in.

Plaintiffs also cite to the testimony of Bruce Kapp, a SFX executive who is a former concert promoter at Pace and Magicworks, concerning the manner in which various promoters achieved dominance in particular markets as support for their claim of a horizontal conspiracy. (Hrg. Tr. 10/17/03 at 64-65.) Mr. Kapp testified that Bill Graham came to "dominate" the San Francisco market because he owned or had exclusive booking arrangements with specific venues. According to Mr. Kapp, Bill Graham "[b]uilt venues in San Francisco, the Philmore [sic], with his own money or partner's money, whatever; promoted and bought the shows--almost all the shows; took the risk; and same way that every other promoter did it" (Kapp Dep., Pls.' Joint Mem. Ex. 12, at 231-32); Larry Magid established his dominance in the Philadelphia market the same way that Bill Graham did in San Francisco (*id.* at 232-33); Don Law in Boston did similarly (*id.* at 235); and all these promoters probably dominated their markets by the mid 1980's" (*id.* at 236).

*16 Similar to the testimony of Mr. Johnson, Mr. Kapp's testimony about the dominance promoters

have over concert promotions in these cities contains no evidence of the existence of an agreement among the "dominant concert promoters" to exclude competition or restrain trade in the United States, as claimed in paragraphs 74 and 75 of the Amended Complaint. Nor does he assert that other promoters or booking agencies assisted these promoters in gaining their positions of dominance. Mr. Kapp's testimony is limited to his knowledge as a former concert promoter at Pace and Magicworks. Even accepting the proof of promoter dominance based on the Plaintiffs' counsel's statistical extrapolation and assuming Mr. Kapp could testify as an expert, [FN52] Mr. Kapp's testimony is that the alleged dominant promoters achieved dominance in the early 1980s by taking risks, buying almost all the shows and building venues. Mr. Kapp's testimony does not suggest any agreement between the Promoter Defendants to divide the market in the United States, nor does it suggest the Booking Agency Defendants agreed together or with any concert promoter that the market should be so divided. In fact, neither Defendant Renaissance nor Defendant CAA existed during the time period discussed by Mr. Kapp and by Mr. Johnson.

FN52. Mr. Kapp has also not been designated as an expert pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure.

As evidence of the alleged conspiracy between the booking agencies and the dominant concert promoters, Plaintiffs cite two letters, dated February 25, 1998, and March 2, 1998, from a booking agent, WMA's agent Shelly Schultz, to Sherry Wasserman and Greg Perloff of Bill Graham Presents, a former promoter defendant. [FN53] (Pls.' Joint Mem. at 21 (citing Pls.' Joint Mem. Exs. 41, 42).) The February 25, 1998 letter attempts to persuade Wasserman and Perloff to promote Culture Club-Human League-Howard Jones concerts in Graham's "market" of the San Francisco Bay area. (See Am. Compl. ¶ 31.) Mr. Schultz states, "I thought I would never, ever think about moving into the Bay Area with another promoter. But then again, the winds are blowing and changes are happening.

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Don't mistake this for a threat. If you don't get it, there are others who do." (Pls.' Joint Mem. Ex. 41.) Earlier in the letter, he stated, "you need to understand that there are others who are chomping at the bit to move into your marketplace and want this show." (*Id.*) The March 2, 1998, letter reads in full as follows: "I am sorry you chose to ignore the Culture Club matter for the Bay area. This agency still has to do business. If the walls are down around the Bay area it's because you allowed that to happen ... with your friends no less." [FN54] (Pls.' Joint Mem. Ex. 42.)

FN53. Plaintiffs have stipulated to dismiss their claims against Bill Graham Presents.

FN54. At oral argument, Plaintiffs asserted that Bill Graham Presents finally booked the Culture Club concert. (Hrg. Tr. 10/17/03 at 70-71; *see also*, Pls.' WMA Ex. 181 (Memo from Lee Smith of Bill Graham Presents to Shelly Schultz of WMA, dated Oct. 5, 1998 (discussing postponement of Culture Club concert)).)

There is also evidence in the record that shows that Mr. Schultz made efforts to get other promoters to promote Culture Club in the Bay Area. Mr. Schultz wrote Mr. Perloff on August 13, 1998, about the Culture Club concert stating, "I told you the whole package would be \$50,000 and the purchaser provides local sound and lights to Artist specifications. This figure is for CULTURE CLUB and the support Artist. If that's not the case, let me know. I have no problem using another promoter in the Bay Area." (Exs. to Pls.' Opp'n to WMA's Summ. J. Mot., undated (received May 5, 2003) ("Pls.' WMA Exs."), Ex. 151.) On August 14, 1998, Mr. Schultz of WMA wrote Mr. Vallon, a concert promoter from Los Angeles, stating "I feel very strongly about opening up the San Francisco marketplace to other promoters. Therefore, would you like to be considered for a Culture Club date plus support in the Bay area in October?" (Pls.' Hrg. Ex. 14.) In a letter dated August 18, 1998, Jeff Trisler of Universal makes an offer for a Culture Club concert at a venue in the Bay Area to Guy Richard of WMA and copies the letter to Mr.

Schultz and Mr. Vallon. (Pls.' WMA Ex. 91.)

*17 These letters allow the inference that Mr. Schultz of WMA may have favored Bill Graham Presents as a concert promoter in the Bay Area prior to February 1998. However, the correspondence on the Culture Club concert does not evidence: (1) an agreement among the Promoter Defendants; (2) an agreement between the Booking Agency Defendants; or (3) an agreement by WMA and Bill Graham Presents to exclude other promoters from Bill Graham's "market." The inference raised by Mr. Schultz's letter to Mr. Vallon, attempting to interest him in buying the promotion for a Culture Club concert in the Bay Area, is that Mr. Schultz had no agreement with Bill Graham Presents to exclude other promoters from that market.

The other evidence Plaintiffs point to for support of their claim of a territorial agreement is a letter dated May 22, 1996, from Rob Light of CAA to Mitch Slater of Delsener/Slater, a former promoter defendant, [FN55] stating, "You're always asking me to protect you in the market." (Pls.' Hrg. Ex. 17.) At most this letter shows that Delsener/Slater had asked CAA to give it a preference in the market. There is no showing of any agreement to any territorial arrangement.

FN55. Plaintiffs have stipulated to dismiss their claims against Delsener/Slater.

In addition, Plaintiffs' exhibits contradict their claims of a horizontal agreement to divide markets. Those exhibits include contracts between the Booking Agency Defendants and alleged dominant concert promoters in cities where the Amended Complaint asserts that another concert promoter is dominant. (*See e.g.*, Pls.' Joint Mem. Ex. E.) [FN56] In the face of evidence showing that the artists represented by the Booking Agency Defendants contract with other concert promoters for concerts in the "designated markets" of the alleged dominant concert promoters, Plaintiffs' claim of an agreement between the Booking Agency Defendants and the Promoter Defendants to restrain trade in the designated areas throughout the United States is too

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implausible to be inferred by the trier of fact .
[FN57] See *Matsushita*, 475 U.S. at 593.

FN56. For example, Exhibit E to Plaintiffs' Joint Memorandum contains artists' contracts with Beaver (New Orleans) on Defendant CCA's form contract for concerts in: (1) Fort Worth and Dallas, Texas (Pace Concerts) (Am. Compl. ¶ 51 (stating that Pace Concerts is the "dominant concert promoter is Texas")); (2) St. Louis (Contemporary Productions) (*id.* ¶ 42 ("Contemporary Productions is the predominant concert promoter operating in the region surrounding St. Louis....")); (3) Worcester, Massachusetts, and Portland, Maine (Don Law Productions) (*id.* ¶ 45 ("Don Law Company is the predominant concert promoter in the New England region....")); (4) Nassau Coliseum in Uniondale, New York (Delsener-Slater) (*id.* ¶ 43 ("Delsener-Slater Enterprises is the predominant concert promotion company operating in the New York City metropolitan area")); and (5) Atlanta, Georgia (Concert/Southern Promotions) (*id.* ¶ 41 ("Concert/Southern Promotions is concert promoter, operating primarily in the Southeastern United States....")). Also Exhibit 12 to Plaintiffs' Joint is an artist contract with Beaver Productions on a WMA contract form for a concert in St. Louis, Missouri (Contemporary Productions) (*id.* ¶ 42). Furthermore, Exhibit 9 of Plaintiffs' Hearing Exhibits contains an artist contract with Beaver on CAA's contract form for a concert in Houston, Texas (Pace) (*id.* ¶ 51). Also, Mr. Kapp testified that to his knowledge Jam Productions promoted concerts in San Francisco (Bill Graham Enterprises) (*id.* ¶ 31 ("Bill Graham Enterprises is the predominant concert promoter in the San Francisco Bay/Northern California area.")). Philadelphia (Electric Factory) (*id.* at ¶ 46 (stating that Electric Factory "is the

predominant concert promoter in Philadelphia, Pennsylvania.")) and Boston (Don Law) (*id.* ¶ 45). (Kapp Dep., Pls.' CAA Dep. Tr., Vol. I, at 238-41) Mr. Leff testified that Beaver promoted concerts in Memphis, Mid-South Concerts' territory, prior to 1998. (Leff Dep., Pls.' Beaver Ex. 4, at 56.) Exhibit A to the affidavit of Don Fox, dated March 13, 2003 ("Fox Aff."), (which is attached as Exhibit 2 to Beaver's Reply Memorandum.) shows that alleged dominant promoters Pace Concerts (Texas), Contemporary Productions (St. Louis), and Cellar Door promoted concerts in New Orleans, Lakefront Arena, Beaver's area. (See also Beaver's Reply Mem. in Support of Mot. for Summ. J., dated Mar. 13, 2003 ("Beaver Reply Mem."), at 9.) In view of these examples, the Court will not set forth all the other contracts Plaintiffs offered as exhibits on this motion which are additional evidence of no horizontal conspiracy to divide markets between the Promoter Defendants.

FN57. There is evidence that WMA and CAA have contacted "dominant promoters," as much as a year in advance, asking them to hold venues on specific dates for artists whose tours they are planning. (Pls.' Hrg. Ex. 8.) These venue holds are obviously competitive attempts to preempt other booking agencies, and promoters in contact with them, from putting holds on the desired venue on the same date for other artists, and are not supportive of the Plaintiffs' antitrust claims as they reflect competition among booking agencies. *Matsushita*, 475 U.S. at 588 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") These venue holds are not proof of the Plaintiffs' claim of a horizontal conspiracy among the concert Promoter Defendants to divide the U.S. market or evidence from which a reasonable jury could find that the

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Booking Agency Defendants are members of a conspiracy with all the concert Promoter Defendants to exclude Plaintiffs from the concert promotion business throughout the United States or to restrain competition in that market.

(ii) *The Alleged Reciprocal Agreement*

The Amended Complaint asserts that:

[t]he booking agency defendants are able to maintain ultimate control over the concert promotion market, and guarantee promotion of all their acts, including the less successful ones, by assuring the promoter defendants that they will always be given the opportunity, to the exclusion of all others, of promoting the defendant booking agents' top acts in the promoter defendant's assigned territory, at highly profitable rates. [FN58] In exchange for this lucrative, anti-competitive agreement, the booking agency defendants are able to assure artists that the promoter defendants will guarantee the sale of tickets for concerts given by less successful acts on the booking agency defendants' talent rosters.

FN58. Plaintiffs' allegation assumes that the Booking Agency Defendants not only have the ability to make, but also to keep these "assurances" to Promoter Defendants. The record is clear and unambiguous that the artist or the artist's manager enters into a contract with the concert promoter for a concert at a specified venue, generally for a guaranteed amount and an artist/promoter split of gross revenues after deducting specified expenses. The booking agency is not a party to the contract, although the contract is generally on the booking agency's form. Accordingly, a contract's terms are not determinative of the terms of any agreement between the promoters and the booking agency. Booking agencies are only agents of the artists. The booking agency, on instructions from the artist or the artist's manager, arranges the routing of an artist's tour and the venue of each

appearance and may state on behalf of the artist the terms of the concert contract with the promoters.

(*Id.* ¶ 79 (emphasis added).)

Although Plaintiffs have had complete discovery of the Defendants' files, including email and hard drive discovery, Plaintiffs have offered no evidence showing that any Booking Agency Defendant has made any assurance to any Promoter Defendant that it will have exclusive access to that booking agency's top acts. Nor have Plaintiffs have offered evidence of any assurance to any artist that a Promoter Defendant will guarantee the sale of tickets for concerts of less successful acts.

*18 Additionally, Plaintiffs have failed to present evidence to show that the Booking Agency Defendants and Promoter Defendants have an economic rationale to participate in this alleged exchange, even considering the alleged "interrelated and interdependent conduct." (*Id.* ¶ 81.) Plaintiffs allege that:

[i]n furtherance of the conspiracy, all of the booking agency defendants are willing to forego the enhanced compensation they would receive from major artists through reduced promoter fees which would result from unrestrained competition, although it is apparently against their economic self-interest. This is because the conspiracy ensures that all of their acts, including their less stellar acts, will be accepted and promoted by the promoter defendants within each of their geographically allocated territories. The promoter defendants are uniformly willing to promote the lesser acts in exchange for promoting the successful acts and for their continuing dominant presence in their assigned geographic territories. The acts of all of the defendants are thus interrelated and interdependent, and the success of the conspiracy depends upon all of the defendants consciously pursuing the identical parallel conduct, which they have done.

(*Id.*)

As to the Booking Agency Defendants, Plaintiffs have failed to offer evidence that any Booking

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Agency Defendant has been willing to forego this enhanced compensation. Additionally, Defendants provide expert evidence by Dr. Williams, who states that due to competitive factors, the Booking Agency Defendants could never recoup their losses from agreements such as the one described by the Plaintiffs. (Williams Report, J.A., Vol. I, ¶¶ 16-22, Exs. 1, 1a, 1b.) Furthermore, such an agreement could result in the booking agency's client, the artist, not receiving the most lucrative concert contract with a resulting loss of income to the artist and to the Booking Agency Defendant. According to Dr. Williams's report, competition between the booking agencies is intense, and artists often switch to other booking agencies. (*Id.* ¶¶ 26-29.) Thus, the alleged conspiracy would be against the economic interest of the Booking Agency Defendants because artists who were not receiving competitive contractual terms would switch to another agency.

As to the Promoter Defendants, Plaintiffs have failed to offer evidence to support their allegation that the Promoter Defendants promote lesser acts in exchange for the promotion of successful acts and territorial dominance. Again, Plaintiffs rely on Mr. Johnson's affidavit, which states that:

WMA's interest in giving as much lucrative business as possible to the same promoter ensured that the promoter would also promote less prominent (but potentially more promising) acts.

(R. Johnson Aff., Pls.' Beaver Ex. 9, ¶ 4.)

Mr. Johnson does not state that WMA artists agreed, or that WMA caused them to agree, to less favorable financial terms for a concert if the promoter agreed to promote less prominent acts. (*Id.*) Mr. Johnson only states that WMA recognized that a concert promoter benefiting from receiving prominent acts for promotion would be more willing to promote less prominent acts. (*Id.*) This testimony, while evidence of a business practice by WMA in 1986, well prior to the limitations period, does not show any "agreement" by WMA with any of the Promoter Defendants to restrain trade in the United States, which is the claim in the Amended Complaint. Nor does it show any agreement among

the concert promoters to restrain trade in the contemporary music concert promotion market in the United States as alleged in the Amended Complaint and restated at oral argument.

*19 Plaintiffs also rely on the deposition testimony of Mr. Kapp, in which he stated that when he was in the concert promotion business, promoters "promoted acts they otherwise would not want to promote, in the hope or expectation that they would obtain other acts from [the booking] agencies" (Kapp Dep., Pls.' Joint Mem. Ex. 12, at 230) and that 20 to 30 years ago he and Defendant Jam (Arny Granat and Jerry Mickelson) had competed in this manner in Chicago (*id.* at 226-28).

Although Mr. Kapp testified that promoters do take on "baby acts" in the hopes that they would "get another act," his testimony is that he and other promoters did so not because of an ongoing arrangement between the dominant promoters and the booking agencies or because the marketing power of booking agencies forced them to take on such acts, but rather because they hoped to improve their competitive position and prestige in the area and to receive more business from the booking agency. (*Id.* at 173, 226-30.) Thus, Mr. Kapp's testimony does not support Plaintiffs' allegation, but rather raises the strong inference that competition among promoters led to their taking on "baby acts" and that promoters seek to gain an edge on their competition in the area by occasionally taking on baby acts, even though such acts could increase their potential liabilities. (*Id.*)

Additionally, Plaintiffs assert that Beaver has an economic rationale to participate in the conspiracy because:

[t]he promoters earn enormous profits by reason of their control over specific territories. The agents, who guarantee the promoters market exclusivity, profit by requiring promoters to promote acts they otherwise would not take, a practice which provides concert outlets for their lesser known or new talent to become groomed for future stardom. Attached to the Rowe Decl. as Comp. Exhibits A and B, respectively, are contracts which show that Beaver has promoted

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concerts with extremely low guarantees to the artists, *sometimes as low as \$1.00*, and Beaver's contracts for the superstar acts such as Celine Dion, Eric Clapton, Michael Bolton, Bette Midler, among others, which Beaver is given in exchange for promoting the lesser known or new talent.

(Pls.' Resp. Beaver Mem. at 7 (emphasis in original) (citations omitted).)

Exhibit A, referred to above, is a single contract on a WMA form for the artist Protein to perform as a special guest at Howlin' Wolf in New Orleans on April 15, 1997, for \$100 flat guarantee (not \$1.00) with no deposit. (Rowe Beaver Decl., Pls.' Beaver Ex. 6, Ex. A.) The contract contained in Exhibit A refers to Beaver as the "purchaser" but is executed by Howlin' Wolf. Exhibit B contains various contracts on CAA forms and a single contract on a WMA form for the artist Korn to perform in St. Louis, Missouri, on April 24, 1999, with a \$101,500 guarantee (versus the right to 85% of the gross box office receipts after the approved expenses with a deposit of \$10,150) to be paid to WMA by April 9, 1999 and the balance of \$91,350 plus \$23,000 for production to be paid to Korn prior to the first performance. (*Id.* Ex. B.) The Court's review of all of the exhibits did not reveal any testimony showing that CAA gave Beaver the various contracts contained in Exhibit B in exchange for Beaver agreeing to the Howlin' Wolf contract on the WMA form. Nor is a reward from CAA likely for an alleged benefit to WMA. Nor could the Court find any evidence linking the contract on the WMA form for the artist Protein with the contract on the WMA form with Beaver for the artist Korn, a concert which occurred two years later. [FN59]

FN59. In his declaration dated February 27, 2003, Mr. Rowe cites the above exhibits as evidence supporting the Plaintiffs' conspiracy theory. (Rowe Beaver Decl. ¶ 7.) Mr. Rowe states that his credentials are that he has worked as a concert promoter in the United States for twenty-eight years and has been president of the Black Promoters Association for

eight years. (*Id.* ¶ 3.) While that experience might give him some knowledge about the activities of a concert promoter, the overwhelming weight of the evidence is that he has not been active as a concert promoter since the 1970s. His experience, in any event, is insufficient to permit the conclusion that these contracts raise an inference of an agreement between the booking agencies and the promoters regarding as rewards for promoting certain artists.

*20 Plaintiffs have also failed to present evidence which would tend to exclude the possibility of independent action by the Defendants. *See Monsanto*, 465 U.S. at 764. Plaintiffs allege that the actions of the Defendants were interrelated and interdependent. (Am.Compl.¶ 81.) "Actions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action." *Modem Home Inst., Inc. v. Hartford Accident & Indem. Co.*, 513 F.2d 102, 111 (2d Cir.1975). Evidence of actions, which are "only in one's self interest if done in concert with others, may also provide the basis for an inference of illegal conspiracy." *Id.* Although Mr. Kapp's testimony that concert promoters did take on less successful acts in the hopes of receiving other acts may show actions against the apparent self-interest of those promoters, this conduct is "as consistent with permissible competition as with illegal conspiracy" and cannot, "standing alone, support an inference of antitrust conspiracy." *See Matsushita*, 475 U.S. at 588. Mr. Kapp testified that a promoter would take this action to improve its competitive position. (Kapp. Dep., Pls.' Joint Mem. Ex. 12, 173, 225-30.) [FN60]

FN60. Mr. Richard Johnson's affidavit is insufficient to demonstrate any action of the booking agencies that would be against their economic interests since his testimony at most relates to a business practice by WMA from 1982 to 1986.

3. *Plaintiffs Have Failed to Provide Evidence of Any Injury Resulting from the Alleged Conspiracy*

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Although Plaintiffs allege that they have been excluded from promoting contemporary music concerts, Plaintiffs have presented no evidence to show that any of the Plaintiffs have ever been excluded from promoting in the geographic areas designated for Jam and Beaver in the Amended Complaint, or in any other area. Each of the Plaintiffs do business in areas different than Jam and Beaver. Furthermore, the Plaintiffs have seldom, if ever, presented the Booking Agency Defendants with bids to promote concerts. *See infra* pp. 48-49, 52, 54-56, 59-60, 155-57, 162-65. When Plaintiffs have made bids, Plaintiffs have not provided evidence to show that they have been damaged by any concerted action of the Defendants. *See infra* pp. 69-71, 110-15, 148-51.

Plaintiffs assert that there is an antitrust injury because "concerts could profitably be promoted at rates of 5% of revenues or less," in contrast to the 15% of the net sales revenues they allege that Promoter Defendants currently receive. (Am.Compl. ¶ 80.) Not only have Plaintiffs offered no evidence to support this alleged antitrust injury, [FN61] such an injury does not support a § 1 claim because higher promoter fees in the industry tend to benefit Plaintiffs as promoters. *Matsushita*, 475 U.S. at 585 n. 8.

FN61. *See supra* note 47.

Even if Plaintiffs had antitrust standing, taking the evidence as a whole, no showing of conspiracy is plausible and no reasonable jury could infer a conspiracy in restraint of trade from the evidence Plaintiffs have provided. Thus, Defendants' motions for summary judgment as to the section 1 of the Sherman Act are granted.

IV. DISCRIMINATION CLAIMS

*21 In addition to their claim under the Sherman Act, Plaintiffs have brought claims for compensatory and punitive damages and injunctive relief under three provisions of the Civil Rights Acts of 1866 and of 1991, 42 U.S.C. §§ 1981, 1985(3) and 1986.

A. Legal Standard for Summary Judgment Motion

1. Applicable Statutes

Section 1981 provides, in pertinent part, that all persons "shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ." [FN62] 42 U.S.C. § 1981(a). In order to succeed under § 1981, a plaintiff must present evidence to "show both that he was subjected to intentional discrimination, and that this discrimination interfered with a contractual relationship." *Murray v. Nat'l Broad. Co.*, 844 F.2d 988, 995 (2d Cir.1988) (citations omitted); *see also Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976) ("[Section 1981] right to 'make and enforce contracts' is violated if a private offeror refuses to extend [on account of race] the same opportunity to enter into contracts as he extends to white offerees."); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 139-40 (2d Cir.1999) ("In order for plaintiff to prevail on his claims for violation of ... 42 U.S.C. § 1981, proof of racially discriminatory intent is required.").

FN62. The statute of limitations for claims brought under § 1981 in New York is three years. *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir.2004).

Section 1985(3) prohibits, in pertinent part, conspiracies undertaken "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws" and provides for "an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3). To prevail on a claim under § 1985(3), a plaintiff must demonstrate that defendants "(1) engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities under the laws; (3) acted in furtherance of the conspiracy; and (4) deprived such person or class of persons the exercise of any right or

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privilege of a citizen of the United States." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1358 (2d Cir.1989); see also *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

As in § 1981, a showing of intent is crucial in a § 1985(3) claim. "[I]n order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show; *inter alia*, (1) that some racial, or perhaps otherwise class-based, invidiously discriminatory animus lay behind the conspirators' action, and (2) that the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (internal quotations omitted).

*22 Section 1986 provides a private cause of action for neglect to prevent conspiracy. Specifically, it states that "[e]very person who, having knowledge [of a § 1985 conspiracy] and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, ... shall be liable ... for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented." 42 U.S.C. § 1986. An action for neglect to prevent a conspiracy must be "commenced within one year after the cause of action has accrued." *Id.*

2. Discrimination Summary Judgment Standard

In "a discrimination case where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate." *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir.2000). Accordingly, "a trial court should exercise caution when granting summary judgment to a [defendant] where ... its intent is a genuine factual issue." *Id.*

Nonetheless, at times summary judgment can be appropriate in discrimination cases. "For a plaintiff in a discrimination case to survive a motion for summary judgment, he must do more than present 'conclusory allegations of discrimination,' he must offer 'concrete particulars' to substantiate his claim." *Murphy v. Bd. of Educ.*, 273 F.Supp.2d 292,

299-300 (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985)). As the Second Circuit has pointed out, "To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases." *Meiri*, 759 F.2d at 998; see also *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases."); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir.1999) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.").

In determining summary judgment motions under § 1981, the courts have generally applied the same analysis utilized in Title VII cases, following the burden-shifting scheme established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (U.S.1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n. 1 (1993) (assuming that the "*McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (stating that the *McDonnell Douglas/Burdine* scheme of proof "should apply to claims of racial discrimination under § 1981").

Under *McDonnell Douglas*, "the plaintiff has the [initial] burden of proving by the preponderance of the evidence a prima facie case of discrimination." [FN63] *Burdine*, 450 U.S. at 252-53. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n. 3 (2003); *McDonnell Douglas*, 411 U.S. at 802. If the defendant satisfies this burden, the presumption of intentional discrimination disappears. *Raytheon*, 540 U.S. at 50 n. 3; *McDonnell Douglas*, 411 U.S. at 804. The plaintiff then "must be afforded the 'opportunity to prove by a preponderance of the evidence that the

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legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 253)). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148.

FN63. To establish a prima facie case of racial discrimination in the employment context under Title VII, the plaintiff must prove by a preponderance of the evidence:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802.

However, "this standard is not inflexible, as 'the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect in differing factual situations.'" *Burdine*, 450 U.S. at 254 n. 6 (quoting *McDonnell Douglas*, 411 U.S. at 802 n. 13).

The second element in the employment promotion context generally requires that a plaintiff show that he or she applied for a specific position or positions and was rejected, rather than generally requested promotion. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 227 (2d Cir.2004) (citing *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir.1998)). To be excused from the specific application requirement, an employee must demonstrate "that (1) the vacancy at issue was not posted, and (2) the employee either had (a) no knowledge of the vacancy before it was filled or (b)

attempted to apply for it through informal procedures endorsed by the employer." *Id.*

*23 Under the *McDonnell Douglas* standard, the Supreme Court has found summary judgment on behalf of a defendant appropriate when (1) "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred;" or (2) "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Reeves*, 530 U.S. at 148.

B. General Claims Regarding Bidding and Contemporary Music Concert Promotion

The Amended Complaint alleges that the Defendants prevented and conspired to prevent Plaintiffs from entering concert promotion contracts for white artists and major black artists because of their race. (Am.Compl.¶ 5.) As for Plaintiffs' prima facie case under § 1981, it is uncontroverted that Plaintiffs are members of a racial minority, and thus, meet the first element of proof set forth in *McDonnell Douglas*.

As to the second element of *McDonnell Douglas*, whether Plaintiffs applied and were qualified for a position, the Amended Complaint alleges that Plaintiffs are "skilled, experienced and financially sound concert promoters," who "are regularly retained by booking agents, including booking agency defendants named herein, to promote concerts throughout the United States" (*id.* ¶ 4), and that "[d]uring the last several years, plaintiffs have accounted for most of the business done by black concert promoters within the United States" (*id.* ¶ 1). These allegations have been shown to be largely false and misleading.

1. Promotion Records of Plaintiffs

Plaintiffs have admitted that for several years they have submitted only a few bids for concert promotions and that they have not had a record of successful contemporary music concert promotion remotely equal to that of the concert Promoter

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Defendants. Plaintiffs also have presented no evidence that they have been regularly retained to promote concerts throughout the United States or in the Amended Complaint's designated territories for the Promoter Defendants Jam and Beaver. Furthermore, other black promoters have accounted for most of the business done by black promoters in the United States. The following facts, unless otherwise noted, are undisputed.

(i) *Leonard Rowe, Rowe Entertainment*

Leonard Rowe has worked in the concert promotion business for over twenty-six years. (Joint 56.1 Stmt. ¶ 52.) He is currently president of Rowe Entertainment, Inc., which was incorporated in 1998 and is located in Atlanta, Georgia. (*Id.* ¶¶ 53-54.) Mr. Rowe mainly specializes in R & B music, not pop or rock. (Rowe Dep., in J.A., Vol. VI, at 237.) Rowe Entertainment employs one other person, LaShonda Goodwin, who serves as secretary to Mr. Rowe and Rowe Entertainment. (Joint 56.1 Stmt. ¶ 54.) [FN64]

FN64. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 54 is considered as if undisputed.

(a) Bids

Mr. Rowe does not remember having submitted any written proposals to promote concerts from 1988 to 1998. (*Id.* ¶ 60.) [FN65] From 1998 to 2001, he submitted at most three written offers, not for concerts, but for national tours. [FN66] Mr. Rowe has never submitted a written bid to promote a white artist. (*Id.* ¶ 61.) [FN67] Additionally, he has never bid for any concert that a white promoter bid on at the same time. (*Id.* ¶ 63.) [FN68]

FN65. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 60 is considered as if undisputed. Mr. Rowe produced no concert files prior to 1997. (Rowe Dep., in J.A., Vol. VI, at 838.) Mr. Rowe testified that the files of any concerts he did with Mr. Haymon from 1984 to 1997 were retained by Mr. Haymon, and before 1984,

his concert files were mistakenly thrown away. (*Id.*)

FN66. Mr. Rowe submitted an offer to CAA for the Janet Jackson tour in 29 cities in 1998. (Joint 56.1 Stmt. ¶ 59; Rowe Dep., in J.A., Vol. VI, at 134-35.) Mr. Rowe also submitted an offer to WMA for certain markets on the 1998 Maxwell tour. (Letter from Mr. Rowe to Jeff Frasco of WMA, dated July 20, 1998 ("Rowe 1998 Maxwell Offer"), Pls.' Rev. Jam Mem. Ex. 1A, at 1) Mr. Rowe's letter did not include venues, dates, artist's split or other key terms for a specific concert that would allow an artist or an artist's manager to compare his offer to other promoters' offers for these cities. However, it will be considered, as WMA acknowledges, an offer for the 1998 Maxwell tour. (Mem. of Law in Supp. of WMA's Mot. for Summ. J., dated Feb. 28, 2003 ("WMA Mem."), at 8 n. 5.) Plaintiffs cite to Mr. Rowe's testimony that he had submitted a written bid for concerts by Lauryn Hill. (Pls.' Am. Joint 56.1 Stmt. ¶ 59 (citing Rowe Dep., in J.A., Vol. VI, at 1172-74).) Plaintiffs did not supply the Court with a copy of Mr. Rowe's Lauryn Hill bid. The testimony suggests it was only an expression of interest. (Rowe Dep., in J.A., Vol. VI, at 1174.)

FN67. Plaintiffs' reply is non-responsive and admits the facts in question; Joint Statement ¶ 61 is considered as if undisputed.

FN68. Plaintiffs' reply is non-responsive and admits the facts in question; Joint Statement ¶ 63 is considered as if undisputed.

(b) Track Record as a Promoter

*24 Plaintiffs acknowledge that Plaintiff Rowe promoted no more than ten shows per year and most of those were co-promotion arrangements. (Pls.'

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Rev. Jam 56.1 Stmt. ¶ 35.) [FN69] All of the shows he worked on were co-promotions, and most were done through Mr. Alex Haymon, a successful black promoter. (Rowe Dep., in J.A., Vol. VI, at 88.) Mr. Haymon would take financial responsibility for the tour, while Mr. Rowe was involved primarily with facilitating advertising and doing general street promotion. (*Id.* at 697-699; Haymon Dep., in J.A., Vol. IV, at 498-99.) Mr. Haymon testified that while working with Mr. Rowe during the period from 1990 to 2002, Mr. Rowe never put any of his own money at risk. (Haymon Dep., in J.A., Vol. IV, at 499.) [FN70]

FN69. Co-promoters generally do not conduct the financial negotiations for a concert.

FN70. Mr. Rowe testified that Mr. Haymon takes financial responsibility for the tours, but that he would "sometimes put up the expense for" the advertising he undertook. (Rowe Dep., in J.A., Vol. VI, at 697.)

In the period from 1991 to 2001, Mr. Rowe was involved in the promotion of live contemporary music performances outside the state of Georgia on only two occasions. (Joint 56.1 Stmt. ¶ 55.) [FN71] Mr. Rowe has not acted as the lead promoter for any concert since the mid-1980s, when he promoted two shows for the Temptations in Georgia (Joint 56.1 Stmt. ¶ 56; [FN72] Rowe Dep., in J.A., Vol. VI, at 64, 67-68, 1117), nor has he paid an artist deposit or a venue deposit (Rowe Dep., in J.A., Vol. VI, at 88-89). [FN73] Mr. Rowe did promote a concert tour for the Jacksons in 1979. (Aff. of Mahlon Jackson, dated Apr. 10, 2003, Pls.' Am. Joint 56.1 Stmt. Ex. 2, ¶ 4.) In 1979, Rowe stopped payment on a check for the Jacksons for \$150,000. (Rowe Dep., in J.A., Vol. VI, at 329-30.) He was not called on to promote the Jackson Tours in 1981 or 1984. (*Id.* at 1129-30.) The Jacksons have not used Mr. Rowe for concert promotion since 1979. (*Id.* at 333.)

FN71. Plaintiffs dispute this statement, asserting that "Mr. Rowe testified he

promoted many live music performances outside of the state of Georgia." (Pls.' Am. Joint 56.1 Stmt. ¶ 55.) Plaintiffs, however, cite only to the same deposition testimony of Mr. Rowe as cited in Joint 56.1 Statement ¶ 55, in which the only concerts Mr. Rowe mentions specifically are concerts on: (1) the Kenny G/Toni Braxton tour, which he asserts he "sharecropped," did no work, and was paid for his silence (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 22); (2) a Sugar Daddy tour, a gospel (non-contemporary) music tour, and (3) the Puff Daddy tour (no further explanation provided). (Rowe Dep., in J.A., Vol. VI, at 202-03). As Plaintiffs have failed to provide citation to evidence controverting Joint 56.1 Statement ¶ 55, that paragraph is considered as if undisputed.

FN72. Plaintiffs state that Joint Statement ¶ 56 is disputed, citing to Mr. Rowe's promotion of the "Sugar Daddy national tour." (Pls.' Am. Joint 56.1 Stmt. ¶ 56.) Sugar Daddy, however, was a "gospel musical play" (Rowe Dep., in J.A., Vol. VI, at 336), not a concert performance of contemporary music within the scope of the Amended Complaint in this litigation. As Plaintiffs' reply is non-responsive, Joint Statement ¶ 56 is considered as if undisputed.

FN73. In this period, Mr. Rowe has only once been made responsible for part of the artist's guarantee. (*Id.* at 295.) During the 1998 Janet Jackson Tour, promoted by Magicworks, \$100,000 of the monies due Mr. Rowe from concert ticket sales as a co-promoter were held as a deposit until after the show. (*Id.*)

(c) Financial Capabilities

In 1984, Mr. Rowe filed for bankruptcy. (*Id.* ¶ 68.) [FN74] His gross income that year was \$20,000, and he owed at least \$312,000 to the

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Columbus Bank and Trust, which sued him that year for \$600,000. (*Id.*) Mr. Rowe also had a number of civil lawsuits filed against him for smaller outstanding debts, several tax liens issued against him, and approximately \$50,000 in other secured debt. (*Id.*) At the time of his deposition in 2002, Mr. Rowe had an outstanding balance owed to Columbus Bank and Trust in the amount of approximately \$600,000 in principal and interest. (*Id.* ¶ 70.)

FN74. Plaintiffs' reply is non-responsive and admits the facts in question; Joint Statement ¶ 68 is considered as if undisputed.

In 1986, Mr. Rowe was indicted by a grand jury for passing a check drawn on a non-existent bank account. (*Id.* ¶ 72.) Mr. Rowe pleaded guilty and was ordered to serve three years probation. (*Id.*) The terms of Mr. Rowe's probation included paying restitution in the amount of \$5,833 by May 1, 1987. (*Id.*) Mr. Rowe was arrested on or about June 8, 1987, for failing to pay the restitution and was subsequently sentenced to serve six months in state prison for violating the terms of his probation. (*Id.* ¶ 73.) Mr. Rowe was convicted of wire fraud for his role in the cashing of a fraudulent insurance check in or around 1984 and sentenced to five years in a federal penitentiary. (*Id.* ¶ 74.) He was incarcerated from October 1990 to April 1992. (*Id.*) Mr. Rowe has been arrested on other occasions for writing bad checks. (*Id.* ¶ 75.) Additionally, Mr. Rowe had at least seven tax liens issued against him from 1979 to 1995. (*Id.*) Mr. Rowe's accountant ultimately negotiated a deal with the federal government, and, after the commencement of this litigation, Mr. Rowe had paid a portion of his debt and was released from the liens by 1999. (*Id.*; Rowe Dep., J.A., Vol. VI, at 474-75.)

*25 Before the start of this lawsuit, Mr. Rowe earned \$52,000 in income from concerts in 1996, and he earned \$79,000 from concerts in 1997. [FN75] (*Id.* ¶ 71.)

FN75. *But see infra* note 115. In 1997, Mr. Rowe obtained a contract for a portion of

concert promotion for concerts on the Toni Braxton tour, but he did not perform any services. (Rowe Jam Aff. I, Pls. Rev. Jam Ex. 1, ¶ 22.)

(ii) *Jesse Boseman, Sun Song Productions*

Plaintiff Boseman formed Sun Song Productions, Inc. ("Sun Song") in 1976. (Joint 56.1 Stmt. ¶ 97.) Mr. Boseman is its sole shareholder and chief executive. (Am.Compl. ¶ 14.) In addition to Sun Song, Mr. Boseman has formed two other businesses: Harlem International Records and Black Expo. (Boseman Dep., in J.A., Vol. III, at 79-80.) Black Expo is a consumer exposition for entrepreneurs seeking to develop their businesses. (*Id.* at 80.) Sun Song is located in New York and has two full-time employees, Mary Cassaberry, who serves as office manager and Shahana Williams, who serves as a receptionist. (Boseman Dep., in Pls.' Am. Joint 56.1 Stmt. Exs., Vol. II, at 127-30.) About half of Ms. Cassaberry's time is spent working on Black Expo matters. (Cassaberry Dep., in J.A., Vol. IV, at 40.) Additionally, Sun Song has several independent contractors it uses to work on promotions. (Boseman Dep., in J.A., Vol. III, at 130-32.)

(a) Bids

Mr. Boseman does not know if Sung Song has submitted a written bid to any booking agency in the last five years. (Joint 56.1 Stmt. ¶ 112.) [FN76] In discovery, Mr. Boseman produced only three concert contracts for performances and all were for concerts after the commencement of this action. (*Id.* ¶ 113.) One of these concerts was by an artist represented by WMA. (J.A. Vol. II, Ex. 35 (Letter from Berkeley Reinhold of WMA to Phil Robinson, Jesse Boseman and Brian O'Connell, dated Aug. 17, 1999, regarding a Maxwell concert).) During his thirty-year career, Mr. Boseman has never submitted a written bid to any booking agency to promote any white artist. (Joint 56.1 Stmt. ¶ 111.) [FN77]

FN76. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 112 is considered

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as if undisputed.

FN77. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 111 is considered as if undisputed.

(b) Track Record as a Promoter

Plaintiffs acknowledge that Mr. Boseman has promoted an average of ten shows per year for the last decade, almost all of which were co-promotions. (Pls.' Rev. Jam 56.1 Stmt. ¶ 36.) Mr. Boseman works on concerts almost exclusively in his local market of "New York and along the East Coast of the United States." (Joint 56.1 Stmt. ¶ 100.) [FN78] He has never promoted a national tour. (Joint 56.1 Stmt. ¶ 101.) [FN79] According to Ms. Cassaberry, approximately 90% of Sun Song's business is co-promotion, 75% of which is done through Al Haymon. (Cassaberry Dep., in J.A., Vol. IV, at 27.) In the last twenty years, Mr. Boseman has worked almost exclusively as a "consultant" or "street promoter" for Al Haymon, distributing flyers and hanging up posters in the New York area for a fixed fee. (Joint 56.1 Stmt. ¶ 104.) [FN80] As a consultant, Mr. Boseman provides "promotional expertise" and gets paid whether the show makes or loses money. (*Id.* ¶ 108.)

FN78. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 100 is considered as if undisputed.

FN79. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 101 is considered as if undisputed.

FN80. Plaintiffs' reply is largely non-responsive. However, Mr. Boseman testified that he was sole promoter for Luther Vandross in 1986 or 1987 in the Raleigh, North Carolina area. (Boseman Dep., in J.A., Vol. III, at 99-100.) This does not controvert Joint Statement ¶ 104, and thus it is considered as if undisputed.

(c) Financial Capabilities

Sun Song has a line of credit with Chase Bank with a maximum authorized amount of \$50,000, from which it has never drawn. (*Id.* ¶ 115.) Typically, Mr. Boseman's investors in shows are his accountant, his doctor, and sometimes his lawyer. (*Id.* ¶ 116.) The largest deposit Sun Song has ever paid was \$100,000 in connection with an R. Kelly show on May 8, 2000, of which Sun Song only paid half, or \$50,000. (*Id.* ¶ 117.)

*26 Mr. Boseman's tax returns for 1996 to 1999 show that his adjusted gross income for each tax year was a negative number (i.e., negative \$1,992 for 1999 and as low as negative \$17,511 for 1996). (*Id.* ¶ 118.) Sun Song's financial statements for 1994 to 2000 show that its net income was negative for all but one year. (*Id.* ¶ 119.) In 1997, which was Sun Song's most successful year, its net income was \$12,464. (*Id.* ¶ 120.)

(iii) Lee King, King Productions

Mr. King is a local promoter in Jackson, Mississippi, and has been in the concert business for approximately thirty years. (*Id.* ¶ 79.) Mr. King formed Lee King Productions in 1978. (*Id.* ¶ 81.) Lee King Productions has no regular, full-time employees, and its offices are located in Mr. King's home. (*Id.* ¶ 84.) [FN81]

FN81. Plaintiffs' reply is non-responsive and admits the facts in question; Joint 56.1 Statement ¶ 84 is considered as if undisputed.

(a) Bids

Mr. King has said that he either never submitted, or has no recollection of submitting, a bid to CAA (Aff. of Lee King, dated Apr. 24, 2003 ("King CAA Aff."), attached as Ex. 4 to Exs. Pls.' Resp. in Opp'n to CAA's Mot. for Summ. J., undated (received May 5, 2003) ("Pls.' CAA Exs."), ¶ 21), WMA (King Dep., in J.A., Vol. V, at 1065-66), or Renaissance (*id.* at 813-15). Mr. King could cite no example of when he submitted a bid for a major

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black act which he "believes" was turned down because of a conspiracy on the part of Defendants. (*Id.* at 218.) Mr. King testified that since he has been a concert promoter he has never put in a bid on a major white act. (*Id.*)

(b) Track Record as a Promoter

Plaintiff King has promoted an average of four shows per year. (Pls.' Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Resp. Renaissance's Mot. for Summ. J., dated Apr. 24, 2003 ("Pls.' Renaissance 56.1 Stmt."), ¶ 10.) Mr. King has not been the lead promoter in any concert since he promoted the Gap Band from 1983 to 1984 and has never been the lead promoter for a national tour. (Joint 56.1 Stmt. ¶¶ 88-89.) All concerts for which Mr. King was the lead promoter were in Mississippi, except for two concerts in Louisiana in 1983. (*Id.* ¶ 90.)

Mr. King testified that he has had no promotion contracts since 1998 and that most of his work has come through Al Haymon. (King Dep., in J.A., Vol. V, at 103.) Although Mr. King consults on Mr. Haymon's national tours, Mr. King's work generally is performed in Mississippi, which is his local market. (Joint 56.1 Stmt. ¶ 92.) Mr. Haymon would consult with Mr. King regarding issues like ticket prices, media and street promotion in the Mississippi market. (Haymon Dep., in J.A., Vol. IV, at 37.) In the last 20 years, Mr. King has not put up money for an artist or venue deposit, nor did he risk have any of his own money while working with Mr. Haymon. (*Id.* at 33-35.) Mr. King produced a total of five concert contracts during discovery for this action. (Joint 56.1 Stmt. ¶ 94.) [FN82]

FN82. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 94 is considered as if undisputed in part.

(c) Financial Capabilities

Mr. King owns real estate valued at \$52,000, but does not own stock worth over \$10,000 or have a bank account with a balance in excess of \$10,000. (King Dep., in J.A., Vol. V, at 212.) Lee King

Productions has never applied for a loan and did not have a credit card until 2001. (Joint 56.1 Stmt. ¶ 85.) [FN83] Lee King Productions relies on cash reserves and individual investors for capital. (King Dep., in J.A., Vol. V, at 151-52.) The largest guarantee that Lee King Productions has paid is approximately \$12,500. (Joint 56.1 Stmt. ¶ 87.) Mr. King's financial records show that his net income for 1993, 1995, and 1996 were all in the negative (respectively, negative \$5,168, negative \$25,446, and negative \$26,197). (*Id.* ¶ 96.)

FN83. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 85 is considered as if undisputed.

(iv) Fred Jones, Summitt Management Corporation

(a) General

*27 Mr. Jones has promoted concerts since 1976, initially under the name Star Entertainment, a company he formed in 1981. (Jones Dep., in J.A., Vol. IV, at 12-13.) Star Entertainment declared bankruptcy and went out of business in 1982 or 1983 after a series of shows promoted by Mr. Jones were not profitable. (Joint 56.1 Stmt. ¶ 121.) [FN84] Mr. Jones then formed Summitt in 1984 [FN85] (Pls.' Am. Joint 56.1 Stmt. ¶ 122; Jones Dep., in J.A., Vol. IV, at 19), which focuses on event management for corporate clients (Jones Dep., in J.A., Vol. IV, at 18-20). Most of its business is pulling in events for corporate sponsors as opposed to concert promotions for artists. [FN86] In this capacity as consultant for corporate-sponsored events, Mr. Jones usually receives a fixed fee for his services and does not assume any financial risk in the success or failure of the concert engagements on which he consults. (*Id.* at 213-19.)

FN84. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 121 is considered as if undisputed.

FN85. *See supra* note 7.

FN86. Summitt has been employed as a

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consultant for major corporations like Seagrams, Phillip Morris, Ford, Coca-Cola, Federal Express, Auto Zone, Exxon, Mobile, Texaco, and numerous others in putting on or sponsoring events as opposed to concert promotion. (Joint 56.1 Stmt. ¶ 122.) Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 122 is considered as if undisputed.

Plaintiffs acknowledge that Plaintiff Jones has promoted an average of three to four shows per year but only in the capacity of co-promoter. (Pls.' Rev. Jam 56.1 Stmt. ¶ 37.) During the entirety of his career, Mr. Jones, through Summitt, has never submitted a bid to promote a concert involving a white artist. (Joint 56.1 Stmt. ¶ 128.) [FN87] Mr. Jones testified that no one at any time has ever prevented him from submitting a bid for a white act. (Jones Dep., in J.A., Vol. IV, at 227-28.)

FN87. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 128 is considered as if undisputed.

Mr. Jones promotes almost exclusively in Memphis, Tennessee, and has not actively sought to promote any concerts outside of Memphis since the early 1980s. (Joint 56.1 Stmt. ¶ 130.) Mr. Jones has not submitted a bid for an entire tour for any artist since 1981. (*Id.* ¶ 127.) [FN88] In 2000 and 2001, the only concert event that Mr. Jones personally promoted, i.e., assumed the financial risk, was the "Southern Heritage Classic," an annual weekend event Mr. Jones started in 1990 that involves a football game between two historically black colleges and performances by musical artists at different venues in Memphis. [FN89] (*Id.* ¶ 125.)

FN88. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 127 is considered as if undisputed.

FN89. Jones has never sought out, or bid on, any white acts for the Southern Heritage Classic. (Jones Dep., in J.A., Vol. IV, at 221-22.) During the years covered by this action, Mr. Jones has been an

owner/limited partner of the Memphis Grizzlies, a National Basketball Association team. (Jones Beaver Decl., in Pls.' Beaver Ex. 1, ¶ 2.)

(b) Island Events

In 1992, Summitt Management and Mid-South Concerts, a company owned by white promoter Bob Kelley, formed a partnership called Island Events. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 5.) Plaintiffs assert that Mid-South Concerts was the dominant promoter in Memphis. (Pls.' Resp. Beaver Mem. at 21.) Island Events, in which Mr. Jones was a one-third partner, promoted numerous concerts of white and black artists at the Mud Island Amphitheatre in Memphis, Tennessee. (Joint 56.1 Stmt. ¶¶ 139-41.) [FN90]

FN90. Plaintiffs' replies are non-responsive; Joint Statement ¶¶ 139-141 are considered as if undisputed.

2. Promotion Records of Other Successful Black Promoters

The evidence shows that other black concert promoters have been far more successful than Plaintiffs. [FN91] Non-party Alex Haymon, a black promoter, testified that his company promoted an average 150 shows per year since 1985. (Joint 56.1 Stmt. ¶¶ 168, 170; [FN92] Haymon Dep., in J.A., Vol. IV, at 26-27.) Plaintiff King testified that Mr. Haymon has a bigger volume of business than the Plaintiffs collectively. (King Dep., in J.A., Vol. V, at 208.) Mr. Haymon testified that his success has been greater than that of most "white" concert promoters. (Joint 56.1 Stmt. ¶ 170.) [FN93] Mr. Haymon has offices in Boston and Atlanta, in which he employs eight to ten full-time employees to handle all aspects of promotion and production. (*Id.* ¶ 176.) He also employs eight to ten contract employees for tours. (*Id.*) Mr. Haymon has put up pre-performance deposits of \$1,000,000. (Haymon Dep., in J.A., Vol. IV, at 139-40.)

FN91. Plaintiffs themselves have admitted that their "claim in the Amended

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Complaint that they represent the majority of business done by black concert promoters is false because [Mr. Haymon] actually accounts for the lion share of the concerts promoted by black promoters, not the plaintiffs." (Pls.' Am. Joint 56.1 Stmt. ¶ 165 (accepting as undisputed Joint 56.1 Stmt. ¶ 165).)

FN92. Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 170.) Joint 56.1 Statement ¶ 170 is considered as if undisputed.

FN93. Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 170.) Joint 56.1 Statement ¶ 170 is considered as if undisputed.

*28 Non-party Darryl Brooks, a black promoter, testified he promotes 100 to 200 concerts per year. (Joint 56.1 Stmt. ¶ 189.) [FN94] His company, CD Enterprises, has seven employees that handle all aspects of concert production and promotion. (Joint 56.1 Stmt. ¶ 190.) [FN95]

FN94. Plaintiffs dispute whether CD Enterprises paid a deposit in excess of \$400,000, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 189.) Mr. Brooks testified that he was unsure of whether this was the final negotiated deposit. (Brooks Dep., in J.A., Vol. III, at 56.)

FN95. Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 190.) Joint 56.1 Statement ¶ 190 is considered as if undisputed.

Non-party Larry Bailey, a black promoter, has been

promoting since 1962, mainly on the West Coast. (Joint 56.1 Stmt. ¶¶ 181-82, 184.) Mr. Bailey testified that approximately 50% of the concerts he, or his company Lar-Vic, has promoted in his career have been for white artists. (Joint 56.1 Stmt. ¶ 186; [FN96] L. Bailey Dep., in J.A., Vol. III, at 21-22.)

FN96. Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 186.) Joint 56.1 Statement ¶ 186 is considered as if undisputed.

Non-party Bill Washington, a black promoter, promoted forty-three concert events in 1999, thirty-two concert events in 2000, thirty-nine concert events in 2001, and nineteen concert events from January through May of 2002. (Joint 56.1 Stmt. ¶¶ 191, 193.) Mr. Washington testified that he has paid pre-performance deposits in the amount of \$100,000. (*Id.* ¶ 192.)

Non-party Earvin "Magic" Johnson, Jr., a black promoter, owns Magic Johnson Productions ("MJP") which, since 1998, has profitably promoted or co-promoted several national concert tours for major artists. (Joint 56.1 Stmt. ¶¶ 194-95.)

3. Promotion Records of Promoter Defendants

In their motion papers replying to Jam's motion, Plaintiffs assert that concert Promoter Defendant Jam promotes on average 600 or 700 shows per year, and in 2001 and 2002, promoted 400 to 1,200 shows. (Pls.' Rev. Jam 56.1 Stmt. ¶¶ 3-4.) Jam counters that this figure included all shows, not only contemporary music events, and events in other cities, and that in the Chicago area, it promotes 200 to 300 or more contemporary music concerts a year. (Mickelson Decl. II, Roberts Decl. Ex. 1, ¶ 18.) Plaintiffs assert that Jam has dominated the Chicago area since the late 1970s or early 1980s. (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 11.)

Beaver, on average, has promoted 200 concerts per year throughout North America. (Leff Dep., Pls.')

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Beaver Ex. 4, at 104.) The majority of these concerts have occurred in the greater New Orleans area. (Fox Decl., Beaver Ex. 1, ¶ 3) Plaintiffs assert that Beaver has been dominant in the areas designated in the complaint since the early 1980s. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 22.)

4. Plaintiffs Have Not Shown They Submitted Bids to Booking Agency Defendants as Required Under McDonnell Douglas

Plaintiffs have presented virtually no evidence demonstrating that they submitted bids to any Booking Agency Defendant for a concert later promoted by any Promoter Defendant, or any other promoter. [FN97] In fact, the un rebutted evidence is that Plaintiffs had little contact with the Booking Agency Defendants until immediately before this lawsuit was filed. According to Peter Grosslight, senior vice president of WMA, Plaintiffs "were not, at least in the past 10 years, among the concert promoters who actively sought to promote concerts by WMA's clients." (Grosslight Decl. I ¶ 17.) Rob Light, director of CAA's music division, testified that the first contact he had with Mr. Rowe was in 1996; that prior to this litigation, he knew that Mr. Boseman was a promoter in New York, but believed he did not promote shows by himself; and that prior to this litigation he had no knowledge of Mr. King or Mr. Jones. (Light Dep., in J.A., Vol. V, at 435-37.) Also, David Zedeck, president of Renaissance, stated that prior to the service of the complaint he had no knowledge of Plaintiffs Rowe, Boseman or King as concert promoters or otherwise and recalled Plaintiff Jones as a producer of corporate events not as an independent concert promoter. (Zedeck Decl. I ¶¶ 13-14.)

FN97. Defendant Jam asserts that Plaintiffs have provided no evidence that they have "ever submitted a bid in competition with Jam." (Jam 56.1 Stmt. ¶ 42.) In response, Plaintiffs assert that Mr. Rowe submitted a bid on the 1998 Maxwell tour in competition with Jam. (Pls.' Counter Jam 56.1 Stmt. ¶ 42.) However, as stated *infra* note 146, Mr. Rowe's letter to WMA did not contain the

particulars to be a concert bid and is considered an offer for the Maxwell tour in 1998. The 1998 tour was cancelled. Plaintiffs also assert that Mr. Boseman submitted a bid for a Kenny G/Braxton concert in competition with Jam. (*Id.*) However, as stated *infra* pp. 76-78, the evidence shows that Mr. Boseman and Mr. Rowe only discussed the possibility of promoting this concert *after* the concert had been awarded to Jam. No party testified or presented any document about such a bid. Plaintiffs also make reference to a concert by Seal, but provide no evidence that any bid was even submitted, let alone in competition with Jam. (*Id.*) Plaintiffs present no evidence showing that Plaintiff King submitted a bid in competition against Jam. (*Id.*)

Defendant Beaver asserts that Plaintiffs have never submitted a bid in competition with Beaver. (Beaver 56.1 Stmt. ¶ 14 (citing Fox Decl., Beaver Ex. 1, ¶ 7).) Plaintiffs' reply is unresponsive and claims that Beaver submits no bids. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 14.) The latter assertion is refuted *infra* p. 62.

Plaintiffs have also provided no evidence that they submitted bids for concerts to the Booking Agency Defendants, aside from two tour offers for Maxwell and Janet Jackson by Mr. Rowe, prior to the bringing of this lawsuit. (See Rowe Dep., in J.A., Vol. VI, at 138-39; Boseman Dep., in J.A., Vol. III, at 465-66; King Dep., in J.A., Vol. V, at 175, 217-18, 813-15, 1065-66; Jones Dep., in J.A., Vol. IV, at 208-13.)

*29 Plaintiffs themselves have repeatedly admitted their own lack of bids. They take the position that, given the long-standing discrimination in the industry and the lack of a true competitive atmosphere, submitting bids would have been a worthless endeavor on the part of black promoters. [FN98] (See, e.g., Boseman Dep., in Pls. Am. Joint 56.1 Stmt., Vol. II, at 370; Jones Dep., in Pls.' Am. Joint 56.1 Stmt., Vol. II, at 226-28; King CAA Aff., Pls.' CAA Ex. 4, ¶ 21; Aff. of Leonard Rowe,

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dated Apr. 24, 2003 ("Rowe CAA Aff."), Pls.' CAA Ex. 1, ¶ 200.)

FN98. Plaintiffs argue also that "[b]y the time black promoters, including the Plaintiffs, find out about the fact that a white artist or superstar black artist is touring, the dates have been sold to white promoters," there is no opportunity to bid. (Decl. of Leonard Rowe, dated Feb. 27, 2003, attached as Ex. 6 to Pls.' Joint Mem. Exs., Vol. I, ¶ 18.) However, promoters may learn of an opportunity to promote by calling booking agents, or artists' managers. (Joint Stmt. 56.1 ¶¶ 20-21.)

As part of this alleged long-standing discrimination, the Amended Complaint asserts that "[n]o black promoter, including plaintiffs, has been able to contract to promote a contemporary music concert given by a white artist, or even been given the opportunity to bid on such promotion," and "plaintiffs are regularly excluded from the promotion of concerts given by top-drawing black performers." (Am.Compl.¶ 1.) The evidence shows, however, that black concert promoters have promoted concerts for well-known white artists as well as well-known black artists. Although Mr. Haymon focuses his business on urban music by major black artists, he has promoted white artists, including Jean Luc Ponte, Charles Aznavour, Steely Dan, Vanilla Ice, Christina Aguilera, Jessica Simpson, Dream, Cleo Laine and John Dankworth. (Joint 56.1 Stmt. ¶ 202.) Also, contrary to the allegations in paragraph one of the Amended Complaint, black promoters have promoted major black artists. Mr. Haymon promoted the following major black artists: Janet Jackson when she was represented by CAA; Whitney Houston when she was represented by WMA (Haymon Dep., in J.A., Vol. IV, at 124); Destiny's Child with CAA (*id.* at 176-77); New Edition with CAA (*id.* at 204-05); and Stevie Wonder with CAA (*id.* at 205). Mr. Brooks has promoted or co-promoted the following white acts: Rolling Stones, Conway Twitty, Waylon Jennings, Willie Nelson, and Eminem. (Brooks Dep., in J.A., Vol. III, at 26-29, 40.) Mr. Bailey has promoted numerous white acts over the course of

his career, including Steppenwolf, Three Dog Night, Johnny Winter, Robin Trower and Edgar Winter, Harry Connick, Jr., Kenny G, War and the Average White Band, and the rock groups Styx, Rush, Kiss and the Young Rascals. (Joint 56.1 Stmt. ¶ 201.) [FN99] Mr. Washington has promoted or co-promoted the following white acts: New Kids on the Block (Washington Dep., in J.A., Vol. VI, at 245-246); Joan Baez (*id.* at 294); Michael Franks, Rare Earth, The Average White Band, and Santana (*id.* at 141-47). (Joint 56.1 Stmt. ¶ 203.)

FN99. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 201 is considered as if undisputed.

Plaintiffs also assert that submitting bids would be futile because concert Promoter Defendants are automatically awarded concerts without submitting bids. Plaintiffs maintain that "Beaver has willingly accepted the promoting opportunities the agencies have given to it without even having to bid, knowing that black promoters, including the Plaintiffs, were never told about these dates, much less given an opportunity to bid for them." [FN100] (Pls.' Resp. Beaver 56.1 Stmt. ¶ 18.) Similarly, Plaintiffs claim there is not competitive bidding in Jam's territory and that this is well known to Jam. (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 9.) Plaintiffs, however, cite to no evidence that Jam or Beaver did not submit bids for concerts. Beaver, on the other hand, produced copies of bids submitted containing the date and venue, the amount of the artist guarantee and artist/promoter split of gross less expenses plus a list of expenses. (Court Ex. A (handed in at Hearing on 10/16/03); *see also* Aff. of Steven Mark Grishman, dated Mar. 13, 2003 ("Grishman Aff."), attached as Ex. 1 to Beaver Reply Mem., ¶ 8 (stating that the documents with Bates numbers matching those of Court Exhibit A contain ninety-seven separate and distinct bid sheets).)

FN100. Plaintiffs also assert that "[t]he facts when taken as a whole demonstrate that Beaver in fact prevented the Plaintiffs and other black promoters from submitting a bid to promote or co-promote concerts."

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(Pls' Resp. Beaver 56.1 Stmt. ¶ 18 (emphasis added).) Plaintiffs do not provide any evidentiary support to show that any defendant, including Beaver or Jam, has taken any action to prevent them from submitting a bid to promote a concert.

*30 Mr. Rowe asserts that he has examined the files of the Defendants and that Defendant Promoters are not required to submit written bids. [FN101] (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 11; Aff. of Leonard Rowe, dated Apr. 21, 2003 ("Rowe WMA Aff."), Pls.' Resp. WMA Ex. 1, ¶ 12; Aff. of Leonard Rowe, dated Apr. 24, 2003 ("Rowe Renaissance Aff."), Pls.' Renaissance Ex. 1, ¶ 9.) WMA has produced to the Court data based on its computer files, furnished to Plaintiffs in discovery, showing the number of bids received, accepted, and rejected, as well as documents showing that bids of the so-called dominant promoters had been rejected. (Decl. of Peter Grosslight, dated May 22, 2003 ("Grosslight Decl. II"), ¶ 14, Ex. 5; *see also* Lewis Decl. ¶ 12, Exs. 5, 6.)

FN101. The record shows that Plaintiffs' former counsel (along with other attorneys and paralegals), Mr. Rowe and Mr. King examined the files. (*See* Decl. of Laura L. Mall, Esq., dated Apr. 22, 2003, attached as Ex. 7 to Pls.' Resp. Mem. in Opp'n to Defs.' Mot. to Exclude Pls.' Expert Witness Dr. Gerald D. Jaynes's Affidavit, dated Apr. 24, 2003, ¶¶ 9-10.) There is no showing that Mr. Rowe examined all files. This statement that Defendant Promoters are not required to submit written bids is conclusory. Nor have Plaintiffs requested any Defendant to admit Mr. Rowe's conclusion.

In addition to the aforementioned evidence contradicting his assertion, Mr. Rowe's claim of no bids is implausible. Artists and artists' managers would not enter into a contract without receiving information from the concert promoter about the back end split, the venue, venue seating capacity, the artist's guaranteed profit and deposit arrangement and agreed upon expenses to be

deducted from gross profits. Additionally, if they did not prefer the promoter for other reasons, the artist or artist's manager would want to see evidence that the bid was competitively priced. Defendants have a policy to pass on all bona fide bids to artists or artists' managers. (Grosslight Decl. I ¶ 17; Light Decl. I ¶ 10.) Furthermore, the independent evidence from artists' managers is that they received the bids when selecting promoters, and this testimony has not been challenged by Plaintiffs. (Azoff Decl., Grosslight Decl. I Ex. 1, ¶ 5; Phillips Dep., in J.A., Vol. V, at 103; Brown Dep., in J.A., Vol. III, at 23-29; Weisner Dep., in J.A., Vol. VI, at 8, 12, 26-27, 29.)

(i) Conclusion

Plaintiffs have not presented evidence that they applied to be the promoters of contemporary music concerts that the Defendant Promoters Jam and Beaver were successful in contracting. Furthermore, the undisputed evidence strongly suggests that Plaintiffs Rowe, Boseman and King did not have the capital, credit record, financial resources or record of successful concert promotion to compete for major acts with established black or white concert promoters. The evidence shows only that Plaintiffs have marginal backgrounds as independent concert promoters.

Plaintiffs have also failed present evidence of a general conspiracy among the Booking Agency and concert Promoter Defendants to discriminate against Plaintiffs because of their race.

C. Claims Against the Promoter Defendants

As discussed below, the specific incidents which Plaintiffs claim demonstrate racial discrimination by Jam and Beaver in violation of 42 U.S.C. § 1981 are not supported by evidence raising a genuine issue of material fact sufficient to survive the Defendants' summary judgment motions. Jam and Beaver were purchasers of artist talent. Plaintiffs have not shown that Jam or Beaver took any action in violation of § 1981 that affected Plaintiffs' ability to purchase artist talent. Nor have Plaintiffs provided any evidence to support their claim that

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Jam or Beaver were members of a conspiracy with the Booking Agency Defendants to exclude Plaintiffs from the contemporary music concert promotion market in violation of § 1985(3). Therefore, Plaintiffs have no basis for their § 1986 claim against Jam and Beaver.

1. *Jam Productions Ltd.'s Motion for Summary Judgment*

*31 The claims of discrimination against Plaintiffs by Jam in the Amended Complaint are based on two alleged overt acts by Jam in connection with the Maxwell tours in 1998 and 1999 and the Kenny G/Toni Braxton tour in 1997. (Am.Compl.¶¶ 87(d), 87(f).) Additionally, the Plaintiffs' Revised Memorandum of Law in Opposition to Jam's Motion for Summary Judgment claims that "Jam has never permitted a black promoter to work with it on a single white act" and that this is evidence of Jam's intent to discriminate against Plaintiffs in violation of § 1981. (Pls.' Rev. Jam. Mem., dated Mar. 12, 2003, at 6.) Also, Plaintiffs allege that Jam has participated in a conspiracy to exclude black concert promoters from promoting white and top-drawing black artists and cite Jam's alleged dominance in the Chicago area and receipt of more favorable contract terms, such as deposit and method of payment requirements in Jam's contracts, as evidence of this conspiracy to discriminate. (*Id.* at 15-17.)

Plaintiffs have not presented any direct evidence to support any of these claims. Accordingly, the Court will examine the evidence presented by Plaintiffs to determine if they have provided evidence from which it may be inferred that Jam has violated §§ 1981, 1985(3), or 1986.

(i) *The 1998 and 1999 Maxwell Tours*

(a) Amended Complaint Claim

Plaintiffs' claim of discrimination in paragraph 87(d) of the Amended Complaint reads as follows:

Prior to the filing of this action, plaintiffs sought the opportunity to promote concerts given by black R & B artist Maxwell, Rolling Stone

Magazine's Breakthrough Artist of 1996. The BPA contacted Jeff Frasco in or about June 1998, an agent at William Morris's Beverly Hills office, who verbally committed to having black promoters involved in Maxwell's concerts. Shortly thereafter, however, plaintiffs discovered that promoter defendants had been retained to promote concert dates for Maxwell, and that plaintiffs were excluded. After this action was filed, defendants William Morris, BGP, Bill Silva Presents, Jam, Ltd., Cellar Door, SFX, Electric Factory, Delsener/Slater, Pace, Don Law and co-conspirator Universal Concerts excluded plaintiffs from bidding on the contracts for the promotions of the concerts on the 1999 tour given by Maxwell. These defendants, acting in concert, "engaged" a company called Magic Johnson Enterprises (MJE), named after a black basketball star, Magic Johnson, as purported co-promoter of the Maxwell tour, *in lieu* of engaging any of the plaintiffs. Neither Magic Johnson nor MJE has any experience in the concert promotion business. Defendants' conduct is a maneuver designed to create the false illusion that defendants' have engaged a black promoter on the Maxwell tour. In reality, defendants' act evidences their intention to perpetuate the conspiracy.

(Am.Compl.¶ 87(d).)

(b) Review of Facts

The Court's review of the facts in evidence as to the Maxwell tour are as follows and are undisputed unless otherwise noted. In 1998, Plaintiff Rowe sought the opportunity to promote a tour of seven or more concerts to be given by black R & B artist Maxwell, Rolling Stone Magazine's Breakthrough Artist of 1996. In or about June 1998, the Black Promoters Association ("BPA") [FN102] through Plaintiff Rowe contacted Jeff Frasco, an agent in WMA's Beverly Hills office, who verbally committed to having black promoters involved in Maxwell's concerts. (Rowe Jam Aff. I, Pls. Rev. Jam Ex. 1, ¶ 16.) Subsequently, on July 20, 1998, Plaintiff Rowe Entertainment wrote Mr. Frasco, stating that it was making a "firm offer" for several markets associated with the Maxwell tour. The markets and remainder of the letter read as follows:

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FN102. The Black Promoters Association ("BPA") is a corporation organized and existing under the laws of Georgia, with its offices located in Atlanta, Georgia. (Am.Compl. ¶ 17.) BPA is a "trade association of black concert promoters" organized "to promote the interests of black concert promoters, to open the industry to free competition, and to eliminate racial discrimination." (*Id.*) BPA was formed sometime between 1995 and 1997 by Plaintiffs Rowe, King and Boseman. (Joint 56.1 Stmt. ¶ 239.) The BPA operates out of Mr. Rowe's office and has no independent funding. (*Id.* ¶ 240.) There are seven members of the BPA, including Plaintiffs Rowe, Boseman and King. (*Id.* ¶ 241.) Al Haymon is a member but has attended only one BPA meeting since becoming a member. (*Id.*) Plaintiff Jones, non-party Larry Bailey and non-party Bill Washington were all members of the BPA for a period before they resigned. (*Id.* ¶¶ 247-49; L. Bailey Dep., in J.A., Vol. III, at 44, 48-49; Washington Dep., in J.A., Vol. VI, at 212.) In the period from 1995 to 2001, there were 50 black concert promoters in the United States. (Expert Report of Ali Saad, dated May, 21, 2003 ("Saad Report"), in J.A., Vol. I, at 5.)

Minneapolis, MN	\$ 60,000.00/Per show
Chicago, IL	\$ 100,000.00/Per show
Detroit, MI	\$ 100,000.00/Per show
Washington, DC	\$ 60,000.00/Per show
New York, NY	\$ 125,000.00/Per show
Atlanta, GA	\$ 100,000.00/Per show
Los Angeles, CA	\$ 125,000.00/Per show

Production is inclusive in all offers.

*32 If any additional markets are added to the Maxwell tour, we would appreciate notification so that we may have the privilege of submitting offers for those as well. Also, please direct these

offers to the responsible agent for each market.
[FN103]

FN103. WMA admits that this letter was

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an offer for the 1998 Maxwell tour by Mr. Rowe. *See infra* note 146.

(Rowe 1998 Maxwell Offer, Pls.' Rev. Jam Mem. Ex. 1A, at 1.)

Following oral negotiations, on about September 1, 1998, Magic Johnson Productions ("MJP") received a written offer to be the tour promoter with local concert promoters for the 1998 Maxwell tour for a 50% interest in the profit or loss of each concert. (Letter from Matthew Burrows of WMA to Ervin Johnson of MJP, dated as of Sept. 1, 1998 ("Maxwell Letter from WMA to MJP, dated Sept. 1, 1998"), attached as Ex. 1E to Pls.' Rev. Jam Mem. Exs.) [FN104] MJP is owned by Magic Johnson, who is black. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 4.) Mr. Johnson confirms that he had been "retained as the lead promoter" for a 1998 tour by Maxwell. (*Id.* ¶ 8.) Mr. Johnson states that in creating MJP he "assembled an experienced and capable concert promotion staff" headed by Phil Robinson, who is black and had numerous years of experience in the music industry prior to coming to MJP as manager. (*Id.* ¶ 6.) Earlier WMA schedules, dated August 5 and August 15, 1998, for Maxwell's 1998 fall tour, show Magic Johnson Enterprises (MJE), which is also owned by Mr. Johnson, scheduled for specific concerts with various local promoters, including Jam for October 9 and 10, 1998, at the Arie Crown Theater, an arena of 4,302 seats, in Chicago. (Pls. Rev. Jam Mem. Ex. 1A at 2, Ex. B at 1.) [FN105]

FN104. Mr. Rowe's counter-affidavit, dated February 27, 2003 (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1), is misleading. In it, Mr. Rowe states that Magic Johnson's "insertion as a co-promoter occurred only *after* I had made threats of going public regarding race discrimination in the concert industry and only *after* I had filed the instant lawsuit." (*Id.* ¶ 16 (emphasis in original).) This lawsuit was filed on November 19, 1998. Mr. Rowe's "threat of going public" was contained in a letter to Randy Hoffman, Maxwell's manager, dated September 3, 1998. (Letter from

Leonard Rowe, as President of the BPA, to Randy Hoffman, dated Sept. 3, 1998 ("Maxwell Letter from BPA to Mr. Hoffman"), attached as Ex. 1G to Pls.' Rev. Jam Mem. Exs.) Mr. Rowe, however, clearly knew that MJP had been "assigned exclusive rights to promote the upcoming Maxwell tour" before August 24, 1998, because on that date he wrote a letter to Mr. Johnson congratulating him on this assignment. (Letter from Leonard Rowe, as President of the BPA, to Irvin "Magic" Johnson, dated Aug. 24, 1998 ("Maxwell Letter from BPA to Mr. E. Johnson"), attached as Ex. 1F to Pls.' Rev. Jam Mem. Exs., at 1.)

Additionally, Exhibit E attached to Mr. Rowe's counter-affidavit, the Maxwell Letter from WMA to MJP as of September 1, 1998 shows that a formal retention of Mr. Johnson for the Maxwell tour occurred on or about that date. (Pls.' Rev. Jam Mem. Ex. 1E.) Exhibit A to that affidavit includes a WMA tour schedule for the 1998 Maxwell tour, which shows that "Magic" as well as certain local promoters had been scheduled for a 1998 tour by WMA by August 5, 1998, some three months before the lawsuit was filed and four weeks before Mr. Rowe's letter dated September 3, 1998 containing a "threat of going public." (WMA Tour Schedule for the 1998 Maxwell Tour, dated Aug. 8, 1998, Pls.' Rev. Jam. Mem. Ex. 1A.) Exhibit B to Mr. Rowe's counter affidavit, a WMA Maxwell tour schedule dated August 18, 1998, also lists MJE as a promoter for virtually every venue. (WMA Tour Schedule for 1998 Maxwell Tour, dated Aug. 18, 1998, Pls.' Rev. Jam Mem. Ex. 1B.)

FN105. Plaintiffs' Counter Jam 56.1 Statement ¶ 42 misidentifies Exhibit 16 (which is the same as Pls.' Rev. Mem. Ex. 1A) as "WMA statement of 8/5/99 listing bids on the 1999 Maxwell Tour" as dated August 5, 1999 when, in fact, it is dated

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8/5/98 and lists bids for the 1998 tour.

On August 24, 1998, Mr. Rowe, as Executive President of the BPA, wrote Mr. Johnson to congratulate him on having "been assigned exclusive rights to promote the upcoming Maxwell tour" and thanking him "for offering participation to our members where [he] saw fit." (Maxwell Letter from BPA to Mr. E. Johnson, Pls.' Rev. Jam. Mem. Ex. 1F; *see also* E. Johnson Decl., McCabe Decl. Ex. 3, ¶¶ 4, 8.) This letter notes that Mr. Johnson had decided to use white promoter participation in some markets and requests that Mr. Johnson become a member of the BPA. (Maxwell Letter from BPA to Mr. E. Johnson, Pls.' Rev. Jam. Mem. Ex. 1F.) On September 3, 1998, Mr. Rowe, again on behalf of the BPA, wrote a letter to Randy Hoffman, Maxwell's manager, copied to Mr. Johnson and various newspapers and magazines, claiming that there was no black promoter involvement of the upcoming Maxwell tour and announcing the BPA's intention to stage public demonstrations in protest. (Maxwell Letter from BPA to Mr. Hoffman, Pls.' Rev. Jam. Mem. Ex. 1G; *see also* E. Johnson Decl., McCabe Ex. 3, ¶ 7.) On September 8, 1998, Mr. King for First Class Productions and as Secretary of the BPA, sent another letter to Mr. Hoffman stating: "YOU NOW HAVE BUT ONE CHOICE. STOP YOUR WICKED WAYS OR FUEL OUR POWER WITH YOUR RACIST TACTICS...." (Pls.' WMA Ex. 128 at 2.)

*33 The 1998 Maxwell tour was cancelled, but a tour was rescheduled in 1999. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8.) Mr. Johnson states specifically that, "with respect to the 1999 Maxwell tour, MJP submitted a competitive offer to booking agency [WMA] that was accepted by Maxwell's management." (*Id.* ¶ 5.)

A letter dated June 15, 1999, to all promoters from Jeff Frasco of WMA reflects that MJP was the 1999 tour promoter. [FN106] Mr. Frasco instructed the promoters that all ticket advertising and ticket faces read "Magic Johnson Productions in association with [local promoter] Presents Maxwell." (Letter from Jeff Frasco of WMA to All Promoters, dated

June 15, 1999, attached as Ex. 6 to Pls.' Counter Jam 56.1 Stmt.) In un rebutted deposition testimony, Mr. Frasco stated that Maxwell and his manager, Randy Hoffman, wanted Magic Johnson involved in the whole tour (Frasco Dep., in J.A., Vol. IV, at 97, 100) and that he had sent all the offers from promoters and expressions of interest in concerts on the tour to Mr. Hoffman (*id.* at 119). Additionally, he stated that Mr. Hoffman's "main concern ... was that the appropriate promoters in the local markets were Mr. Johnson's partners" (*id.* at 125) and this would include involvement for Plaintiff Fred Jones "if [Maxwell] played markets that Fred [Jones] normally plays" (*id.* at 127). [FN107]

FN106. Plaintiffs present only argument to the contrary.

FN107. Plaintiff Fred Jones had been scheduled as a promoter in Dallas/New Orleans on WMA's September 11, 1998 schedule for the Maxwell 1998 tour. (Pls.' Rev. Jam. Mem. Ex. 1C at 2.)

Contrary to the suggestion in paragraph 87(d) of the Amended Complaint that none of the Plaintiffs were "engaged" in the 1999 Maxwell Tour, Plaintiff Sun Song (Jesse Boseman) was one of the local co-promoters who shared the proceeds with MJP of the Maxwell concert on September 8, 1999, at the Landmark Theater in Richmond, Virginia. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8; *see also* Letter from Berkeley Reinhold, of WMA to Phil Robinson of MJP, Jesse Boseman of Sun Song, and Brian O'Connell of Cellar Door Concerts, dated Aug. 17, 1999, (amending the contract between Maxwell, MJP and Sun Song dated July 21, 1999), in J.A., Vol. II, Ex. 35.) Also, non-plaintiff black promoters Bill Washington, Lionel Bea and Clarence Jones co-promoted, respectively nine, two and two concerts on the 1999 Maxwell tour. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8.)

(c) Plaintiffs Have Presented No Evidence Supporting Their Claims Against Jam in Relation to Maxwell

Jam has submitted sworn declarations from its two

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principals, Mr. Mickelson and Mr. Granat, denying Plaintiffs' claims. First, Jam claims to have done "nothing to prevent any of plaintiffs from bidding on any show, let alone the Maxwell shows in Chicago where Magic Johnson was the lead promoter." (Jam 56.1 Stmt. ¶ 31; Decl. of Jerry Mickelson, dated Jan. 24, 2003 ("Mickelson Decl. I."), attached as Ex. 4 to McCabe Decl., ¶¶ 5, 9-11; Decl. of Arny Granat, dated Jan. 24, 2003 ("Granat Decl."), attached as Ex. 5 to McCabe Decl., ¶¶ 5, 9-11). Second, Jam denies taking "any action to prevent, exclude or hinder, in any way, any of the plaintiffs from submitting bids to promote or co-promote any of the concerts during Maxwell's 1999 concert tour." (Jam's 56.1 Stmt. ¶ 40; Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 5; Granat Decl., McCabe Decl. Ex. 5, ¶ 5).

*34 Plaintiffs offer no evidence to contradict paragraph 31 of Jam's 56.1 Statement. Plaintiffs state:

It is not true that Jam did nothing to prevent Plaintiffs from submitting bids on any show or for Maxwell's tour. Jam's participation in the conspiracy, a question of fact for the jury, resulted in the virtual exclusion of the Plaintiffs from competing in the concert promotion industry. And it is through Jam's participation in the conspiracy to exclude Plaintiffs that the Plaintiffs were repeatedly rejected over the years, and it is that repeated rejection that ultimately dissuaded the Plaintiffs from uselessly submitting bids. Therefore, Jam's participation in the conspiracy prevented Plaintiffs from submitting bids on many shows, including Maxwell.

(Pls.' Counter Jam 56.1 Stmt. ¶ 31, (citing Rowe Dep., in Ex. 2 to Pls.' Counter Jam 56.1 Stmt., at 1283).)

The sole evidence relied on by Plaintiffs, Mr. Rowe's deposition testimony, reads as follows:

Q. Besides their mere presence in the industry, do you have any knowledge that they have ever acted in a way to try to prevent you from submitting bids? Once again just to clarify, besides the fact that they are part of the industry.

A. Their actions is the only thing I can go by. The way that they have been able to do business and

the facts and the proof is all I could go by. (Rowe Dep., Pls.' Counter Jam 56.1 Stmt., Ex. 2, at 1283.)

Plaintiffs' response to paragraph 40 of Jam's 56.1 Statement takes the same position as their response to paragraph 31, and again cites Rowe's testimony to support their position. Mr. Rowe's testimony does not contain any specific facts, and thus is "insufficient to defeat a properly supported motion for summary judgment." See *Bickerstaff*, 196 F.3d at 452. [FN108]

FN108. See also *Berman v. Parco*, 986 F.Supp. 195, 200 (S.D.N.Y.1997) ("Simple hope that a jury will not believe the testimony of defendants that has been submitted in support of a summary judgment motion will not defeat the motion where there has been no affirmative evidence submitted to counter the defendants' evidence.") (citing *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 109 (2d Cir.1997) ("If all of the witnesses deny that an event essential to the plaintiff's case occurred, the plaintiff cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event occurred.") (citations and quotations omitted)).

Plaintiffs have also failed to present evidence that Jam interfered with any contractual or any potential contractual relationship of any Plaintiff in relation to the 1999 (or the 1998) Maxwell tour, let alone evidence that would give rise to an inference of discriminatory intent by Jam. See *Murray*, 844 F.2d at 995. Plaintiffs have not provided any evidence that they bid on any concert on the tour in competition with Jam. The only bids Plaintiffs made were for concerts not in Jam's alleged territory. Mr. Boseman contracted for a concert in Richmond, Virginia, and Mr. Jones bid on a concert on the 1999 Maxwell tour in Nashville, Tennessee. (Letter from Fred Jones of Summit to Jeff Frasco of WMA, dated July 23, 1999, attached as Ex. 39, in J.A., Vol. II.) [FN109] Plaintiffs' lack of bids

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precluded the possibility of Jam taking any action, in concert or otherwise, to interfere with any potential contractual relationship in connection with the Maxwell tour in violation § 1981. Plaintiffs have provided no evidence of a conspiracy against them in relation to the Maxwell tour as would be required to sustain a § 1985(3) and § 1986 claim. Thus, a rational juror could not find that Jam directly or indirectly excluded Plaintiffs from promoting or co-promoting the Maxwell tour. See *Matsushita*, 475 U.S. at 587.

FN109. As stated earlier, Mr. Rowe's letter of July 20, 1998 does not make a bid for a concert, but is considered as a bid for the tour of seven or more cities.

(ii) *Toni Braxton Tour*

(a) Amended Complaint Claim

*35 Paragraph 87(f) of the Amended Complaint reads as follows:

Black artist Toni Braxton was promoted by plaintiffs Rowe and Boseman before she became a superstar. Once she became a star, however, plaintiffs were excluded from promoting her shows. In connection with a tour she was scheduled to perform with white artist Kenny G in 1997, CAA made misrepresentations to plaintiff Rowe. After Rowe made inquiry concerning plaintiffs' [sic] being able to promote her concerts, Rowe was advised by Mike Piranian of CAA in October 1996, that minimum artist guarantees of \$225,000 to \$275,000 per show were required from any of the plaintiffs, with a fifty (50%) deposit required upon contract signing. Plaintiffs later learned that the defendant promoters, who were actually retained to promote these concerts, were required to guarantee only \$150,000 to \$175,000 per show. No white promoter, including any of the promoter defendants promoting this tour, was required to submit a deposit of any more than 0-10% of the \$150,000-175,000 guarantee. The effect of this discriminatory and disparate practice was intended to eliminate all black promoters, including all of the plaintiffs, from the bidding

process on the Toni Braxton tour. In order for plaintiffs to have bid successfully for 10 of the Toni Braxton shows, at \$250,000 per show, plaintiffs would have been required to deposit not less than \$1,250,000. In contrast, defendant promoters were required to deposit either nothing or, at maximum, 10% of \$175,000, or a total of \$175,000 for 10 shows. The booking agency defendants William Morris and CAA (who each represented one of the two acts), thus required that plaintiffs post over \$1,000,000 more than the promoter defendants for 10 shows by Toni Braxton. Plaintiffs became enraged upon learning of this treatment, and announced that they intended to picket the concert. CAA and William Morris eventually allowed plaintiffs to co-promote a few of the Toni Braxton shows with the defendant promoters. The promoter defendants who promoted the Toni Braxton concerts were aware of the plaintiffs' inquiry, and were forced to co-promote certain shows with plaintiffs, over their objections. Certain of the promoter defendants were particularly insistent about excluding plaintiffs. Belkin, the owner of Belkin Productions, vigorously sought to exclude plaintiffs from the show in the Gund Arena in Cleveland, Ohio, even after CAA and William Morris agreed to permit plaintiffs to co-promote the show, and even though plaintiffs explained to Belkin that they had previously promoted Toni Braxton. Similarly, Don Fox of Beaver Productions refused to allow any of the plaintiffs to promote Toni Braxton in his territory, the Lake Front Arena in New Orleans, telling Rob Light of CAA that he would not allow it. Fox was able to exclude them, even as co-promoters. Rob Light communicated this refusal to Rowe. Another principal of a promoter defendant, Larry Maggot [sic] of Electric Factory, was also successful in excluding plaintiffs from even co-promoting the Toni Braxton show in Philadelphia. The other promoter defendants who were well aware of the Toni Braxton incident, and who were forced, over their objections, to co-promote 10 of Toni Braxton's shows with plaintiffs in their respective territories were Don Law (Boston, MA); DeCesare-Engler (Pittsburgh, PA); Contemporary Productions (St. Louis, MO); Fantasma (Florida);

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Cellar Door (Detroit); Jam Ltd. (2 shows in Chicago); Concert/Southern Promotions (Atlanta); Delsener/Slater (New York); and Belkin Productions (Cleveland).
 *36 (Am.Compl. ¶ 87(f).)

(b) Review of Facts

The evidence presented relevant to the 1997 Kenny G/Toni Braxton tour is as follows. As to the claimed representation of Ms. Braxton prior to her 1997 tour with Kenny G, Plaintiffs have provided little evidence showing that they in fact ever served as "promoters" for Toni Braxton. Mr. Rowe testified that, in 1995, Al Haymon was the lead promoter for Ms. Braxton's concerts and that Mr. Rowe was a "co-promoter." (Rowe Dep., in J.A., Vol. VI, at 778-79.) Mr. Rowe states that in 1995, he worked with Mr. Haymon to involve Ms. Braxton on the Frankie Beverly tour. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 214; Pls.' Stmt. of Contested Material Facts Pursuant to Local Rule 56.1, dated Apr. 25, 2003 ("Pls.' CAA 56.1 Stmt."), ¶ 319.) Mr. Rowe also stated that he provided advertising for part of that tour. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 214) Mr. Boseman testified that he was involved in providing advertising for that tour. (Boseman Dep., in Pls.' CAA Dep. Tr., Vol. I, at 1190-91; Pls.' CAA 56.1 Stmt. ¶ 319.)

As to the 1997 Kenny G/Braxton tour, Mr. Rowe states, in his affidavit dated April 21, 2003, submitted in support of Plaintiffs' Counter Jam 56.1 Statement, that:

[i]n late 1996, [FN110] I learned that an upcoming 1997 Toni Braxton/Kenny G tour had been sold to dominant white promoters without the knowledge and resultant opportunity for the black promoters to participate. [FN111] ... When I called CAA about it to protest and insist on black promoter involvement, Mike Piranian told me the minimum guarantee required to promote Toni Braxton and Kenny G would be between \$225,000-\$275,000 and the usual 50% deposit. The price CAA quoted was inflated beyond reason and it was apparent that I and the other members of the BPA were being shut out of a fair bidding process on the basis of our race. Because

of this exclusionary tactic, I threatened to protest if black promoters were not allowed to participate. I communicated this to CAA and drew up fliers that I planned to use if we were not included. I sent those fliers to CAA in late 1996. In early January, only after and on account of my threats to make the discrimination public, were we granted a 33 1/3% interest in nine cities out of approximately fifty on the 1997 Toni Braxton tour. A tenth show was subsequently added to the Chicago date because the first one had sold out. Jam insisted that this second show should not be subject to the same agreement which forced it to co-promote the first Ms. Braxton date with me. In the end, Jam was forced to partner with me on both shows, but only after I threatened to go to court and ask a Judge to settle the issue. I thereafter learned that white promoters promoted Toni Braxton/Kenny G for minimum guarantees of between \$150,000-\$175,000, far less than the falsely inflated figure that I had been quoted. [FN112]

FN110. In his deposition on August 14, 2001, Mr. Rowe placed the time of the call in October or November 1996. (Rowe Dep., in J.A., Vol. VI, at 1384.)

FN111. In his deposition, Mr. Rowe states he called Mr. Piranian because he had received phone calls from black promoters saying that they had been excluded from the Kenny G/Braxton tour and he was calling on their behalf. (Rowe Dep., in J.A., Vol. VI, at 1377.) He states that the black promoters were not invited to bid or able to participate in the bidding process. (*Id.* at 1379.) However, Mr. Rowe contradicts his claim of no opportunity to bid in this same deposition when he states that after his initial conversation with Mr. Piranian, he spoke with Mr. Haymon about the quoted prices, and they did not discuss making a counteroffer because "that's what the promoter was paying." (*Id.* at 1384.) In his affidavit, dated April 24, 2003, submitted in Opposition to Defendant CAA's Motion for Summary Judgment,

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Mr. Rowe also contradicts his deposition testimony that black promoters were not invited to bid or able to participate in the bidding process. He states:

In 1996, Al Haymon called me and told me that Kenny G and Toni Braxton were going to tour in 1997. Mr. Haymon told me that the guarantee was about \$250,000 to \$275,000 depending on the city, and that it was his opinion that the guarantee was too high. I then called Mike Piranian, the responsible CAA agent for the tour, to discuss the possibility of involvement in the tour.

(Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 215.)

FN112. According to his deposition testimony, Mr. Rowe learned that the Kenny G/Braxton dates were selling for much less than the \$225,000 to \$275,000 Mr. Piranian originally quoted him after he had spoken with Mr. Piranian for the first time and spoke with Mr. Haymon about those terms, but before threatening to protest. (Rowe Dep., in J.A., Vol. VI, at 1386.) Thus, he did not learn of the "minimum guarantees of between \$150,000 to \$175,000 after his protest or after Jam allowed him to partner on the Kenny G/Toni Braxton shows. Mr. Rowe's deposition is the evidence with conclusory effect on points of difference. *Bickerstaff*, 196 F.3d at 455.

(Aff. of Leonard Rowe, dated Apr. 21, 2003 (Rowe Jam Aff. II"), attached as Ex. 8 in Pls.' Counter Jam 56.1 Stmt., ¶ 29.)

*37 It is not disputed that the minimum artist guarantees of \$225,000 to \$275,000 plus the usual 50% deposit were the early bid requirements. These guarantee amounts were the amounts Kenny G's manager, Turner Management, asked CAA to request. (Phillips Dep., in J.A., Vol. V, at 49; Light Dep., in J.A., Vol. V, at 475.) [FN113]

FN113. Corroborating these early terms, CAA presents contracts showing that on

August 16, 1996, Radio City Music had agreed to promote six Kenny G/Braxton concerts for a per show guarantee of \$280,000, revised by Dennis Turner, Kenny G's manager, in January 1997 to \$232,597 per show. (Decl. of Robert Light, dated May 20, 2003 ("Light Decl. II"), Exs. 1-4.) On October 25, 1996, Nederlander Theatres agreed to a minimum artist guarantee of \$225,000 and a 90/10 artist split for the auditorium in Anaheim, California. (Light Decl. I Ex. 5.)

According to Rob Light of CAA, after Mr. Rowe sent a letter to Kenny G's manager, with copies sent to leading black activist figures, threatening to boycott and picket the Kenny G/Braxton shows, Kenny G's manager asked Mr. Light to attempt to fix the situation. (Light Dep., attached as Ex. 13 to Pls.' Counter Jam 56.1 Stmt., at 487-89.) Mr. Light testified that when he spoke to Mr. Rowe, Mr. Rowe complained that he had not been given a fair opportunity to bid, that he had been given an unjustifiably high price, and that he had later found out that other promoters had paid less. (*Id.* at 487-88.) Mr. Light testified that he told Mr. Rowe, "Leonard, you need to put in offers. No matter what Mike quoted you, you know you are not precluded from putting in any offer that you want to put in." (*Id.* at 488.) Mr. Light also testified that Mr. Rowe stated that he felt he was entitled to serious consideration for participation based on his prior involvement in Toni Braxton concerts. [FN114] (*Id.*) Mr. Light stated that he responded "that it was a Kenny G tour, not a Toni Braxton tour," and that Rowe should know "from his experience that there is no precedent for the support act dictating who the promoter was," and that the manager of the headliner chooses the promoter. (*Id.*)

FN114. As stated *supra* p. 73, Mr. Rowe's and Mr. Boseman's claims of having promoted Toni Braxton previously were based on having been employed in Mr. Haymon's promotion of Toni Braxton.

Mr. Light further testified that because Kenny G's manager was afraid Kenny G would be hurt by the

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protests, Mr. Light negotiated a written settlement with Mr. Rowe and Mr. Boseman for a one-third promoter participation in nine markets for shows already confirmed to certain local promoters. (*Id.* at 489-90, 493; Letter Agreement from Mr. Light to Mr. Rowe and Mr. Boseman, dated Jan. 6, 1997, attached as Ex. 14 to Pls.' Counter Jam 56.1 Stmt.) Mr. Light's letter had been pre-approved by Kenny G, Toni Braxton and their respective managers. (Light Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 13, at 497.) Thereafter, when Kenny G decided to do a second show in Chicago, a dispute arose between Mr. Light and Mr. Rowe as to whether the letter agreement of January 6, 1997, gave Plaintiffs any right to participate in the second concert. Mr. Rowe then threatened to go to court for his one-third participation, and Mr. Light agreed that Plaintiffs would get a one-third participation in the second show. (Rowe Dep., McCabe Decl. Ex. 6, at 1418-20; Boseman Dep., McCabe Decl. Ex. 8, at 1016-17.) Mr. Rowe does not dispute Mr. Light's testimony on this subject.

(c) Plaintiffs Have Presented No Evidence Supporting Their Claims Against Jam in Relation to Toni Braxton

There is no evidence in the record after oral discovery and exhaustive document discovery—including review of the computer files and e-mails retrieved from the computer hard drives of CAA, WMA, Renaissance and Jam—of Jam taking any action to exclude Plaintiffs or other black promoters from promoting concerts in Chicago, including the 1997 Kenny G/Toni Braxton tour. Plaintiffs have also failed to present evidence of any interference with any contractual relationship by Jam in relation to the 1997 Kenny G/Braxton tour, let alone evidence that would give rise to the inference that there was interference due to discriminatory intent. *See Murray*, 844 F.2d at 995. Paragraph 42 of Plaintiffs' Counter Jam 56.1 Statement states that Mr. Boseman submitted a bid for a concert in an unspecified city on the Kenny G/Braxton Tour, citing Mr. Boseman's deposition as support for this assertion. (Pls.' Counter Jam 56.1 Stmt. ¶ 42 (citing Boseman Dep., Pls.' Jam 56.1 Stmt. Ex. 9, at 916-17, 1034).) Mr. Boseman

testified, however, that he had made an "inquiry about playing some Kenny G dates, and "we eventually wound up with some dates for Kenny G" and Toni Braxton through conversations with Mr. Light and Mr. Phillips. (Boseman Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 9, at 916-17.) As Mr. Light testified, these conversations took place after the concert had been confirmed to Jam. The contract between Jam and Turner Management for the 1997 Kenny G/Braxton concert in Chicago is dated November 25, 1996. (Contract between Jam and Turner Management for a Kenny G/Braxton concert on Jan. 18, 1997 on a CAA form, dated Nov. 25, 1996, attached in Ex. A to Decl. of Pierre Armand, dated May 23, 2003 ("Armand Decl."), attached to Light Decl. II.) Also, Mr. Boseman in his testimony did not state that he placed a bid or offer on the 1997 Kenny G/Braxton tour, but rather responded to the question "Besides the Kenny G and Toni Braxton tour, have you ever submitted a bid or put an offer in on a show that Jam promoted?" with a "No." (*Id.* at 1034.) Plaintiffs do not show that this testimony by Mr. Boseman, which Plaintiffs assert relates to a bid for the Kenny G/Braxton tour, refers to anything more than the discussion with Mr. Light settled by the January 6, 1997 letter agreement. It does not state Mr. Boseman submitted a bid.

*38 Nor can Plaintiffs complain that they were unaware of the opportunity to bid, or that Jam in any way prevented them from learning of any bidding opportunity. Although Mr. Rowe presents contradictory testimony within his own deposition, the evidence indicates that he, and the black promoters he claims to represent, had an opportunity to bid. The beginning of Mr. Rowe's deposition testimony on this issue reads as follows:

Q. So your position at the time, I want to be clear, was not that you had to participate in the tour, but that you simply wanted an opportunity to bid against others, is that correct?

A. We thought we should have received that opportunity, yes.

(Rowe Dep., in J.A., Vol. VI, at 1380.)

Mr. Rowe, however, later states that he was told of the parameters requested by Mr. Piranian (\$225,000

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to \$275,000 and a 50% deposit). (*Id.* at 1382.) Mr. Rowe then testified that he and Mr. Haymon discussed the requested terms and found them "too risky" and decided to "let it go for the time being." (*Id.* at 1383.) Thus, Mr. Rowe acknowledged that he had the opportunity to bid.

Plaintiffs have also presented no evidence that Jam interfered with the Plaintiffs' co-promotion of Toni Braxton. Mr. Rowe asserts that Jam was forced over its objections to co-promote with Plaintiffs due to the agreement between Mr. Light and Plaintiffs and that "Jam insisted that the second show should not be subject to the same agreement." (Rowe Jam Aff. II, Pls.' Counter Jam 56.1 Stmt. Ex. 8, ¶ 21). [FN115] These are only Mr. Rowe's conclusions. Plaintiffs cite no evidence indicating that Jam played any role in the later negotiations between CAA and Plaintiffs regarding co-promotion, but rather argue that "a jury may well conclude, that Jam would not give up a piece of a concert for which the work was already done to a promoter with whom it had never co-promoted without being told the reason." (Pls.' Counter Jam Stmt. 56.1 ¶¶ 36, 39.) Plaintiffs cite nothing in Mr. Rowe's affidavit and no testimony by Rob Light of CAA, by Jam employees, or by anyone else, to show that Jam objected to either of the co-promotions. Mr. Rowe and Mr. Boseman have testified that Jam tried to "exclude" Plaintiffs when Kenny G decided to do a second show in Chicago two months after the first show, but their conversations were solely with Mr. Light. (Rowe Dep., McCabe Decl. Ex. 6, at 1418-20; Boseman Dep., McCabe Decl. Ex. 8, at 1016-17.) The cited testimony of Mr. Rowe and Mr. Boseman contains no reference to the Plaintiffs or Mr. Light discussing the second show with Jam.

FN115. Although Mr. Rowe states he "was permitted to sharecrop" and did nothing to promote the Chicago Kenny G/Braxton show (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 22), Mr. Boseman testified that he also shared in the co-promotion fee and that he did make several calls to Chicago radio stations on behalf of the Braxton concert (Boseman Dep., McCabe Decl. Ex. 8, at 1015). Plaintiffs received

1/3 of the promoter's profits on both shows promoted by Jam. (Rowe Dep., McCabe Decl. Ex. 6, at 767.)

Even if one were to speculate (1) that Mr. Light would not have reached an agreement with Mr. Rowe and Mr. Boseman with respect to the second show scheduled for Chicago without discussion with Jam and (2) that Jam objected to the Plaintiffs being made co-promoters for the second show, the record is clear that the letter agreement of January 6, 1997 (Pls.' Counter Jam 56.1 Stmt. Ex. 14) was entered into when all parties were of the belief there would be only one show in Chicago. The letter agreement of January 6, 1997, also provides that Plaintiffs "will not have any claim for involvement in any future Kenny G dates in this tour." (*Id.*) Accordingly, if there were evidence that Jam tried to exclude Mr. Rowe and Mr. Boseman from the second show, the dispute over the meaning of the January 6, 1997 letter would, at most, be a bona fide contract dispute, a matter of contract interpretation. Thus, if Jam had objected, Jam would have been acting in its own economic interest, which would be a legitimate nondiscriminatory reason for its actions. See *Raytheon*, 540 U.S. at 50 n. 3.

(iii) Other § 1981 Claims by Plaintiffs

*39 Plaintiffs claim that an inference of an intent to discriminate can be drawn against Jam because the evidence shows that Jam has never co-promoted a white act with a black promoter prior to the filing of this lawsuit. (Pls.' Rev. Jam Mem. at 5 (citing Granat Dep., Pls.' Rev. Jam Mem. Ex. 2, at 55, 75-79).) Thus, Plaintiffs claim that this pattern and practice would allow a jury to infer discrimination, because "the disparity has no reasonable business explanation." (Pls.' Rev. Jam Mem. at 6 (citing *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir.1983)).) [FN116] Mr. Granat's testimony, however, does not support Plaintiffs' assertion because he testified that he believed that he has co-promoted acts with several black promoters whom he named (Granat Dep., Pls.' Rev. Jam Mem. Ex. 2, at 34), but was unable to name any white artists involved (*see, e.g., id.* at 76 (responding to

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the question of whether he had ever co-promoted a white artist with Al Haymon with "You know I think I did, and I can't remember the name"). Mr. Granat's testimony is not adequate support for Plaintiffs' assertion that Jam has never co-promoted a white act with a black promoter. Additionally, Mr. Mickelson, Mr. Granat's partner, testified that he believed that Jam had used Jerry Dickerson, a black promoter, in a city other than Chicago, to co-promote a white act or acts. (Mickelson Dep., Pls.' Rev. Jam Mem. Ex. 9, at 112-13.) He testified, "I am pretty sure that we have copromoted every black show we have ever done with a black promoter." [FN117] (*Id.* at 111.) Mr. Mickelson also testified that "[w]e'll copromote with anybody, regardless of what race they are if they bring us something that we don't already have. So if it is in a market that we are not in or that we don't regularly like to go in and they have an expertise and a knowledge that we don't have, we would be glad to work with them." [FN118] (*Id.* at 111.)

FN116. Although Plaintiffs state that a court may draw an inference of pretext from more general comparative evidence, citing *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir.1983) and *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580 (1978), those cases relate to the hiring of a workforce required to perform a service, not a situation where the promoter already has the work force necessary to provide the service and only enters into co-promotion contracts, which reduce its profit, in order to avail itself of knowledge or expertise which it does not possess to promote a particular concert.

FN117. In their brief, Plaintiffs state that "Jam has co-promoted every black act it has ever done with black promoters," (Pls.' Rev. Jam Mem. at 6 (citing Dep. of Jerry Mickelson, undated ("Mickelson Dep."), Pls.' Rev. Jam Mem. Ex. 9, at 111) but then, only a page later in their brief, inconsistently state that "Jam's refusal to co-promote black acts with black promoters except under threat of public

outcry (one of many statements not supported by the evidence) is evidence of Jam's intent to discriminate against the Plaintiffs" (*id.* at 7).

FN118. A co-promoter's familiarity with a particular genre of music, e.g., R & B, hip hop, or pop can lead to an agreement to co-promote. (Joint 56.1 Stmt. ¶ 41.)

Jam submitted an affidavit dated December 4, 2000, long before this motion, from a black promoter, Al Kennedy of Dance Contests International, with his letter dated January 27, 1999 attached, which contains a list of many artists whom he has co-promoted with Jam, including Rosie O'Donnell and the Average White Band. (Letter from Al Kennedy to Arny Granat & Jerry Michaelson [sic], dated Jan. 27, 1999, attached as Ex. 1 to Aff. of Al Kennedy, dated Dec. 4, 2000, attached as Ex. 3 to Decl. of James D. Roberts, Esq., dated Mar. 13, 2003 ("Roberts Decl.")). Plaintiffs' claim that Jam has never used a black promoter for concerts by white artists is not supported by any evidence, and no inference of discrimination by Jam can be drawn from this unsupported assertion.

(iv) *Claims Against Jam Under § 1985*

Jam states that it "has not tried to exclude black concert promoters from promoting concerts for white and top-drawing black artists" (Jam's 56.1 Stmt ¶ 43; (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 10; Granat Decl., McCabe Decl. Ex. 5, ¶ 10), and "has not participated in any conspiracy to exclude black concert promoters from promoting concerts for white and top-drawing black artists" (*id.* ¶ 44 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 11; Granat Decl., McCabe Decl. Ex. 5, ¶ 11)). Plaintiffs counter these statements by claiming that "Jam's participation in the conspiracy [is] a question of fact for the jury based on the totality of evidence," and that this evidence includes Jam's "virtual exclusivity in the Chicago territory [citing Pls.' Rev. Jam 56.1 Stmt. ¶ 2-6] and the lack of competition in the promotion industry [citing R. Johnson Aff., Pls.'

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Counter Jam. Ex. 15, ¶ 5 [FN119]]. (Pls.' Counter 56.1 Stmt. ¶ 44.) Also, as evidence supporting the conspiracy, Plaintiffs state that "Jam was automatically awarded contracts in its territory free from competition [citing Pls.' Rev. Jam 56.1 Stmt. ¶¶ 2-6; Rowe Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 2, at 1283]," and was "awarded more favorable terms than those which were made available or known to the Plaintiffs [citing Pls.' Rev. Jam 56.1 Stmt. ¶¶ 14-21]." [FN120] (*Id.*)

FN119. Paragraph 5 does not relate to the claim made by Plaintiffs here. Paragraph 3, however, relates to the claimed competitiveness of the market.

FN120. Plaintiffs also assert that the evidence shows the Booking Agency Defendants and the Promoter Defendants have conspired to exclude black promoters from the Promoter Defendants geographically assigned territories. (Pls.' Counter Jam 56.1 Stmt. ¶ 44 (citing R. Johnson Aff., Pls.' Counter Jam. Ex. 15, ¶ 3,5).) As stated *supra* p. 32 in the antitrust section, this affidavit does not support the allegation of territorial allocation or a conspiracy to exclude by the Promoter Defendants.

*40 The evidence cited by Plaintiffs to support their allegation of Jam's virtual exclusivity in the Chicago territory does support this position. The number of years Mr. Granat has been a promoter, the information in paragraph 2 of Plaintiffs Revised Jam 56.1 Statement, and the claimed raw numbers of shows that Jam has promoted, the information in paragraphs 3 and 4 (which is disputed by Jam), cannot raise any inference of dominance without further information. As stated previously, the Pollstar extrapolation, which Plaintiffs offer as support for their claims of Jam's virtual exclusivity in Chicago in paragraph 5, is not supported by expert testimony and is apparently incomplete since Mr. Haymon testified he did not submit his concert results to Pollstar. (Haymon Dep., in J.A., Vol. IV, at 38.) The handwritten notes, which Mr. Rowe states were written by CAA agent Carol Kinzel,

cited as evidence of a conspiracy to have Jam dominate the Chicago area in paragraph 6, also includes "Joseph Entertainment" under the heading of Chicago, Illinois. Furthermore, although Mr. Rowe claims that these notes were written by Ms. Kinzel (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 10), Ms. Kinzel has submitted a declaration, in which she states that these notes are not her handwriting (Decl. of Carole Kinzel, dated May 20, 2003 ("Kinzel Decl."), attached to Light Decl. II, ¶ 4). Plaintiffs have offered nothing to contradict her statement, nor anything to show that Mr. Rowe is familiar with her handwriting. Furthermore, his testimony about her handwriting is conclusory and is not admissible evidence.

Even assuming Plaintiffs could show Jam's "virtual exclusivity," they have not provided any evidence linking this alleged dominance to a conspiracy. Plaintiffs provide no evidence showing that Jam's alleged dominance as a promoter in Chicago is a result of discrimination rather than due to legitimate business reasons, e.g., trust in promoter's experience in promoting concerts, ability in advertising and marketing concerts, the promoter's financial viability, and the promoter's exclusive arrangements for venue. (*Cf.* Gonzalez Report, Pls.' Rev. Jam Mem. Ex. 10, ¶ 12; Kapp Dep., Pls.' Joint Mem. Ex. 12, at 231-36.)

As to the other cited evidence of Jam's dominance, in paragraph 3 of Mr. R. Johnson's affidavit, he states, "When a white artist represented by WMA wanted to have a concert in one or more cities, or stage a nationwide tour, there was no competitive 'bidding' process.... Agents, who were also organized by territory, instead were instructed to book their dates through the dominant promoter in his or her market." (R. Johnson Aff., Pls.' Counter Jam. Ex. 15, ¶ 3.) Mr. R. Johnson does not mention Jam, or Jam's alleged virtual exclusivity in the Chicago territory.

Plaintiffs also cite paragraph 5 of Mr. Johnson's affidavit, discussing the division at WMA of white and black acts, and again, Mr. Johnson makes no reference to Jam or any other particular promoter. Additionally, as stated previously, Mr. Johnson is

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not an expert and his knowledge is limited to his personal knowledge of actions taken by WMA booking agents from 1982 to 1986, well before the statute of limitations for this action.

*41 As to the claim that Jam was awarded contracts in its territory free from competition, paragraphs 2 through 6 of Plaintiffs' Revised Jam 56.1 Statement cite no evidence in support of this allegation and page 1283 of Mr. Rowe's deposition testimony does not contain any evidence indicating that Jam was awarded contracts free from competition.

Furthermore, Plaintiffs' claim that Jam was awarded contracts with terms that were not made available or known to Plaintiffs. However, the evidence they cite to support this claim, paragraphs 14 through 21 of Plaintiffs' Revised Jam 56.1 Statement, (Pls.' Counter Jam 56.1 Stmt. ¶¶ 44-45), does not support their claim of a conspiracy to discriminate. The cited paragraphs of the Plaintiffs' Revised Jam 56.1 Statement maintain that: (1) the industry standard requires a promoter to deposit 50% of the guarantee upon contract (citing Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 18; [FN121] Gonzalez Report, Pls.' Rev. Jam Mem. Ex. 10, ¶ 5); (2) the industry standard is to deposit funds by cashier's check or money order (citing Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 18; Pls.' Rev. Jam Mem. Ex. 15 (containing contracts with preprinted language requiring a deposit of 50% of the artist's guarantee); and (3) Jam's contracts required no deposit or a 10% deposit or other more favorable terms (citing Pls.' Rev. Jam Mem. Exs. 15, 16, 19, 23, 25). [FN122]

FN121. Plaintiffs have submitted no evidence demonstrating that Mr. Rowe is an expert in the concert promotion business, and when he speaks on matters, such as the industry standard, Plaintiffs have failed to demonstrate that he has sufficient qualifications to state these conclusions. These statements are inadmissible under the Federal Rules of Evidence. See Fed.R.Evid. 602.

FN122. In paragraph 87(f) of the Amended

Complaint, Plaintiffs claim that in regards to the 1997 Kenny G/Braxton concert, "No white promoter, including any of the promoter defendants promoting this tour, was required to submit a deposit of any more than 0-10% of the \$150,000-1575,000 guarantee." CAA has submitted copies of contracts, however, which show that the promoters, including JAM, agreed to pay a deposit of 50% of the guarantee. (Armand Decl., Light Decl. II, Ex. A.)

Even assuming that Plaintiffs' allegations are true, Jam's contracting on more favorable terms than those made available or known to Plaintiffs is not evidence of a conspiracy to exclude Plaintiffs based on race without additional evidence which Plaintiffs have failed to submit. Receipt of more favorable terms would affect any white promoters in competition as much as black promoters. Furthermore, although a booking agency may negotiate the terms of a contract with a promoter, usually an artist or an artist's manager retains ultimate authority to accept or reject these terms. (Gonzalez Report, J.A., Vol. I, ¶ 7.) Additionally, in this commercial context, the most prominent promoter is likely to have demonstrated to the booking agent or artist's manager to have expertise in advertising and marketing concerts, to have demonstrated financial integrity and, as acknowledged in the Amended Complaint paragraph eighty-two, to have exclusive venue arrangements, all explanatory of favorable terms obtained. (Kapp Dep., Pls.' Rev. Jam Mem. Ex. 4, at 245; Gonzalez Report, Pls.' Rev. Jam Mem. Ex. 10, ¶ 12.)

Plaintiffs claim to have raised an inference of race discrimination based on examples of Jam's contracts as compared to Mr. Haymon's contracts. (Pls.' Rev. Jam Mem. at 17.) Plaintiffs' example of a Jam contract for two Lauryn Hill concerts (Pls.' Rev. Jam Mem. Ex. 30 (which is the exact same as Ex. 17)) contains alterations reflecting Jam's counter offers as to amounts of guarantee, deposit and terms for payment. (Mickelson Decl. II, Roberts Decl. Ex. 1, ¶¶ 5-17 (describing the process for negotiating

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a contract between Jam, the booking agencies and the artists and stating that Jam's proposed changes to a draft contract are accompanied by a box stating "initial here" to indicate where changes are located, similar to those in Exhibit 30).) [FN123] Plaintiffs' copies of three Haymon contracts for Lauryn Hill concerts (Pls.' Rev. Jam Mem Ex. 14) do not reflect any of Mr. Haymon's proposed alterations to the draft contract and are not signed by any of the parties. Thus, the exhibits are at different points of contract negotiations. In any event, it is not an act of race discrimination to negotiate and obtain more favorable contract terms in an offer than the "industry standard."

FN123. Also, this contract form is only signed by Jam, not the artist Lauryn Hill, and therefore, does not reflect the final terms.

*42 Furthermore, comparing the terms offered to Jam (*id.* Ex. 30) and Mr. Haymon (*id.* Ex. 14) for the Lauryn Hill concerts in different cities shows that the booking agency, Defendant WMA, proposed a deposit of 50% of the guarantee on those contracts. Since both Mr. Haymon (black) and Jam (white), both of whom are very successful promoters, were offered the same deposit as a percent of guarantee, an inference of a conspiracy with the booking agency to discriminate against black promoters on the basis of race by requiring more onerous terms from them is not supported by the evidence.

Review of Plaintiffs' selected examples of other Jam contracts (Pls.' Rev. Jam Mem. Ex. 15) shows that Jam was required to pay no deposit or 10% of its guarantee for some concerts due to its rejection of a 50% deposit term in the proffered contract and sometimes because the performances were by supporting acts for the headline act. Many such contracts also allow payment by company check and are for concerts in cabarets or small theaters or are for guest appearances. This contrasts with the 50% guarantee to be made by certified check or cash, which Plaintiffs Rowe (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 18) and Boseman (Boseman Aff., Pls. Rev. Jam Mem. Ex. 8, ¶ 14),

assert they were uniformly required to deposit by the booking agents. [FN124] Mr. Boseman and Mr. Rowe, however, have not submitted evidentiary support for the assertion that they make bids on individual concerts or that they have the same track record for successful concerts, connections with venues and financial integrity as Jam.

FN124. Among the contracts in Exhibit 15, the Court finds a contract on a CAA form between Wonder Production (Stevie Wonder) and Haymon Entertainment/Jam Productions, Ltd., dated December 15, 1994, requiring each promoter to pay a 25% deposit. Stevie Wonder is a major black artist.

In short, Plaintiffs have not shown a tacit agreement between Jam and the Booking Agency Defendants to give Jam more favorable terms than black promoters as claimed by Plaintiffs. They have merely shown that Jam is often able to negotiate more favorable terms than the Plaintiffs have been offered.

(v) *Plaintiffs Have Presented No Evidence Supporting Their Claim that Jam Violated § 1986*

Plaintiffs have not provided sufficient evidence for their § 1985 conspiracy claim, as required to bring a claim for a violation of § 1986. 42 U.S.C. § 1986. Even if Plaintiffs had provided evidence of a conspiracy in violation of § 1985, the evidence presented does not show that Jam had any knowledge of the alleged conspiracy to discriminate against black promoters. Thus, this claim must fail. *See Buck v. Bd. of Elections of City of New York*, 536 F.2d 522, 524 (2d Cir.1976) (holding that defendants' knowledge of allegedly discriminatory acts is a prerequisite to suit under § 1986).

Jam states, "Before the commencement of this litigation, Jam did not have any knowledge of the conspiracy alleged by plaintiffs." (Jam 56.1 Stmt. ¶ 35 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶¶ 6-8; Granat Decl., McCabe Decl. Ex. 5, ¶¶ 6-8).) Furthermore, "Jam did not attend a public meeting or read an article in which plaintiffs' [sic]

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claimed the existence of an alleged conspiracy." (Jam 56.1 Stmt. ¶ 37 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 8; Granat Decl., McCabe Decl. Ex. 5, ¶ 8).) Plaintiffs argue that the truth of the declarations of Mr. Mickelson and Mr. Granat is a question of fact for the jury, but cite no evidence contradicting these declarations or from which an inference of knowledge of the conspiracy by either declarant or Jam can be drawn. [FN125] (Pls.' Counter Jam 56.1 Stmt. ¶¶ 35, 37.)

FN125. Plaintiffs also repeat the claim that Jam dominates the Chicago market and is awarded contracts automatically, and thus, a jury could conclude that Jam knew of the conspiracy. As stated *supra* pp. 83- 86, there is no evidence of Jam's dominance or Jam's being automatically awarded contracts. Nor do Plaintiffs offer any evidence that Jam knew that it was automatically awarded contracts or that the contracts were awarded free from competition. Also, Plaintiffs do not cite to evidence explaining how the awarding of contracts to Jam by the booking agencies would give Jam knowledge of a conspiracy to exclude Plaintiffs due to their race.

*43 Plaintiffs' response argues that "[a] jury may attribute knowledge [by Jam] of the Plaintiffs' allegations of conspiracy to Jam due to the publication in major and widely distributed publications, namely, "Black Promoters Say They're Excluded From Top R & B Gigs," Billboard Magazine, June 21, 1997, and "Black Music Promoters Being Muscled Out of the Business by Whites," Jet, April 5, 1979. (*Id.* ¶¶ 35, 37, Exs. 10, 11.) The 1997 article in Billboard Magazine states that Plaintiff Rowe and the BPA assert that WMA and CAA discriminate against black promoters when black acts become famous R & B acts. (J.R. Reynolds, "Black Promoters Say They're Excluded from Top R & B Gigs," Billboard, June 21, 1997, attached as Ex. 10 to Pls.' Counter Jam 56.1 Stmt.) The 1997 article does not contain any conspiracy allegation, nor does it claim that white concert promoters take part in the discrimination. The 1979 article in Jet cites Mr. Rowe, stating that

black performers "usually have White managers who owe other White promoters big favors. So when the manager's Black group gets big, the White promoter comes to collect." The article also quotes Quentin Perry, a black promoter, as stating, "Black performers defect to the White promoters ... because 'there is some belief white folk can do it better'...." ("Black Music Promoters Being Muscled Out of the Business by Whites," dated Apr. 5, 1979, attached as Ex. 11 to Pls.' Jam Counter 56.1 Stmt.) The article does not allege that white promoters are members of a conspiracy with booking agencies to discriminate against black promoters. No reasonable jury could infer from either of those articles that Jam was aware that Plaintiffs' were alleging a conspiracy between the booking agents and white promoters as argued by Plaintiffs in this case.

There is no evidence that Jam knew that Plaintiffs were claiming the promoters were part of a conspiracy with the booking agents to discriminate against the Plaintiffs. To further support this lack of knowledge of the alleged conspiracy, Jam points out that Mr. Rowe acknowledged in his deposition testimony that his "letter-writing campaign to convince the industry to break the alleged conspiracy was directed to the booking agencies, not to Jam or the other concert promoter defendants, because it is the booking agencies who control the selection of promoters." (Jam 56.1 Stmt. ¶ 38 (citing Rowe Dep., McCabe Decl. Ex. 6, at 1285).)

Q. Did you write any letters to Beaver, Jam or Fantasma?

A. No, I didn't write any letters to any promoters because the agencies was the one I figured could help straighten this situation out because the agency serves as the gatekeepers. They are the liaison between the promoters and the artists, the selling of the artist, and I figured if I could get the agency to straighten out their conduct, the conduct of all would probably be straightened out.

(Rowe Dep., McCabe Decl. Ex. 6, at 1285.)

Plaintiffs respond to paragraph 38 of Jam's 56.1 Statement, citing Mr. Rowe's further testimony,

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which states:

*44 Q. Why didn't you write letters to the promoters, then?

A. Well, because the promoters was reaping the benefits of this conspiracy and the discriminating, and they wasn't about to give that up. They was in Disneyland with it. It was great to them. They didn't have to worry about bidding against black promoters.

They didn't have to worry about sharing with black promoters. If a black artist came out that was a huge ticket-seller, they didn't have to worry about having a history with it. The agencies automatically gave it to them. They loved that. They loved it.

(*Id.* at 1286.)

This testimony by Mr. Rowe consists of purely conclusory statements and is not evidence admissible to show that Plaintiffs put Jam on notice of their claims that there was a conspiracy to exclude Plaintiffs from promoting or co-promoting concerts. As to Jam's knowledge of the Toni Braxton incident or any other claim of conspiracy, paragraph 29 of Jam's 56.1 Statement states, "There is no testimony from the plaintiffs, that they discussed with Jam their belief that there existed some 'conspiracy' to exclude black promoters from promoting, whether in connection with the Maxwell tour, the Toni Braxton concerts, or any other concert or setting." (Jam 56.1 Stmt. ¶ 39 (citing Rowe Dep., McCabe Decl. Ex. 6, at 765-66, 1279-83; Boseman Dep., McCabe Decl. Ex. 8, at 1011-15).) Similarly, in paragraph 36 of Jam's 56.1 Statement, Jam's owners assert that "Jam did not have any conversations with any of the plaintiffs, or receive any letters from any of the plaintiffs, about any alleged conspiracy to exclude black promoters from the concert promotion business." (*Id.* ¶ 36 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 7, Granat Decl., in McCabe Decl. Ex. 5, ¶ 7).) Plaintiffs' Counter Jam 56.1 Statement in response dispute in part paragraphs 39 and 36 of Jam's 56.1 Statement. However, paragraphs 39 and 36 of Plaintiffs' Counter Jam 56.1 Statement are the same and are simply argumentative, stating, "Even though Plaintiffs communicated with Jam only indirectly through CAA regarding this matter [co-promotion

of Toni Braxton], it is not conceivable, and for that reason a jury may well conclude, that Jam would not give up a piece of a concert for which the work was already done to a promoter with whom it had never co-promoted without being told the reason." (citing Rowe Jam Aff. II, Pls.' Counter Jam 56.1 Stmt. Ex. 8, ¶¶ 18-20; Light Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 13, at 486-90, 493-98; Letter Agreement from Mr. Light to Mr. Rowe and Mr. Boseman, dated Jan. 6, 1997, Pls.' Counter Jam 56.1 Stmt. Ex. 14 (emphasis added).)

Plaintiffs' response is deemed an admission (1) that Plaintiffs did not communicate with anyone at Jam regarding the Plaintiffs' claim of a conspiracy or about their alleged exclusion from the second Kenny G/Braxton concert in Chicago and (2) that Plaintiffs did not obtain evidence from which an inference can be drawn that Jam acted in a discriminatory manner. Review of the testimony cited by paragraphs 39 and 36 of Plaintiffs' Responses to Jam's 56.1 Statement does not support the conclusion that Jam knew, or was part of, any alleged conspiracy to exclude Plaintiffs from the concert promotion business.

*45 First, the cited paragraphs of Mr. Rowe's affidavit, dated April 21, 2003, submitted in support of Plaintiffs' Counter Jam 56.1 Statement, do not show Jam was made aware of any claim of an alleged conspiracy between the booking agents and dominant white promoters to exclude black promoters from the concert promotion business.

Second, review of the cited testimony of Mr. Light of CAA similarly does not provide evidence that Jam was made aware of any claims of a conspiracy to discriminate against Plaintiffs.

Furthermore, Plaintiffs' claim, as made in their responses to paragraphs 39 and 36 Jam's 56.1 Statement, that Jam would not have agreed to allow Mr. Rowe and Mr. Boseman to be co-promoters without being aware that Plaintiffs were alleging a conspiracy to exclude them from concert promotion on the basis of race is sheer speculation, unsupported by Mr. Light's testimony or other evidence from which such an inference could be

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drawn. One could equally speculate that Mr. Light told Jam that Kenny G's manager insisted on co-promotion with Plaintiffs because Ms. Braxton's music was directed to black audiences. [FN126] In view of the foregoing discussion, Jam's motion for summary judgment on each claim in the complaint is granted.

FN126. As alleged in paragraph 87(f) of the Amended Complaint, Kenny G is a white artist.

2. Beaver Productions Inc.'s Motion for Summary Judgment

The claims in the Amended Complaint that Beaver discriminated against Plaintiffs are based on three alleged overt acts by Beaver. First, Plaintiffs allege that Don Fox, president of Beaver, refused to allow any of the Plaintiffs to promote Toni Braxton in 1997 at the Lake Front Arena in New Orleans. (Am.Compl. ¶ 87(f).) Second, Plaintiffs allege that in late summer 1997, Mr. Fox refused to allow Plaintiff Rowe to co-promote the 1997 Luther Vandross show. (*Id.* ¶ 87(h).) Third, Plaintiffs claim that Beaver interfered with Plaintiff Fred Jones's potential exclusive agreement to promote shows at the Mud Island Amphitheatre in Memphis and conspired with other Defendants to interfere with this contract. (*Id.* ¶ 87(k).) Plaintiffs also allege that Beaver has participated in a conspiracy to exclude black concert promoters from promoting white and top-drawing black artists and cite Beaver's alleged dominance in the greater New Orleans area, automatic receipt of contracts without bidding, and receipt of more favorable contract terms, such as deposit and method of payment requirements in Beaver's contracts, as evidence of this conspiracy. (Pls.' Revised Response in Opp'n to Beaver's Mot. for Summ. J., dated Mar. 12, 2003 ("Pls.' Resp. Beaver"), at 18-22.)

Plaintiffs have not presented any direct evidence to support any of these claims. Accordingly, the Court will examine the evidence presented by Plaintiffs to determine if they have provided evidence from which it may be inferred that Beaver has violated §§ 1981, 1985(3) and 1986.

(i) Toni Braxton Concert

The Amended Complaint alleges that in 1997, Mr. Fox "refused to allow any of the plaintiffs to promote Toni Braxton in his territory, the Lake Front Arena in New Orleans, telling Rob Light of CAA that he would not allow it." (Am.Compl. ¶ 87(f); *see also* Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 19.) The general facts related to the Kenny G/Braxton 1997 tour are reviewed in the Jam section. *Supra* pp. 73-76. In relation to Beaver specifically, Mr. Rowe did not approach Beaver or Mr. Fox with a request to co-promote, but had discussions with Rob Light, head of the music department at CAA, about co-promoting the Braxton performances. (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 19; Pls.' Rev. Beaver 56.1 Stmt. ¶ 56.) When Mr. Rowe approached Mr. Light, Beaver had already contracted to promote the Kenny G/Toni Braxton concert in New Orleans. [FN127] (Rowe Beaver Decl. ¶ 19; Pls.' Rev. Beaver 56.1 Stmt ¶ 57.) [FN128] According to Mr. Rowe, Rob Light told him that Don Fox of Beaver would not allow him to co-promote in New Orleans, but he could participate in the tour in other markets. (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶¶ 20-21.) Plaintiffs provide no testimony from Mr. Light confirming that he did in fact have such a conversation with Mr. Fox. Accordingly, Mr. Rowe's statement about that conversation is hearsay and not admissible evidence. F.R. Civ. P. 56(b).

FN127. The 1996 contracts for the Kenny G concerts between the concert promoters and Turner Management provided that Kenny G would provide the services of Toni Braxton and that she would receive 34% of the net revenues. (Light Decl. II, Ex. 6.) (The Court could not find Beaver's contract with Turner Management.) Ms. Braxton's manager testified that Ms. Braxton saved the expense of her agent (WMA) by allowing Kenny G, his manager and CAA to negotiate the concerts for her. (Phillips Dep., in Pls. CAA Dep. Tr., Vol. II, at 33-34.)

FN128. Mr. Rowe's affidavit, dated April

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21, 2003, also confirms that he learned about the lower guarantees on the 1997 Kenny G/Toni Braxton tour after it "had been sold to the dominant white promoters." (Rowe Jam Aff. II, Pls.' Counter Jam 56.1 Stmt., ¶ 29; *but see supra* pp. 76-78.)

*46 Mr. Fox has submitted a sworn declaration stating that he did not tell anyone, including Rob Light of CAA, that Beaver would not allow any of the Plaintiffs to co-promote Toni Braxton. (Fox Beaver Decl., Beaver Ex. 1, ¶ 19.) Rather, Mr. Fox states that "[p]romoting Toni Braxton was not a possibility with respect to this concert because Kenny G was the lead act, with Toni Braxton as the supporting act." (*Id.* ¶ 18.) "Beaver purchased the services of Kenny G as the lead act, and Kenny G selected Toni Braxton as the supporting act. Beaver had no control, authority or role in the selection of Toni Braxton as the supporting act for this concert, as supporting acts are selected by the artists themselves." (*Id.* ¶ 38.)

Even assuming Mr. Light's alleged statement to Mr. Rowe that Mr. Fox had refused to allow Mr. Rowe to co-promote Toni Braxton is not hearsay and could be admitted in evidence, Plaintiffs have not provided evidence showing that Beaver's alleged refusal to co-promote could form the basis of a *prima facie* case of discrimination under *McDonnell Douglas*. Even if Plaintiffs had requested to co-promote, [FN129] Plaintiffs have presented no evidence showing that Beaver was seeking co-promoters or decided to use a white co-promoter instead of Mr. Rowe. Furthermore, Beaver had a legitimate business reason not to co-promote since it had already been awarded the concert and was under no obligation to relinquish to Mr. Rowe a share of any of the benefits of its contract with Kenny G. Beaver merely behaved in a competitive manner, acting in its own self-interest. Plaintiffs do not cite any evidence to demonstrate that Beaver's offered business reason was pretextual. *McDonnell Douglas*, 411 U.S. at 804.

FN129. Additionally, Plaintiffs have not submitted any evidence showing that they

submitted a bid to co-promote this concert.

(ii) *Luther Vandross Concert*

The Amended Complaint also alleges that Beaver denied Plaintiff Rowe a role as promoter of a 1997 concert by Luther Vandross in New Orleans, and further alleges that even after Mr. Rowe explained to Mr. Fox that he had previously promoted Luther Vandross, Mr. Fox did not allow him to co-promote a Luther Vandross show in New Orleans, Louisiana. (Am.Compl.¶ 87(h).) To provide evidentiary support for these claims, Mr. Rowe has submitted a declaration in Plaintiffs' Response to Beaver's Motion in support of this allegation (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶¶ 22-25), in which Mr. Rowe's factual statements make clear that he never had any personal discussions with Mr. Fox or Beaver about the August 1997 Vandross concert.

Mr. Rowe states that he had promoted Luther Vandross in 1986, 1987 and 1988. (*Id.* ¶ 22.) Similar to the Toni Braxton incident, Mr. Rowe states that he found out about the 1997 Vandross concert in New Orleans after the concert date was already "sold to Beaver." (*Id.*) Mr. Rowe states that he contacted Dennis Arfa, Luther Vandross's booking agent at QBQ Entertainment, [FN130] who asked Mr. Rowe to choose which markets he wanted to be involved in. (*Id.* ¶ 23.) Mr. Rowe states he chose New Orleans and called Mr. Fox to discuss co-promoting the concert, but Mr. Fox did not return his call. (*Id.* ¶ 24.) According to Mr. Rowe, Mr. Arfa then informed him "that Don Fox had refused to agree to allow me or any other black promoter to co-promote Luther Vandross/Vanessa Williams with him." (*Id.* ¶ 25.) [FN131] Again, according to Mr. Rowe, Mr. Arfa did not require Mr. Fox to co-promote that concert, and Mr. Rowe was not involved. (*Id.*)

FN130. QBQ is a former Booking Agency Defendant, against whom Plaintiffs have dismissed their claims.

FN131. Mr. Rowe's testimony about Mr. Arfa's statement is hearsay. Since Plaintiffs offer no testimony that Don Fox said he

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would not allow Mr. Rowe, or any other black promoter, to co-promote Vandross, Mr. Rowe's testimony must be disregarded.

*47 Mr. Fox corroborates that Beaver received a call from Mr. Rowe towards the end of July 1997. (Fox Beaver Decl., Beaver Ex. 1, ¶ 20; Fox Dep., Beaver Ex. 5, at 112.) Mr. Fox states that at that time, he "suspected that Mr. Rowe wanted to co-promote concerts involving Luther Vandross and Vanessa Williams," and he "elected not to return [the] phone call." (Fox Beaver Decl., Beaver Ex. 1, ¶¶ 21-22.) In his deposition testimony, Mr. Fox states that "the only reason [Mr. Rowe] called me was just to get in and be a partner on a show when the show was already confirmed." (Fox Dep., Beaver Ex. 5, at 107.) Mr. Fox further explains in his declaration that "[s]ince the concert had already been confirmed to Beaver, there was no economic reason for Beaver to co-promote the concert with any other promoter ... and for this reason, Beaver declined to co-promote the concert with Leonard Rowe." (Fox Decl., Beaver Ex. 1, ¶ 23.) After his call to Mr. Fox, Mr. Rowe wrote a letter on BPA letterhead, dated July 24, 1997, to Mr. Arfa with copies to black leaders stating that Mr. Fox "exerts racist behavior toward black people and black promoters" and "declaring economic warfare on any and all of Beaver Promotions that embrace African-Americans Artists." (Beaver Ex. 3.) On July 25, 1997, Mr. Fox wrote a letter to Mr. Rowe denying racist behavior. (Beaver Ex. 4.)

While it appears that Beaver determined not to take actions that would inure to Mr. Rowe's benefit, there is no showing of a prima facie case of discrimination under *McDonnell Douglas*. As with the Kenny G/Braxton concert, Beaver already had obtained the Vandross contract, [FN132] and Plaintiffs provide no evidence that Beaver was seeking co-promoters or opted to co-promote with a white co-promoter instead of Mr. Rowe. Beaver had a legitimate business reason not to co-promote and was perfectly justified in choosing to not share the benefits of the Vandross concert with Mr. Rowe. Plaintiffs do not provide any evidence to demonstrate that Beaver's offered business reason was pretextual. *McDonnell Douglas*, 411 U.S. at

804. Accordingly, these facts do not show actions which give rise to an inference of racial discrimination in violation of § 1981.

FN132. Again, Plaintiffs fail to present evidence showing they submitted bids to promote or co-promote on the Luther Vandross concert. Although Plaintiffs assert that they did not submit bids because of the futility of this action, Plaintiffs have failed to present evidence supporting this theory.

(iii) *Mud Island Amphitheater Exclusivity Agreement*

(a) Amended Complaint Claim

Plaintiffs claim of discrimination in relation to the Mud Island Amphitheatre reads as follows:

While still negotiating the terms of an exclusive agreement to promote shows in the venue Mud Island Amphitheatre in Memphis, Fred Jones and Summitt wrote to many of the booking agency defendants and others ... advising them of his expected role as concert promoter at the venue. Beaver Production's executive Barry Leff, however, then wrote to the Memphis Director of Parks Commission, urging the city not to enter into any agreement with Fred Jones and Summitt, and informing the city that Beaver would be opening an office in Memphis, where it had not previously done business, expressly at the request of the top talent agencies in the county. Fred Jones and Summitt lost the agreement to promote at Mud Island and all ensuing business. Beaver is now the predominant promoter in Memphis.

*48 (Am.Compl.¶ 87(k).)

(b) Review of Facts

The chronology of the events is as follows and is undisputed, unless otherwise noted. In 1992, Mid-South Concerts, an alleged dominant promoter owned by a white promoter, Bob Kelley, and Summitt Management, owned by Plaintiff Jones, formed a partnership by the name of Island Events, which Mr. Kelley (a two-thirds owner) operated.

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(Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 5; Aff. of Fred Jones, dated Apr. 24, 2003 ("Jones CAA Aff."), Pls.' CAA Ex. 2, ¶¶ 20, 21, 59; Jones Dep., Pls.' Resp. WMA Ex. 49, at 50.)

In Memphis, the mayor serves as the sole contracting authority for the municipality. (Dep. of Willie W. Herenton, Mayor of Memphis, dated Oct. 15, 2001 ("Herenton Dep."), Beaver Ex. 9, at 13.) Mud Island itself is under the jurisdiction of the Memphis Park Commission, but any contract with respect to Mud Island has to be finalized and approved by the Mayor. (*Id.* at 27.) As a matter of procedure, a proposal normally would be first sent to the Park Commission, who then makes a recommendation to the Park Board regarding the proposal. (*Id.* at 38-39.) The Park Board then votes to either approve or reject the contract, and if approved, it goes to the mayor for final approval. (*Id.* at 39.)

In March 1993, Mayor Herenton, had approved a two-year exclusive promotion agreement at Mud Island between Island Events and the City of Memphis. (Jones Beaver Decl., Pls. Beaver Ex. 1, ¶¶ 5-6.) When the agreement expired in 1995, it was renegotiated and again approved by the Mayor to last through 1997. (*Id.* ¶ 8.)

In early 1998, Island Events negotiated the draft of an exclusive contract, which was approved by the staff of the Park Commission. (*Id.* ¶ 9.) On March 4, 1998, Bob Fouche, acting manager at Mud Island, sent a draft of the agreement to the Park Commission Board for its review. (*Id.* ¶ 10.) On March 27, however, Bob Kelley committed suicide. (*Id.* ¶ 11.) As a result, a new agreement was drafted in which Summitt was to have an exclusive promotion agreement at Mud Island for two years, with a potential third year contingent on Summitt's performance. (*Id.* ¶ 12.)

Mr. Jones testified that on April 17, 1998, he told the Mayor that the Park Board had approved his exclusive agreement for Mud Island. (Jones Dep., Beaver Ex. 8, at 363.) At that point, according to Mr. Jones, the Mayor said that he was fine with the contract going along as planned. (*Id.* at 363-65.) In

Mayor Herenton's deposition, the Mayor agreed that he and Jones "did have some discussion about this," but did not acknowledge the time or the content of his statement. (Herenton Dep., Pls.' Beaver Ex. 2, at 36.) Three days later, on April 20, 1998, the Board of the Memphis Park Commission approved the agreement with Summitt. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 14.)

On April 20 and 21, 1998, Mr. Jones faxed two letters to various booking agents, including agents employed by the Booking Agency Defendants, other than Renaissance. (*Id.* ¶¶ 15-16.) [FN133] The letters were identical and stated, in part, that "[a]s of today, my company Summitt Management Corporation, will exclusively book the [Mud Island] amphitheater. We have a multi-year agreement with the city of Memphis into the next millennium." (Pls.' Beaver Ex. 1B ("Jones letter").) These letters were not sent to any concert promoters. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 18.) When Mr. Jones faxed his letters, the Mayor had not yet officially approved the agreement, as required by the Memphis Charter.

FN133. Copies of the letter indicate that copies were sent to CAA and WMA but not to Renaissance. (Pls.' Beaver Ex. 1A, 1B (documents P00719, P007196, P007197, P007201, P00720, P007194, and P007195).) Copies were also sent to the media. (*Id.* (document P00720).)

*49 On April 20, 1998, Barry Leff, vice-president of Beaver, sent a letter to Wayne Boyer, Director of the Memphis Park Commission. (Pls.' Beaver Ex. 1C ("Leff letter") at 1.) His letter is included here in full because the Plaintiff Jones considers it so central to his arguments.

I understand today you are considering an exclusive agreement on the future of Mud Island this summer. I want to inform you that because of the unfortunate circumstances with Mid-South Concerts, my company has been asked by the top talent agencies in the country to establish an office in Memphis and begin immediately booking all venues in the area. We produce about 200 shows across North America every year, and

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because of our relationship with Bob Kelly [sic] we have always stayed out of your market.

As of this past Friday, we have hired Susan Green, former V.P. of Mid-South Concerts. We are in the process of opening an office in Memphis and plan to hire additional staff members. We have already begun to actively pursue shows in the market and are very much looking forward to doing shows in your facility.

If however, an exclusive agreement is entered into with any other party, it will cause us to take our shows to other facilities in the market. I want to make it clear that we understand your concern for getting shows into Mud Island this summer, and we *can* and *will* help you do that. I would like to suggest because of the timing of all the events that have surrounded the 1998 season, that you keep your facility open to all promoters this summer. This will allow you to judge the true intent of all outside promoters.

Beaver Productions is very excited about our future in Memphis. Please keep your doors open and allow us to show you what a great business relationship we can have together.

(*Id.* (emphasis in original).)

Mr. Jones received a letter, dated April 22, 1998, from John Malmo, chairman of the Board of the Memphis Park Commission. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 19.) In this letter, Mr. Malmo wrote:

Mayor Herenton told me yesterday that he believes it is unwise for the Memphis Park Commission Board to sign an exclusive contract for booking the Mud Island amphitheater for the 1998 season. Further, that he believes it unwise for the Board to sign a multi-year agreement of any kind with any firm for such bookings.

He has asked that we invite a variety of promoters to book events in the amphitheater this season to sample the opportunities that may be available to us that would not be under an exclusive agreement with any one firm.

The Mayor has assured me that he will not sign an exclusive and/or multi-year contract for 1998 under any circumstances....

(Pls.' Beaver Ex. 1D ("Malmo letter"), at 1.)

On April 23, the Mayor issued a press release stating in its entirety:

Fred Jones is a competent and well-respected promoter. However, at this time I support an open contract regarding the use of the Mud Island Amphitheater. I encourage Fred Jones and other promoters to bring numerous entertainment acts to Memphis. A myriad of musical acts would best serve the citizens of Memphis and generate a greater return of investment to the Memphis Park Commission.

*50 (Pls.' Beaver Ex. 1E at 1.)

Thereafter, Beaver promoted fourteen concerts at Mud Island. (Fox Beaver Decl., Beaver Ex. 1, ¶¶ 34-35.) Summitt did not promote any. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 22.) Mr. Jones testified that Summitt did not make any effort to promote at Mud Island for the rest of the season, nor from 1999 to 2001. (Jones Dep., Beaver Ex. 8, at 366-67.) Mr. Jones maintains that without the revenue from parking, food, and souvenir concessions, which were part of the exclusive agreement, it was not economically feasible for him to promote concerts on a non-exclusive basis. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 22.)

(c) Plaintiffs Have Presented No Evidence in Support of Their Claims Under §§ 1981 and 1985(3) Against Beaver in Relation to Mud Island

The undisputed evidence is that Mayor Herenton, the black Mayor of Memphis, was not aware of the Leff letter to Wayne Boyer, Director of the Memphis Park Commission, at the time he decided not to approve an exclusive agreement for Mud Island with Summitt. (Herenton Dep., Beaver Ex. 9, at 40 (stating that he was seeing the Leff letter for the first time in that deposition).) The Mayor had no recollection of any communications with Mr. Boyer or Mr. Malmo regarding Beaver (Herenton Dep., Pls.' Beaver Ex. 2, at 76), and testified that he did not hear about Beaver's interest in promoting in Memphis until after he decided not to approve the exclusive agreement with Summitt (*id.* at 77-78). Mayor Herenton also testified that the Leff letter had nothing to do with his decision (Herenton Dep., Beaver Ex. 9, at 46), but rather that he "thought it

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was in the best interest of the City of Memphis and that facility that we open up participation to a variety of promoters" (*id.* at 47).

The Plaintiffs offer no testimony by Mr. Malmö, Mr. Boyer, or anyone else showing that the Mayor was aware of the Leff Letter or casting any doubt about or contradicting Mayor Herenton's testimony. Accordingly, the uncontradicted evidence is that Mr. Jones was denied the exclusive contract at Mud Island based only on the independent decision of the Mayor and that the Leff letter had no effect on that decision, either directly or indirectly. Thus, the Plaintiffs have not shown that Beaver's actions involving Mud Island injured Mr. Jones or any of the Plaintiffs or interfered with a potential contractual relationship in violation of 42 U.S.C. § 1981. *See Murray*, 844 F.2d at 995.

Furthermore, Plaintiffs offer no evidence from which it can be inferred that any action by Beaver was motivated by Mr. Jones's race. Mr. Fox, owner of Beaver, testified that he had never heard of Fred Jones before learning of the proposed exclusive agreement, did not know Mr. Jones was Mr. Kelley's partner in promoting concerts at Mud Island (Fox Dep., Pls.' Beaver Ex. 5, at 39), and did not know Mr. Jones was an African American (*id.* at 38). Mr. Leff did know of a promoter in Memphis named Fred Jones but had never met him and could not recall if he knew Mr. Jones was black. (Leff Dep., Pls.' Beaver Ex. 4, at 33.) Mr. Jones did not offer contradictory testimony. Furthermore, by April 17, 1998, Beaver had decided to open an office in Memphis with Susan Green, former vice president of Mid-South Concerts. (*Id.* at 50-52; *see also* Pls.' Hrg. Ex. 26 (Letter from Shelly Schultz of WMA to Susan Green and copied to Don Fox, dated Apr. 17, 1998 (discussing cancelling the James Taylor concert at the Mud Island Amphitheatre and rescheduling with "Don Fox in conjunction with you and your new organization" for a concert at Mid-South Coliseum).) [FN134] Having made the decision to open an office in Memphis, it was in Beaver's economic interest not to have Mud Island subject to an exclusive contract. [FN135] (Leff Dep., Pls.' Beaver Ex. 4, at 10-12.)

FN134. This letter from Mr. Schultz to Ms. Green is also dated three days prior to: (1) Mr. Jones's press release about his Mud Island exclusive to booking agencies and the media; (2) Mr. Leff's letter to Mr. Boyer, urging the Memphis Board not to grant an exclusive contract at Mud Island; and (3) the Board of the Memphis Park Commission's approval of the Summitt agreement.

FN135. The Leff letter of April 20, 1998, also mentions Beaver's hiring of Susan Green the previous Friday, which was April 17, 1998.

*51 Plaintiffs cite the statement in the Leff letter that "my company has been asked by the top talent agencies in the country to establish an office in Memphis" as evidence that "the Defendant agencies ... conspired with the dominant white promoter Defendants, including Beaver, to prevent all black promoters, including the Plaintiffs, from promoting white and superstar black acts." (Pls.' Resp. Beaver 56.1 Stmt. ¶ 15.)

Although the Leff letter does state that Beaver had been asked by the top booking agencies in the country to establish an office in Memphis and to begin immediately booking all venues in that area, [FN136] Plaintiffs provide no evidence from which one could infer that this decision to open an office in Memphis was racially motivated or in furtherance of a conspiracy to discriminate. Whether Beaver had remained out of the Memphis market because of Mid-South's exclusivity contracts at Mid-South Coliseum and Mud Island, or because of Mr. Kelley's reputation with artists, artists' managers and booking agencies and his greater familiarity with the Memphis market is beside the point. Beaver's actions were taken after the death of a concert promoter, whom Plaintiffs assert was the dominant promoter in Memphis, and Beaver moved into a newly created vacuum with one of Mr. Kelley's top employees. While these actions could be consistent with a racially motivated conspiracy to interfere with a contractual relationship, Beaver's hiring of one of Mr. Kelley's top employees to open a

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Memphis office was obviously in Beaver's economic interests. Beaver points out that Mr. Leff urged fewer restrictions on trade, not less, in furtherance of their economic interests. (Hrg. Tr. 10/17/03 at 83.) Accordingly, Plaintiffs have presented no evidence giving rise to an inference of racial motivation to sustain their claims under 42 U.S.C. §§ 1981 or 1985(3).

FN136. Mr. Leff testified he wrote Mr. Boyer without prompting by anyone (Leff Dep., Pls.' Beaver Ex. 4, at 12-13) and that his statement about the top talent agencies requesting Beaver to open a Memphis office was misworded (*id.* at 20). He testified he wrote this at an emotional time, after Bob Kelley's suicide, and he should have written "many people." (*Id.* at 20-22.)

(iv) Other §§ 1985(3) and 1986 Claims Against Beaver

Plaintiffs have offered no direct evidence of a conspiracy, such as when the conspiracy started, how Beaver joined the conspiracy and how Beaver was aware of the conspiracy's objectives, [FN137] to support their conclusory allegation that Beaver participated in a conspiracy to exclude black concert promoters from promoting concerts for white and/or top-drawing black artists in violation of § 1985(3) and § 1986.

FN137. Plaintiffs again cite the article "Black Promoters Say They're Excluded From Top R & B Gigs" from the June 21, 1997 issue of Billboard Magazine (Pls.' Beaver Ex. 6K) as evidence to show that Beaver was aware of discrimination against black promoters. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 19) As with this claim against Jam, discussed *supra* p. 87, this article provides no basis for an inference of Beaver's knowledge of a conspiracy to exclude black promoters. As in the Jam section, even if the article provided notice of a conspiracy in violation of § 1985, the evidence presented does not show that Beaver had any

knowledge of that white promoters were members of a conspiracy to discriminate against black promoters. Thus, this claim must fail. *See Buck*, 536 F.2d at 524 (holding that defendants' knowledge of allegedly discriminatory acts is a prerequisite to suit under § 1986).

Beaver states that it "has not attempted to prevent any of the plaintiffs, or any black promoter, from submitting a bid to promote or co-promote any concert." [FN138] (Beaver 56.1 Stmt. ¶ 18 (citing Fox Decl.)). Beaver also asserts it has "not participated in any conspiracy, combination or agreement to exclude black promoters from promoting any concerts." (*Id.* ¶ 19 (citing Fox Decl.)). Plaintiffs counter, as with Jam, by claiming that "the facts when taken as a whole demonstrate that Beaver in fact prevented the Plaintiffs and other black promoters from submitting a bid to promote or co-promote concerts" (Pls.' Resp. Beaver 56.1 Stmt. ¶ 18) and that "[t]he facts when taken as a whole prove that Beaver has participated in a conspiracy combination or agreement to exclude black promoters from promoting concerts of white and superstar black acts" (*id.* ¶ 19). Plaintiffs claim that Beaver's participation in the conspiracy is proven by Beaver's alleged territorial dominance, the alleged lack of competition in the industry, and the alleged automatic awarding of contracts to Beaver. [FN139] (*Id.*) However, the only evidence cited to support these allegations in Plaintiffs' Response to Beaver's 56.1 Statement is Mr. Rowe's declaration, dated February 27, 2003, which does not contain statements supporting these claims shown to be based on personal knowledge. As stated previously, Plaintiffs have submitted no evidence demonstrating that Mr. Rowe is qualified to give expert testimony on the concert promotion industry and when he speaks on matters beyond his personal knowledge, these statements are inadmissible under the Federal Rules of Evidence. *See Fed.R.Evid.* 602. Thus, Plaintiffs have submitted no evidence to support these conclusory allegations. [FN140]

FN138. Although Plaintiffs assert that "Fox has never involved any black

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promoter as a co-promoter when a white artist was the featured act," (Pls.' Resp. Beaver Mem. at 11), Fox has co-promoted black artists with Al Haymon, an African-American promoter, and has co-promoted Kenny G, a white artist, with Larry Bailey, also African-American, in nineteen separate concerts (Fox Beaver Decl., Beaver Ex. 1, ¶¶ 14-15; Beaver 56.1 Stmt. ¶ 11). Plaintiffs claim that the only reason Larry Bailey was involved in co-promoting Kenny G with Beaver was Mr. Bailey's long standing friendship with Kenny G and base this claim on paragraph 29 of Mr. Rowe's declaration. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 11 (citing Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 29.) Mr. Rowe provides no evidentiary basis for this conclusion, which is beyond the scope of his personal knowledge and therefore inadmissible.

FN139. Plaintiffs allege that Beaver has not produced any bids, citing paragraph 26 of Rowe's declaration. (Pls.' Resp. Beaver Mem. at 19.) In his affidavit, dated March 13, 2003, Steven Mark Grishman, the Chief Financial Officer for Beaver, stated that "[e]very individual concert file in the possession of Beaver Productions, Inc., without exception, contains a bid sheet." (Grishman Aff., attached as Ex. 1 to Beaver Reply Mem., ¶ 6 (emphasis in original).) Mr. Grishman also stated that he "personally reviewed ... [the] documents that were produced to the plaintiffs, and contained therein were ninety-seven (97) separate and distinct bid sheets, for different shows" and then listed the specific numbers of these sheets. (*Id.* ¶ 8.) Beaver presented these bid sheets at the hearing. (Court Ex. A.)

FN140. In Plaintiffs' Memorandum, they support these allegations by citing to paragraphs 3 and 5 of Mr. R. Johnson's affidavit and the Pollstar data. (Pls.' Resp. Beaver Mem. at 20-21.) As stated *supra* p.

32 in the antitrust and Jam section, this information does not support Plaintiffs' claim that Beaver, or any Promoter Defendant, has territorial dominance. Nor does it support the existence of a conspiracy among defendants to exclude black promoters.

Plaintiffs also misleadingly cite testimony by Brad Wavra, vice president of Clear Channel Touring's music division, stating that "there is a predominant promoter in every market, one that does the majority of dates" (citing Dep. of Brad Wavra, dated Feb. 28, 2002 ("Wavra Dep."), attached as Ex. 11 in Pls.' Beaver Exs., at 56, 84) and that " 'primarily concert promoters were regionally oriented, and ... their primary interest was just playing specific acts in their regions, and that seemed to be how the business was primarily structured' " [quoting *id.* at 56]. (Pls. Resp. Beaver Mem. at 21 (emphasis added).) However, Mr. Wavra testified that there is a "predominant promoter in many markets" and that that this came about based on performance and how a promoter built relationships, not a conspiracy to exclude black promoters. (Wavra Dep., Pls.' Beaver Ex. 11, at 84.) Mr. Wavra also does not list Jam or Beaver as a predominant promoter in his testimony. (*Id.* at 56.)

Plaintiffs cite other testimony by Brad Wavra as support for the alleged conspiracy, specifically that there is a "concert promoting fraternity," which included Mr. Fox, and that Mr. Wavra did not *initially* include any black promoters as members of the fraternity. (Pls.' Resp. Beaver Mem. at 23 (citing Wavra Dep., Pls.' Beaver Ex. 11, at 39-40.) Mr. Wavra, however, testified that he was using the term fraternity "loosely," that if a person was "in the music business then they would be part of that fraternity" and that the fraternity included black promoter Al Haymon. (Wavra Dep., in Joint Reply Appendix Filed in Further Supp. of

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Booking Agency Defs.' Mot. for Summ. J., undated (received May 29, 2003) ("J. Reply A."), at 42-43.)

Plaintiffs also cite the testimony of Mr. Alex Cooley as support for the alleged conspiracy, specifically that "(a) there is a 'good ole boy network ... and yes, racism very well in some cases could raise its head in there,' (b) he knows of no black promoters who are a part of the good ole boy network, and (c) racism plays a part in the concert promotion industry today with regard to black promoters not promoting white acts." (Pls. Resp. Beaver Mem. at 23 (quoting and citing Dep. of Alex Cooley, dated Mar. 20, 2003 ("Cooley Dep."), attached as Ex. 12 to Pls.' Beaver Exs., at 96-97, 105.) Mr. Cooley, however, also testified that racism was not "an overriding pervasive major thing in the industry" (Cooley Dep., in J. Reply A., at 96), that "the business has changed so drastically that [race] is not much of a factor" (*id.* at 98), that the "good ole boy network" was "not a conspiracy kind of a thing" (*id.* at 101), and that the "good ole boy network" consists of "friendships and business working relationships" (*id.* at 104).

*52 As for Plaintiffs' claim that Beaver receives favorable contract terms, which are unavailable to black promoters, (Pls.' Resp. Beaver 56.1 Stmt. ¶¶ 7- 9), [FN141] as in discussed in the Jam section, *see supra* pp. 83-86, the evidence shows that these are negotiated terms, which are approved by artists and their managers and do not raise an inference of discrimination based on race. Plaintiffs offer as exhibits a multitude of copies, many of which are duplicates, of contracts between the artists and Beaver. (Pls.' Resp. Beaver Mem. Ex. 6E, 6F.) Plaintiffs do not show that they bid on any of the concerts to which the exhibit contracts pertain; thus, the Promoter Defendants' negotiation of these contracts are not evidence of disparate treatment with respect to any specific contract that Plaintiffs sought. Furthermore, the contracts' disparate terms would affect other white promoters just as much as the Plaintiffs. Accordingly, no inference of

discrimination based on race can be made.

FN141. For example, a contract (without a signature line for Beaver) on a WMA form for the artist Protein to perform as a special guest at Howlin' Wolf in New Orleans on April 15, 1997, for \$100 flat guarantee with no deposit (Pls.' Beaver Ex. 6A) and a 1999 contract (with Beaver) with Celine Dion on a CAA form with a deposit of 10% of artists' guarantee and a 92.5% artist split of gross receipts after deduction of expenses. (Pls.' Beaver Ex. 6B (document BEA 006410).)

In the Plaintiffs' Response to Beaver's Memorandum, Plaintiffs cite Mr. Rowe's review of "thousands of 'confidential' contracts between the other former and current promoter Defendants" (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 14; *see also* Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 19) to assert that Beaver was almost always only required to pay a 10% deposit or no deposit at all. (Pls.' Resp. Beaver Mem. at 9.) Based on his review, Mr. Rowe asserts that he has "personal knowledge of two different deposit standards, one for white promoters and one for black promoters" and that "[e]ach was well known to Beaver and the agency Defendants who conspired to exclude black promoters from the competition by making the price to promote an act too steep." (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 14; *see also* Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 19.) Plaintiffs have not shown that Mr. Rowe is qualified an expert witness, and no expert report stating that these contracts are a representative sample or supporting Mr. Rowe's conclusions has been submitted on this motion. (*See also* Jaynes Dep., in J. Reply A., at 288; *see also* *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98-8272, 2003 WL 22124991, (S.D.N.Y. Sept. 15, 2003).)

Nonetheless, in a large number of those contracts, Beaver was required to pay no deposit or a 10% deposit. In others, Beaver was required to pay the 50% guarantee deposit. Thus, the Plaintiffs' selection of contracts shows that the lower deposit is not uniformly offered to Beaver. In some

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contracts Beaver evidently was able to negotiate a lesser deposit or other more favorable terms (such as payment by a company check rather than a certified check). Since the standard terms are often crossed out and initialed, the Court's review of the contracts in question show that the Booking Agency Defendants generally used a form of contract which asked concert promoters to pay a deposit of 50% of the artist's guarantee, but that the Beaver and other concert promoters would negotiate the deposit down to a lesser amount. [FN142] (See Mickelson Decl. II, Roberts Decl. Ex. 1, ¶¶ 5-17 (describing the process for negotiating a contract between Jam, the booking agencies and the artists and stating that Jam's proposed changes to a draft contract are accompanied by a box stating "initial here" to indicate where changes are located); see also Dep. of Bill Washington, dated July 11, 2002 ("Washington Dep."), in J.A., Vol. VI, at 192 (a black promoter explaining that he has been able to negotiate lower deposit terms based on a prior relationship with the artist or the artist's manager); L. Bailey Dep., in J.A., Vol. IV, at 69-71 (a black promoter who has a personal relationship with Kenny G, explaining that he also had been able to receive a lower deposit requirement in contracts with Kenny G).)

FN142. Since the contracts generally reflect that the booking agency did not offer better terms to the concert promoter the changes in contract terms strongly reflect negotiation by the promoters as claimed by Jam in the hearing. (Hrg. Tr. 10/20/03 at 207-11.) The successful concert promoters often end up with better terms than are offered by the Booking Agency Defendants. The only inference to be drawn is that due to their standing in the market or relationship with a desirable concert venues or relationship with the artists they can negotiate better contract terms. Indeed, a concert promoter who owns a desirable venue (Nederlander Theaters) may refuse to pay deposits. (See Fax from Nancy Vance of WMA to Billie Bullock, dated June 28, 1995 (stating "Nederlander does not pay deposits (never

has, never will)"), Pls.' Hrg. Ex. 15.)

*53 Plaintiffs have presented no expert evidence or other evidence to negate the conclusion that there are good business reasons for the different terms negotiated in the contracts of the Promoter Defendants with the artist. Mr. Rowe's review of documents cannot create an inference of "two different deposit standards" used by the Booking Agency Defendants, particularly when review of the selected contracts presented to the Court shows that the different standard claimed is generally not offered to the Promoter Defendants and often is not negotiated to a lower standard by the Promoter Defendants.

D. Claims Against the Booking Agency Defendants

1. William Morris Agency, Inc.'s Motion for Summary Judgment

Plaintiffs allege specific acts of discrimination and participation in a conspiracy to discriminate by WMA in the Amended Complaint and in their Response in Opposition to WMA's Motion for Summary Judgment. First, Plaintiffs allege that WMA and other Defendants excluded them from promoting Toni Braxton in connection with the 1997 Kenny G/Braxton tour. (Am.Compl.¶ 87(f).) Second, Plaintiffs allege that WMA and other Defendants excluded them from promoting concert dates in 1998 and 1999 for Maxwell. (*Id.* ¶ 87(d).) Third, Plaintiffs allege that WMA excluded Plaintiff Boseman from promoting a concert by Erykah Badu in 1997 and excluded Plaintiffs generally from promoting Ms. Badu's concerts in 1998 in favor of the concert Promoter Defendants. (*Id.* ¶ 87(c).) Fourth, Plaintiffs claim that in the late 1980s and the 1990s, WMA allegedly "excluded plaintiffs from promoting shows given by [its] black artists the Temptations, Barry White, Earth Wind & Fire, War and Lauren [sic] Hill." (*Id.* ¶ 87(e).) Additionally, in their Response in Opposition to WMA's Motion for Summary Judgment, Plaintiffs further elaborate on their allegation of discrimination in relation to Lauryn Hill concert promotion and also allege that WMA prevented Plaintiff Jones from securing an exclusive at Mud

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Island and from promoting James Taylor at Mud Island. (Pls.' Resp. in Opp'n to WMA's Mot. for Summ. J., dated Apr. 24, 2003 ("Pls.' Resp. WMA"), at 19-21, 23-24.) Plaintiffs also allege various general claims of discrimination against WMA. [FN143] (*Id.* at 5-17.)

FN143. In Plaintiffs' Opposition to the Booking Agency Defendants' Motions for Summary Judgment, Plaintiffs cite to Exhibit 31 as evidence of WMA's and CAA's "unvarnished racial animus." (Pls.' Joint Mem. at 15.) Exhibit 31 is an unidentified and unauthenticated document, not produced by Plaintiffs in discovery, which Plaintiffs reference in support of the allegation in their opposition brief that "the racial epithet 'nigger' was used 349 times in e-mails of employees of CAA and WMA." (*Id.*; Declaration of Beverly R. Frank, Esq. in Support of Booking Agency Defendants' Motions for Summary Judgment, dated May 23, 2003 ("Frank Decl."), ¶¶ 3-4.) Despite repeated requests by CAA and WMA, Plaintiffs' new counsel refused to provide the Defendants with any foundational information regarding Exhibit 31 or to produce a hard copy of the underlying e-mails referenced in Exhibit 31.

In the first half of 2001, Plaintiffs' former counsel had sought production of Defendants' e-mails, including e-mail data stored on thousands of CAA and WMA back up tapes and computer hard drives. Magistrate Judge Francis granted the request by order dated January 16, 2002 (the "Order"), but required Plaintiffs' former counsel, among other things, to: (1) notify Defendants' counsel of the search procedure to be used by Plaintiffs in identifying responsive e-mails, including specific word searches; (2) identify any e-mails they considered "material" to this litigation; and (3) produce them to Defendants in "hard copy with Bates Stamp." *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D.

421, 433 (S.D.N.Y.2002). Until the materiality of the e-mails had been agreed upon by counsel, this discovery was to be for attorney eyes only. *Id.* Plaintiffs' counsel, thereafter, notified Defendants that only the e-mails of certain named employees of the Defendant agencies would be searched. Defendants complained that Exhibit 31 demonstrates that the Plaintiffs thereafter conducted searches of mailbox users who were not among those agreed upon employees, and that Plaintiffs' counsel have not produced the hard copies of actual e-mails identified in Exhibit 31 as required by the Order. Plaintiffs' new counsel, thereafter, agreed that the number of uses of "nigger" referred to in their brief should have been 76 times, not 349 times, but due to Plaintiffs' failure to comply with Judge Francis's Order, Defendants have been unable to determine whether the racial epithet was used by an employee or by a correspondent to the employee or was contained in song lyrics, scripts, screen plays or spam. (Frank Decl. ¶¶ 32-33.)

In view of Plaintiffs' new counsel's breaches of Magistrate Judge Francis's Order, and Plaintiffs' failure to present any evidence or argument to show that the e-mails constituted utterances by employees of Defendants whose actions were material to the issues in this case, the Court is disregarding Exhibit 31 in its entirety as irrelevant material.

(i) Plaintiffs' Claims of Exclusion from Promoting Toni Braxton on the 1997 Kenny G/Toni Braxton Tour

With respect to the 1997 Kenny G/Braxton tour, [FN144] Plaintiffs have not provided any evidence to establish a prima facie case of racial discrimination by WMA under § 1981. Nor have Plaintiffs provided evidence which raises an inference that WMA conspired with other Defendants to exclude Plaintiffs. Plaintiffs have not offered any evidence that Mr. Rowe, Mr. Boseman,

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or any other Plaintiff had contact with any WMA agent regarding the Kenny G/Braxton tour. (Rowe Dep., in J.A., Vol. VI, at 1230 (stating that he had no contact with WMA "because CAA was the sole lead agency for the tour"); Boseman Dep., in J.A., Vol. III, at 815, 916, 945, 961-62, 1331, 1347 (discussing his conversations with CAA concerning Ms. Braxton, but never mentioning WMA).) Nor did Mr. King have any contact with any WMA agents regarding the Kenny G/Braxton tour. (King Dep., in J.A., Vol. V, at 1120.) Plaintiff Jones makes no assertion of discrimination in regards to the Kenny G/Braxton Tour.

FN144. The facts related to the 1997 Kenny G/Braxton tour are reviewed *supra* pp. 73-76.

*54 Moreover, the evidence does not show that WMA had any involvement in choosing the lead promoters for concerts on the 1997 Kenny G/Braxton tour, which is the subject of Plaintiffs' Amended Complaint. As Brandon Phillips, Ms. Braxton's manager, testified:

Well, basically, we didn't want to pay William Morris Agency a commission since she'd just gone there, and they really had nothing to do with this tour. We didn't need two agencies booking the tour.

So we accepted CAA as the tour agent, but only Kenny G paid them a commission. Toni was able to avoid paying an agent's commission on her part of the tour....

And, structurally, it just meant that Mike Peranian [sic] and CAA went out there and either solicited or received the offers for the tour, for the Kenny G/Toni Braxton tour.

(Phillips Dep., in J.A., Vol. V, at 33-34; *see also* Light Decl. I, Ex. 6 (showing two Kenny G contracts, dated November 7 and 21, 1996, on CAA forms between Turner Management, Kenny G's manager, and promoters requiring Turner Management to produce artist Braxton and splitting artists' net revenues between Braxton and Kenny G 34%/51%); Armand Decl., attached to Light Decl. II, Ex. A (showing additional Kenny G contracts, dated in November 1996, December 1996 and January 1997, with similar terms to the above

contracts).)

Therefore, Plaintiffs have documented no evidentiary basis from which to infer any acts of racial discrimination by WMA in connection with the 1997 Kenny G/Braxton tour. [FN145]

FN145. In their Response in Opposition, Plaintiffs attempt to inculcate WMA in the Plaintiffs' complaint about Kenny G/Braxton tour pointing out that WMA issued contracts for Ms. Braxton's performances to a former concert Promoter Defendant. (Pls.' Resp. WMA Mem. at 21 n. 45 (citing Pls.' WMA Ex. 43, a fax from Nick Caris of WMA to Rich Engler of Dicesare-Engler Productions, dated Jan. 17, 1997 (requesting the forwarding of a signed contract).) This fax was sent after Mr. Rowe and Mr. Boseman reached their agreement with Mr. Light for co-promotion of Ms. Braxton on January 6, 1997. (See Letter from Mr. Light to Mr. Rowe and Mr. Boseman, dated Jan. 6, 1997, attached as Ex. 14 to Pls.' Counter Jam 56.1 Stmt.) Plaintiffs also cite Exhibits 44 to 48, containing contracts on WMA forms with Ms. Braxton as a party, to demonstrate that WMA required only 10% or no deposit from dominant promoters whom it awarded "the Braxton concerts" or required a 50% deposit only a few days before her scheduled performance. (Pls.' Resp. WMA Mem. at 21 n. 46.) Review of these contracts shows that they are not the subject of Plaintiffs' complaint, which involved the original awarding of contracts to promote concerts on the 1997 Kenny G/Braxton tour by CAA's Mike Piranian in the fall of 1996. These contracts on WMA forms appear to provide remuneration for Ms. Braxton and assure her performance, but do not add terms to the original contract between Kenny G's manager and the promoter. (See Armand Decl., attached to Light Decl. II, Ex. A (contract on CAA form between Contemporary Productions and Turner

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Management, dated Nov. 12, 1996, for a concert at Kiel Auditorium in St. Louis on Jan. 16, 1997) and Pls.' Resp. WMA Ex. 47 (contract on WMA form between Contemporary Productions and Madam Ashley, Inc., Ms. Braxton's manager, dated Dec. 16, 1996 for this same concert). Contemporary Productions' WMA contract form merely secures Ms. Braxton's services for the same concert on the terms required under Contemporary Productions contract with Turner Management. The evidence provided does not show WMA had any involvement in the scheduling or choosing of lead promoters for concerts on the Kenny G/Braxton tour.

(ii) Plaintiffs' Claims Regarding the 1998 and 1999 Maxwell Tours

With respect to Plaintiffs' claim that WMA excluded and conspired to exclude Plaintiffs from promoting concert dates for Maxwell in 1998 and in 1999, the evidence shows that, in or about July 1998, Mr. Rowe called Jeff Frasco, WMA's agent assigned to black artist Maxwell, learned that Maxwell was going on tour, and was promised black promoter involvement in the tour. (Aff. of Leonard Rowe, dated Apr. 21, 2003, ("Rowe WMA Aff."), attached as Ex. 1 in Pls.' Resp. WMA Exs., ¶ 21.) Mr. Rowe then sent a letter, dated July 20, 1998, to Mr. Frasco (Pls.' Resp. WMA Ex. 18), but received no response. Exhibit 18, a letter on Rowe Entertainment letterhead, lists seven cities and states it is making a "firm offer" for:

Minneapolis, MN	\$ 60,000.00/Per show
Chicago, IL	\$100,000.00/Per show
Detroit, MI	\$100,000.00/Per show
Washington, DC	\$ 60,000.00/Per show
New York, NY	\$125,000.00/Per show

Atlanta, GA	\$100,000.00/Per show
Los Angeles, CA	\$125,000.00/Per show

(Id.) [FN146]

FN146. Exhibit 18 lists no venues, dates,

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artist's split or other key terms for a specific concert that would allow an artist or an artist's manager to compare this offer to other promoters' offers for specific concerts. This letter, however, will be considered an offer for part of the national tour for the purposes of this opinion, as is admitted by WMA. (See Mem. of Law in Supp. of WMA's Mot. for Summ. J., dated Feb. 28, 2003 ("WMA Mem."), at 8 n. 5.)

Plaintiffs' Exhibit 19, a WMA draft tour schedule for Maxwell, shows that by August 5, 1998, WMA had also received firm guarantees for venues in five cities at an equal or higher price to those offered by Mr. Rowe, and shows the venue with seating capacity from a number of the Promoter Defendants with the name "Magic" or "Mag" scripted in for three of these cities. [FN147] (*Id.*)

FN147. Minneapolis, Detroit, New York and Los Angeles are not listed as "Magic." (Pls.' Resp. WMA Ex. 19.)

*55 On August 24, 1998, Mr. Rowe, as Executive President of the BPA, wrote to Magic Johnson and congratulated him on being assigned exclusive rights to promote the upcoming Maxwell tour and offered Mr. Johnson membership in the BPA. (Maxwell Letter from BPA to Mr. E. Johnson, dated Aug. 24, 1998, Pls.' WMA Resp. Ex. 24; see also E. Johnson Decl., McCabe Decl. Ex. 3, ¶¶ 4, 8.) A letter dated as of September 1, 1998, from WMA acting as agent for Maxwell to MJP asked MJP to confirm its agreement that in exchange for a \$350,000 advance to Maxwell, MJP would contract with each local promoter to receive 50% of any promoter profit and to assume 50% of any promoter loss incurred. (Pls.' Resp. WMA Ex. 23.) A later WMA tour schedule, dated September 11, 1998, shows sixteen cities with firm offers from MJE (Magic Johnson Enterprises) and local promoters, in which eight shows had black local co-promoters. (*Id.* Ex. 20.)

On September 3, 1998, Mr. Rowe wrote Randy Hoffman of Hoffman Entertainers, Maxwell's managers, on BPA letterhead, stating the BPA

would protest and boycott the Maxwell tour. The letter indicates copies were sent to Magic Johnson, Maxwell, WMA, various publications and a number of civil rights leaders. [FN148] (Letter from BPA to Mr. Hoffman, dated Sept. 3, 1998, Pls.' Rev. Jam Mem. Ex. 1G; see also E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 7.) On September 8, 1998, Mr. King for First Class Productions and as Secretary of the BPA sent another letter to Mr. Hoffman stating, "YOU NOW HAVE BUT ONE CHOICE. STOP YOUR WICKED WAYS OR FUEL OUR POWER WITH YOUR RACIST TACTICS...." (Pls.' WMA Ex. 128.)

FN148. On September 4, 1998, Mr. Frasco of WMA sent a memo to all promoters informing them that Magic Johnson Productions would be a 50% promoter on all Maxwell deals, that tickets would read "Magic Johnson Productions in association with local promoter Presents," that the Black Entertainment Network would be the tour sponsor, and that Billy Sparks, a black promoter, would approve all radio and media advertising. (Pls.' WMA Resp. Ex. 22.)

The Maxwell 1998 tour was cancelled, but a tour was rescheduled in 1999. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8.) Magic Johnson states specifically that, with respect to the 1999 Maxwell tour, MJP "submitted a competitive offer to booking agency [WMA] that was accepted by Maxwell's management." (*Id.* ¶ 5.) On June 15, 1999, Jeff Frasco of WMA sent a memo to "all promoters" stating MJP is a 50% co-promoter on all dates and:

All advertising must read, "Magic Johnson Productions in association with [local promoter] Presents Maxwell."

BET (Black Entertainment Television) is the tour sponsor....

All marketing plans, radio promotion, and advertising must be approved by Billy Sparks prior to the on-sale....

(Pls.' Resp. WMA Ex. 25.)

In connection with the 1998 Maxwell tour,

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Plaintiffs have failed to present a prima facie case of discrimination under *McDonnell Douglas*. Plaintiffs have failed to provide evidence to contradict Mr. Frasco's testimony that Maxwell's management, not WMA, rejected their offers. Even assuming that there was evidence showing that WMA had contributed to that decision, the circumstances do not give rise to an inference of racial discrimination because, instead of Mr. Rowe, a black promoter was hired as the national promoter for the 1998 Maxwell tour. In their Memorandum of Law in Support of their Motion for Summary Judgment, WMA acknowledges Mr. Rowe's offer for seven cities (Pls.' Resp. WMA Ex. 18), and Mr. Jones's offer for three cities (Memphis, Nashville, Norfolk/Hampton) "whenever there is a tour for Maxwell" (Letter from Fred Jones to Jeff Frasco of WMA, dated July 6, 1998, in J.A., Vol. II, Ex. 5). (WMA Mem. at 8 n. 5.) However, it is un rebutted that, as Mr. Frasco testified, he forwarded any offer expressing interest in the tour to Mr. Hoffman, Maxwell's manager (Frasco Dep., in J.A., Vol. IV, at 119-20), and that Mr. Hoffman and Maxwell were the ultimate decision makers in choosing promoters for Maxwell's tour engagements (WMA 56.1 Stmt. ¶ 57; [FN149] Frasco Dep., in J.A., Vol. IV, at 97). It is also un rebutted that Mr. Hoffman and Maxwell hired MJP as the national tour promoter for the 1998 Maxwell tour [FN150] (WMA 56.1 Stmt. ¶¶ 57-59; King Dep., in J.A., Vol. V, at 588, 597, 1098-99; Frasco Dep., in J.A., Vol. IV, at 97, 100-01, 125; Grosslight Dep., in J.A., Vol. IV, at 122-24), and that MJP is owned and operated by African Americans ((E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 6). [FN151] Additionally, the 1998 Maxwell tour was cancelled. Thus, Plaintiffs have no claim under § 1981 for race discrimination for the cancelled 1998 Maxwell tour.

FN149. Plaintiffs dispute this statement, but only cite the affidavit of Mr. R. Johnson, who worked as a booking agent at WMA from 1982 to 1986, to support this contention. (Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Opp'n to WMA's Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. WMA Stmt."), ¶ 57 (citing R. Johnson Aff., Pls.' WMA Ex. 9,

¶ 3).) As stated previously, Mr. R. Johnson's testimony is admitted as far as it relates to his personal knowledge, which does not extend to the 1998 Maxwell tour. WMA 56.1 Statement ¶ 57 is considered as if undisputed.

FN150. Even if Plaintiffs had shown a prima facie case of discrimination, Mr. Frasco's testimony sets forth a valid business reason, a decision by the principal to reject the Plaintiffs' offers. See *McDonnell Douglas*, 411 U.S. at 804. Plaintiffs do not offer any evidence to show that the reasons for choosing MJP were pretextual.

FN151. Mr. Frasco also testified that Mr. Hoffman decided that Mr. Jones would be involved as a copromoter if Maxwell played in any of the cities Mr. Jones "normally plays." (Frasco Dep., in J.A., Vol. IV, at 127.)

*56 As for the 1999 Maxwell tour, Plaintiffs maintain that the total of Mr. Rowe's "firm" offers in his July 20, 1998 letter for the 1998 Maxwell tour was greater by \$100,000 than the guarantees of the "dominant" white promoters who were later awarded concerts for the 1999 tour. (Pls.' WMA 56.1 Stmt. ¶ 110 (citing Pls.' Resp. WMA Ex. 19 (WMA Doc. of 8/5/99), [FN152] Ex. 20 (WMA Doc. of 9/11/98); see also Rowe WMA Aff., Pls.' WMA Ex. 1, ¶ 21.) However, a comparison of these offers cannot be made because: (1) Rowe's offer (Exhibit 18) was for 1998 and did not contain proposals for the artist/promoter split, venues, venue capacity or ticket price; [FN153] (2) Exhibit 19 and Exhibit 20 do not reflect MJP's advance of \$350,000 or the guarantees of the local promoters for the 1999 tour, and (3) Rowe Entertainment made no offer for Maxwell's 1999 tour (Rowe Dep., in J.A., Vol. VI, at 1221), when another year had passed since Maxwell was named Rolling Stones Breakthrough Artist of the Year (1996). As Mr. Rowe did not bid on the 1999 Maxwell tour, he has not provided evidence to form a prima facie case of racial discrimination by WMA under *McDonnell*

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Douglas.

FN152. Exhibit 19 is dated 8/5/98, not 8/5/99.

FN153. Guarantees cover the artist in the event the concert is not successful. The artist promoter split, venue capacity, and ticket prices allow the artist to benefit from a successful concert.

In connection with the 1999 tour, Plaintiff Jones did submit a bid to promote Maxwell on September 16, 1999 at the Grand Old Opry House in Nashville, "if Maxwell performed there." (Letter from Fred Jones to Jeff Frasco of WMA, dated Sept. 16, 1999, in J.A., Vol. II, Ex. 39.) Plaintiffs, however, have not submitted evidence to show that Maxwell performed there or in the other cities included in Mr. Jones's offer for the 1998 Maxwell tour. Accordingly, Plaintiff Jones has also failed to provide evidence of a prima facie case for a violation of 42 U.S.C. § 1981. [FN154]

FN154. Plaintiff King testified he did not submit a bid to promote the 1999 Maxwell tour. (King Dep., in J.A., Vol.V, at 1101.)

As to Plaintiffs' claim that WMA conspired with other defendants to exclude them from the 1999 Maxwell tour, it is un rebutted that Maxwell and his manager, Randy Hoffman, made the selection of MJP as the Maxwell tour promoter and of the local promoters for Maxwell's 1998 and 1999 tour engagements. Plaintiffs have presented no evidence suggesting that WMA and other defendants conspired to engage MJP in order to exclude Plaintiffs because of their race. It is undisputed that MJP is owned and managed by African Americans. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 6.) In addition to MJP, the following black promoters were retained in local markets to co-promote concerts on the 1999 Maxwell tour: Bill Washington co-promoted nine shows; Lionel Bea co-promoted two shows; Clarence Jones co-promoted two shows; and Plaintiff Boseman co-promoted one show in Virginia with MJP and Cellar Door Concerts. (Johnson Decl., McCabe

Decl. Ex. 3, ¶ 8; Boseman Dep., in J.A., Vol. III, at 762-64; Letter from Berkeley Reinhold of WMA to Mr. Robinson, Mr. Boseman. and Mr. O'Connell, dated Apr. 17, 1999, J.A., Vol. II, Ex. 35 (amending contract between Sun Song and MJP to include Cellar Door Productions (Sun Song 25%, MJP 50% and Cellar Door 25%).) Additionally, Maxwell and his manager hired Billy Sparks, an African American, to coordinate the marketing and promotional radio activity for the 1999 Maxwell tour and hired BET Television. (Sparks Dep., in J.A., Vol. VI, at 24-25, 41-42; Frasco Dep., in J.A., Vol. IV, at 217-19.) Accordingly, Plaintiffs have failed to show that in relation to the 1998 and 1999 Maxwell tour there was a conspiracy by WMA and others to discriminate against Plaintiffs because of their race.

*57 A reasonable jury could not find an inference based on the evidence presented on this motion that Defendant WMA intentionally discriminated against any of the Plaintiffs in making a contract, or interfered with Plaintiffs making a contract, to promote the Maxwell Tour in 1998 or 1999 because of any Plaintiff's race in violation of 42 U.S.C. § 1981 or conspired with others to deny plaintiffs equal protection of the laws or equal privileges and immunities under the law in violation of 42 U.S.C. § 1985(3).

(iii) Plaintiffs' Claims Regarding Erykah Badu

Paragraph 87(c) of the Amended Complaint reads as follows:

In connection with concerts to be given by the Grammy award-winning R & B performer, Erykah Badu, a black performer, and not long prior to release of Ms. Badu's debut album in early 1997, plaintiff Jesse Boseman telephoned Badu's agent, Cara Lewis at William Morris, and asked to promote Badu's concerts at either of the two New York City venues on specific dates. Lewis, who personally knows Boseman, denied that Badu was scheduling concerts. In or about March 1997, Mr. Boseman asked Ron Delsener of Delsener/Slater to telephone Lewis and inquire whether Badu was scheduling concerts. Delsener thereupon telephoned Lewis and was informed

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that Badu was in fact scheduling concerts and, in Boseman's presence, Delsener obtained from Lewis the right to promote a May 1997 concert to be given by Badu at the Supper Club in New York City. After Badu's second album was released in November 1997, the BPA telephoned Lewis at William Morris to request concert dates for Badu's 1998 tour. Lewis assured the BPA that there were no concert dates planned. Within a month thereafter, however, the promoter defendants were assigned numerous Badu tour dates by William Morris.

(Am.Compl. ¶ 87(c).)

Mr. Boseman testified that possibly as early as January 1997 he had called Cara Lewis, WMA's agent in charge of R & B acts, and asked to promote Ms. Badu at the Theatre at Madison Square Garden [FN155] or the Beacon Theater. (Boseman Dep., in J.A., Vol. III, at 715, 721-22.) According to Mr. Boseman, Ms. Lewis stated Ms. Badu wasn't going to tour and, therefore, he did not propose dates or other venues. (*Id.* at 722-23.) He also testified that later, in March 1997, [FN156] when he was in the office of former promoter defendant Delsener/Slater with Mr. Delsener and Mr. Slater, Mr. Slater [FN157] called Cara Lewis about Ms. Badu's availability. (*Id.* at 729, 732.) According to Mr. Boseman, Mr. Slater said "Ms. Lewis had told him that [Ms. Badu] was going to do some dates," but the venues and specific dates had not been decided. (*Id.* at 736.) Mr. Boseman further testified that, a week or two later, Mr. Delsener and Mr. Slater told him that "they had selected a venue and Ms. Lewis had told him also that if they do business with Sun Song, that she wouldn't do any business with them any further." (*Id.* at 737-38.) [FN158]

FN155. In his deposition Mr. Boseman refers to the Theatre as a venue relating to the Paramount, but all further references by Plaintiffs to this conversation refer to the Theatre at Madison Square Garden. (Boseman Dep., in J.A., Vol. III, at 721-22.)

FN156. Mr. Boseman said that the conversation between Mr. Slater and Ms.

Lewis couldn't have been more than a week or two after a conversation he had had with Ms. Lewis and that he may have spoken to Ms. Lewis in both January 1997 and March 1997. (Boseman Dep., in J.A., Vol. III, at 733.)

FN157. The Amended Complaint alleges that Mr. Delsener made the call, not Mr. Slater, as Mr. Boseman states in his deposition.

FN158. What Mr. Delsener and Mr. Slater said Ms. Lewis told them is hearsay as to the truth of the statements made and must be disregarded for purposes of this motion. Plaintiffs offer no testimony from Mr. Delsener or Mr. Slater to support this attribution to Ms. Lewis.

As for the concert promoter defendants who are alleged in Paragraph 87(c) of the Amended Complaint to have been "assigned numerous Badu tour dates by William Morris" within a month of the BPA November 1997 phone call regarding Ms. Badu's 1998 tour, Mr. Boseman could not identify any specific concert promoter defendant who had received these dates. (*Id.* at 745.) Mr. Boseman acknowledges he did not submit a bid for a Badu concert at any venue. (*Id.*)

*58 Ms. Lewis's recollection was that when Mr. Boseman first called he asked about Ms. Badu playing the Apollo Theater and that, "[c]onsistent with management's career objectives for Ms. Badu, [she] advised Mr. Boseman that Ms. Badu was not playing at venues like the Apollo ... because she wanted to play only small clubs and general admissions rooms," [FN159] (Decl. of Cara Lewis, dated Feb. 27, 2003 ("Lewis Decl."), ¶ 14; *see also* Dep. of Cara Lewis, dated Jan. 17, 2002, in J.A., Vol. V, at 314.) Ms. Lewis states, however, that if Mr. Boseman did call in January 1997, the statement that Ms. Badu was not doing any dates at that time was correct. (Lewis Decl. ¶ 15.) Ms. Lewis attaches to her declaration a schedule generated from WMA's concert database of all Ms. Badu's concert engagements for 1997, which shows

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that, other than appearing at an industry function in January, Ms. Badu did not perform any concert engagements in January and for a period of two months thereafter. [FN160] (*Id.* Ex. 1 (Erykah Badu Engagements 1997) at 1.) Ms. Badu's first concert engagements were on April 8 and 9, 1997, and were promoted by black concert promoters. (*Id.* ¶ 15, Ex. 1 at 1.) Ms. Badu made only two appearances in New York City, one at the Supper Club and another at Tramps. (*Id.* ¶ 16, Ex. 1 at 2.) Ms. Lewis states that both of these venues are booked exclusively by the building and, thus, no independent promoter could have promoted Ms. Badu at these venues. [FN161] (*Id.* ¶ 17.) Only five of Ms. Badu's forty-seven engagements in 1997 went to the former concert promoter defendants, and at least seven of her shows were promoted by black promoters. (*Id.* ¶ 19, Ex. 1.) Plaintiffs have offered no evidence in contradiction of Mr. Lewis's sworn statement.

FN159. Ms. Lewis's uncontradicted affidavit states that, although she has specialized in urban, contemporary music (primarily R & B, hip hop and rap music) for eleven years at Norby Walters and for the past thirteen years at WMA, has a 99% client base of African American artists, and had business relationships with numerous black promoters, she had had virtually no contact with any of the four Plaintiffs until 1997. (Lewis Decl. ¶¶ 3-8.) Prior to 1997, none of the Plaintiffs had expressed an interest in promoting any of the clients she has represented over the last 20 years, and Mr. Boseman has never submitted a bid for any of the artists she has represented. (*Id.* ¶¶ 6, 8.)

FN160. It is the Court's understanding that industry functions hire their own promoters, and independent promoters do not compete to be hired by the artist or the artist's manager.

FN161. Delsener/Slater did promote Ms. Badu at the Supper Club. (Lewis Decl. Ex. 1.) During the oral argument, Defendant's

counsel asserted without contradiction that Delsener/Slater "controlled" the Supper Club and any artist wishing to perform in that venue would have to go through Delsener/Slater. (Hrg. Tr. 10/16/03 at 113.)

In regards to the 1997 concerts of Ms. Badu, Plaintiff Boseman has failed to present a prima facie case of discrimination under *McDonnell Douglas* because the evidence shows that no concerts were held at either of the two specific venues Mr. Boseman inquired about, the Theatre at Madison Square Garden (Paramount) and the Beacon Theatre. Both of these venues are too large to be considered similar to the venues in which Ms. Badu played. (See Lewis Decl. ¶ 18.) Most importantly, Mr. Boseman failed to submit a bid for any Badu concerts after he learned that Ms. Badu would perform concerts at small venues and supper clubs. [FN162]

FN162. Even if Mr. Boseman argued that he was exempt from the specific bid requirement his claim would fail. Assuming that the standards for exemption from the specific bid requirement set forth in *Brown v. Coach Stores* and *Petrosino*, both cases concerning failure to promote in the employment context, apply in the contract discrimination context, Mr. Boseman has failed to present evidence to qualify for these exemptions. Under *Brown v. Coach Stores*, Mr. Boseman must present pattern and practice evidence showing that bidding would have been futile and identify a specific position (in this case, venue) he would have applied for "had the alleged discriminatory practice not existed." *Brown v. Coach Stores*, 163 F.3d at 711. Mr. Boseman has presented no evidence demonstrating a pattern or practice of discrimination by WMA, and he has not identified any specific venue for which he would have applied. Under *Petrosino*, Mr. Boseman must demonstrate "that (1) the vacancy at issue was not posted, and (2) the employee either had (a) no knowledge of the vacancy before it was

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filled or (b) attempted to apply for it through informal procedures endorsed by the employer." *Petrosino*, 385 F.3d at 227. Mr. Boseman had knowledge that Ms. Badu was playing smaller venues, and thus, had the opportunity to submit a bid to WMA for Ms. Badu concerts at such venues.

Plaintiffs' second claim alleges that after the release of Ms. Badu's second album in November 1997, the BPA (Mr. Rowe and Mr. Boseman) telephoned Ms. Lewis to request concert dates for Ms. Badu's 1998 tour and that Ms. Lewis stated there were no concert dates planned. (Am.Compl.¶ 87(c).) The Amended Complaint further alleges that Plaintiffs learned a month later that "the promoter defendants were assigned numerous Badu tour dates." (*Id.*) Ms. Lewis's declaration in response attaches a schedule from WMA's database of Ms. Badu's 1998 concerts, which support her statements and also show that none of the concert promoter defendants promoted Ms. Badu in 1998, contrary to Plaintiffs' allegation in paragraph 87(c). [FN163] (*Id.* Ex. 2 (Erykah Badu Engagements 1998).) Ms. Lewis states that Ms. Badu did not go on tour in 1998 but did schedule four individual engagements, three of which were promoted in-house by the venue itself (not by independent concert promoters). (Lewis Decl. ¶ 22.) The fourth date was copromoted by a black promoter, Al Wash. (*Id.*) Plaintiffs have offered no evidence in contradiction to these sworn statements by Ms. Lewis. Thus, Plaintiffs' claims that Ms. Lewis failed to give them the concert dates for Ms. Badu's 1998 tour and instead assigned them to the Promoter Defendants has no evidentiary support. Ms. Badu did not tour in 1998 and no dates were given to the Promoter Defendants. Instead in 1998 Ms. Badu scheduled only four concerts, and three of the concerts could not be promoted by independent concert promoters, such as Plaintiffs or the Promoter Defendants. Plaintiffs were not similarly situated to those who received the promotion opportunities. Lastly, the fourth concert was co-promoted by a black promoter. On the above evidence, no rational juror could infer discrimination based on race from the actions of Ms. Lewis.

FN163. Attached to Ms. Lewis's declaration is a press release, which she states the BPA disseminated in 1998 to the media, stating that Ms. Badu was "allowing herself to be prostituted and exploited by the White Music Establishment," that "[h]er White Booking Agency refused to let her work for Black Promoters" and calling for a boycott of her recording products and concert appearances. (Lewis Decl. Ex. 3 (BPA Press Release).)

*59 Finally, Ms. Lewis's declaration contradicts Plaintiff Jones's testimony that in 1998 that he spoke to her assistant and was told Ms. Badu was not playing any dates in Memphis, but later learned Ms. Badu had agreed to play in late April 1998 for Bob Kelley of Mid-South Concerts in Memphis. (Jones Dep., in J.A., Vol. IV, at 249-50.) Ms. Lewis attached two offers from Mr. Kelley generated from the WMA concert database for Badu concerts to take place at the Mid-South Fair in April 1998, which show one offer was rejected January 16, 1998, and the other February 9, 1998. (Lewis Decl. ¶ 26, Exs. 4, 5.) Since Mr. Jones's statement about what he learned in regards to the alleged April 1998 concert is hearsay and the un rebutted evidence shows that each of the offers by Mr. Kelley was rejected by Ms. Badu in or near January 1998, well before Mr. Kelley's suicide, Plaintiff Jones has not presented a prima facie case of discrimination under *McDonnell Douglas*.

(iv) *Plaintiffs' Claims Regarding the Temptations and Other Groups*

Paragraph 87(e) of the Amended Complaint reads as follows:

In the late 1980's and the 1990's, William Morris excluded plaintiffs from promoting shows given by William Morris' black artists the Temptations, Barry White, Earth Wind & Fire, War and Lauren [sic] Hill. The promoter defendants were given promotion contracts for these acts. In 1998, Electric Factory was given the exclusive contract to promoter nationwide tours of Earth Wind & Fire and Barry White. Both of these acts were

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previously promoted by Rowe and Rowe Entertainment, and Electric Factory was aware of their earlier involvement with those groups, but excluded them.

(Am.Compl.¶ 87(e).)

The Plaintiffs have dismissed their claims against Electric Factory and present no evidence against it or WMA in support of their allegation. Since 1987, Mr. Rowe has never submitted a bid to WMA to promote a concert engagement by the Temptations. (Rowe Dep., in J.A., Vol. VI, at 1135-36.) Mr. Rowe has never submitted a bid to WMA to promote a concert by Barry White during the 1980s or 1990s. (*Id.* at 1225-26.) Plaintiffs have presented no evidence that Mr. Rowe or Rowe Entertainment bid for the nationwide tour of Earth, Wind & Fire in 1998, or at any other time. Mr. Rowe has never submitted a bid or called anyone at WMA to promote a concert by War during the 1980s or 1990s, and he testified that he did not want to promote a concert by War in the 1990s because War's "popularity fell off." (*Id.* at 1140.)

Mr. Boseman has never called a WMA agent to express an interest in promoting a concert engagement by the Temptations and never submitted a bid to promote the Temptations. (Boseman Dep., in J.A., Vol. III, at 769.) Mr. Boseman testified that he had no interest in promoting the Temptations because "[t]heir popularity was the years before I started promoting." (*Id.*) Mr. Boseman promoted Barry White in the early 1970s and on Mr. White's tour (which may have been in 1995, 1996, or 1997), and he does not recall "anybody at William Morris ever [telling him] not to put in a bid for Barry White." (*Id.* at 771.) Mr. Boseman never submitted a bid to WMA to promote a concert by Earth, Wind & Fire after 1988 (*id.* at 460), or a concert by War (*id.* at 772-73). He thinks he "might have passed" on promoting War. (*Id.* at 773.)

*60 Plaintiff King has not submitted a bid to WMA to promote a concert by the Temptations, Barry White, War or Earth, Wind & Fire. (King Dep., in J.A., Vol. V, at 1115-18.) Mr. King testified that no one at WMA ever told him not to submit a bid to

promote a concert by Earth, Wind & Fire or War. (*Id.*) Mr. King turned down an offer to promote a concert by Earth, Wind & Fire because he felt there was no demand for the show in Mississippi. (*Id.* at 741-42, 747-48.) Mr. King has never bid on a concert by a white artist represented by WMA, not because of anything a WMA agent did or said, but because lead Plaintiff Leonard Rowe and Plaintiff Jesse Boseman told him not to do so. (*Id.*, in J. Reply A., at 1066-67.)

Plaintiff Jones testified that he did not submit a bid on a concert by Barry White and never had any interest in being tour promoter for any artist. (Jones Dep., in J.A., Vol. IV, at 208-09.) Plaintiffs have presented no evidence that Mr. Jones expressed an interest to WMA for promotion of the concerts of the other artists mentioned in paragraph 87(e) of the Amended Complaint.

Plaintiffs have failed to present a prima facie case of discrimination under *McDonnell Douglas* in relation to the claims in paragraph 87(e), as they have not provided evidence of any specific promotion opportunity for which they submitted a bid and were rejected.

(v) Plaintiffs' Claims Involving Lauryn Hill

In their Response in Opposition to WMA's Motion for Summary Judgment, Plaintiffs further elaborate on the claim included in paragraph 87(e) of the Amended Complaint that WMA discriminated against Plaintiffs in relation to the artist Lauryn Hill. (Pls.' Resp. WMA at 23-24.) During discovery, Plaintiff Boseman asserted that Cara Lewis of WMA discriminated against him on the basis of his race in connection with the artist Lauryn Hill. (Boseman Dep., in J.A., Vol. III, at 685.) This assertion was based on conversations Mr. Boseman had with Ms. Lewis in March or April 1999, in which he mentioned his interest in being involved in a Lauryn Hill concert at the Theatre at Madison Square Garden. [FN164] (*Id.* at 329, 635-36, 638, 685-86, 690.) Mr. Boseman testified that despite being told by Ms. Lewis that he could be involved and that someone at WMA would contact him, Ms. Lewis gave the work to Mary Flowers, another

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black promoter. (*Id.* at 328-30, 635-36, 638, 640, 685-86.) Mr. Boseman did not submit a bid to promote any Lauryn Hill concert in 1999. (*Id.* at 1183-84.)

FN164. Plaintiff Boseman also speaks of the venue Radio City Music Hall when referring to this concert.

Also, Plaintiff Rowe testified that Ms. Lewis has discriminated against him on the basis of race in connection with Lauryn Hill, because he had submitted a "bid" to promote Ms. Hill in 1997 or the beginning of 1998. (Rowe Dep., in J.A., Vol. VI, at 1172-74.) Mr. Rowe testified that after sending in this bid, he met with Ms. Lewis, who told him he would be involved in some dates, but he never was. (*Id.*) During his deposition Mr. Rowe was unable to state the specific date, the venue, or any of the financial terms included in his bid and has not produced a copy of his bid to promote Ms. Hill. (*Id.*)

*61 In her declaration, Ms. Lewis maintains that neither Mr. Rowe nor Mr. Boseman ever submitted a bid to promote a concert for Lauryn Hill. (Lewis Decl. ¶ 28.) She states that in 1999, Ms. Hill did individual concerts as well as a concert tour. (*Id.* ¶ ¶ 30-31.) The tour was promoted by Al Haymon, a black promoter. [FN165] (*Id.* ¶ 30, Ex. 7.) Ms. Lewis has submitted a true and complete listing of Ms. Hill's concerts in 1999 from WMA's computerized concert records, showing that Delsener/Slater and Mary Flowers promoted Ms. Hill's concert at the Theatre at Madison Square Garden and that Mr. Haymon promoted three other individual concerts, in addition to the tour. (*Id.* Ex. 6.) Additionally, other black promoters, Lionel Bea, Bill Washington, Darryl Brooks, Anthony Williams, Earnest Booker and Magic Johnson Enterprises, promoted or co-promoted five Lauryn Hill concerts. (*Id.*)

FN165. Plaintiffs contend that Mr. Haymon sold his business to SFX in May of 1999 and thus, did not promote the tour. (Pls.' Resp. WMA Mem. at 24 n. 53.) However, SFX only acquired 50% of Mr.

Haymon's business in May 1999 and a year later increased their ownership to 80%. (Haymon Dep., Ex. 86 in Pls.' Resp. WMA Exs., at 23.) Mr. Haymon stated that after the purchases by SFX, he ran the business in the same way. (Haymon Dep., in J. Reply A., at 162-163.)

Plaintiffs have failed to present evidence of a prima facie case of discrimination based on race under *McDonnell Douglas*. Plaintiffs Boseman and Rowe have not shown that they submitted a bid in relation to any Lauryn Hill concerts in 1999. Although Mr. Boseman expressed interest in a specific concert by Ms. Hill at the Theatre at Madison Square Garden, he testified that Ms. Lewis gave the "shows I normally do with Ron Delsener" to Ms. Flowers. (Boseman Dep., J.A., Vol. III, at 328.) Mr. Boseman's complaint is not that he was not awarded a contract for full promotion or lead promotion, but rather the work he would normally do was awarded to another black promoter. Since Mary Flowers, a black promoter, was the co-promoter for the concert at the Theater at Madison Square Garden, Mr. Boseman's claim that he was not the co-promoter due to discrimination based on race fails. Since Mr. Rowe cannot recall any specific information about his claimed bid and has not produced a copy, Plaintiffs have presented no evidence to show that his bid was equal to, but lost to, a white promoter's bid. Additionally, the substantial black concert promoter involvement in Ms. Hill's 1999 concert and concert tours, contradicts Plaintiffs' claim of intent to discriminate due to Plaintiffs' race.

(vi) Plaintiffs' Claims Regarding Mud Island

Plaintiffs maintain that WMA discriminated against Plaintiff Fred Jones when it prevented him from securing an exclusive contract for the Mud Island Amphitheatre and from promoting James Taylor at Mud Island. (Pls.' Resp. WMA at 19-21.) The facts related to the Mud Island claim are reviewed in the Beaver section, *supra* pp. 96-99.

Plaintiffs have failed to produce any evidence indicating that WMA interfered, or conspired with other Defendants to interfere, with Mr. Jones

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potential exclusive contract at Mud Island. As stated *supra* pp. 99-100, Mayor Herenton decided that it was in the best interest of Memphis to keep Mud Island open to all promoters and made this decision without the influence of any of the Defendants in this matter.

*62 Plaintiffs argue that it is not a coincidence that on the same day (April 20, 1998) Mr. Jones sent WMA and other booking agencies a press release regarding his pending exclusive at Mud Island, Beaver sent a letter to the Memphis Park Commission asking that it not grant anyone an exclusive agreement on Mud Island and stating that if "an exclusive agreement is entered into with any other party, it will cause us to take our shows to other facilities in the market." (Pls.' Resp. WMA at 20 (quoting Leff letter, Pls.' WMA Ex. 141).) Mr. Jones also testified that a day or so after he sent out his press release to WMA, he spoke with Mr. Shelly Schultz and Mr. Kenny DiCamillo and was told that WMA was cancelling the James Taylor concert at Mud Island. (Jones Dep., Pls.' WMA Ex. 49, at 350.) Plaintiffs have presented no direct evidence that WMA used information it received from anyone, including Plaintiff Jones, to interfere or to conspire with others to interfere with the Mud Island contract. Plaintiffs argue instead that Beaver's "threat" in its April 20, 1998 letter, to use other facilities in the market if an exclusive agreement for Mud Island was granted was in fact endorsed by WMA and that the simultaneous cancellation of James Taylor's performances at Mud Island evidences this endorsement. (Pls.' Resp. WMA at 20.)

On April 17, 1998, three days before Mr. Jones announced his pending exclusive and Mr. Leff's letter, and less than a month after Mr. Kelley's suicide, Mr. Schultz of WMA confirmed to Susan Green, who was the former vice president of Mr. Kelley's Mid-South Concerts and who had been hired by Beaver for their new office in Memphis, that WMA was "cancel[ing] the James Taylor engagement at Mud Island Amphitheatre on June 23-24, 1998" and rescheduling the James Taylor concert with "Don Fox in conjunction with [her] and [her] new organization" at Mid-South Coliseum

on June 24, 1998. (Pls. WMA Ex. 124.)

Plaintiffs argue that "WMA switched venues in order to disguise its true intentions, which was to switch promoters and send a powerful message to the Commission regarding its intentions if it entered into an exclusive agreement with Jones." (Pls.' Resp. WMA at 21.) However, Plaintiffs have presented no evidence that WMA or Beaver or anyone else notified the Memphis Park Commission of the change of venue for the James Taylor concert. Accordingly, Plaintiffs' argument is pure speculation. Plaintiffs have failed to offer testimony by Commission Officers Mr. Boyer and Mr. Malmö or by Ms. Green to support their arguments.

Plaintiffs also argue that WMA switched promoters to discriminate against Mr. Jones and drive him out of the Memphis market. (*Id.*) In response to this allegation, WMA presents the affidavit of Shelly Schultz, now a third-party witness, who states that WMA did not decide to switch promoters, but rather "Mr. Taylor's management decided to have Beaver promote Mr. Taylor's appearance in Memphis at the Mid-South Coliseum on June 24, 1998 because ... Beaver was going to promote Mr. Taylor's appearance on June 20, 1998 in Little Rock [and due to Mr. Kelley's suicide] we did not have a promoter at Mud Island." (Aff. of Sheldon Schultz, dated May 21, 2003 ("Schultz Aff."), ¶ 8.) Mr. Schultz further states that Mr. Taylor's management also made the decision "because we understood at that time that Bob Kelley's employees in Memphis, who would be involved in promotion, were being hired by Beaver." (*Id.*) Mr. Schultz also states that when he wrote the letter to Ms. Green, he "did not know of Mr. Jones, let alone know that he hoped to step in at Mud Island." [FN166] (*Id.* ¶ 9.) Mr. Schultz states that he only learned about Mr. Jones intentions and relationship with Mr. Kelley when he received the fax from Mr. Jones about the Mud Island exclusive sometime after April 21 or 22, 1998. (*Id.*) Additionally, Mr. Schultz states that at the time of Mr. Kelley's death, no written contract between Mr. Taylor and Island Events or Mid-South Concerts had been prepared or even negotiated, but rather that he and Mr. Kelley had an oral understanding that Mr. Taylor intended to

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appear at Mud Island on June 23 and 24, 1998 and that the building was on hold for those dates. (*Id.* ¶ 6.)

FN166. Mr. Schultz states that he only spoke with Mr. Kelley or his employees at Mid-South Concerts, including Ms. Green, when his clients wished to play at Mud Island and that all concert related matters were handled by Mid-South employees. (Schultz Aff. ¶ 5.)

*63 Plaintiffs have failed to present a prima facie case of discrimination against Mr. Jones by WMA in relation to the alleged switching of promoters for the James Taylor concerts. Although there was an oral understanding that Mr. Kelley would promote Mr. Taylor's concerts, there was no written contract. Additionally, Plaintiffs have failed to present evidence of WMA's awareness of Mr. Jones's intention to promote shows at Mud Island before Mr. Jones's April 21, 1998 fax. The decision to change venues occurred on April 17, 1998. Even if Plaintiffs had presented a prima facie case of discrimination in relation to Mr. Taylor's concerts, WMA has provided a good business reason for its action since its principal, Mr. Taylor and his management, decided to hire Beaver. Plaintiffs have not offered any evidence to show that this business reason for WMA's actions was a pretext. *McDonnell Douglas*, 411 U.S. at 804.

(vii) *General Allegations of Discrimination by WMA*

Plaintiffs in their Response in Opposition to WMA's Motion for Summary Judgment state that "WMA has not produced a single contract demonstrating that a black promoter has ever promoted a white artist whom it represented. Not one." (Pls.' Resp. WMA at 1.) To support this claim, Plaintiffs do not cite the discovery record but rather paragraph 17 of Mr. Rowe's affidavit, dated April 21, 2003, and paragraph 5 of Mr. King's affidavit, dated April 22, 2003, both presented in response to the Defendant WMA's motion. (*Id.*) These two parties' statements, however, fail to mention evidence of the promotion of white artists

represented by WMA by black promoters, which WMA had produced to Plaintiffs. This evidence includes: Darryl Brooks's promotion of Eminem (Joint 56.1 Stmt. ¶ 189); [FN167] Bill Washington's promotion of New Kids On The Block, The Average White Band and Santana (*id.* at ¶ 203); Larry Bailey's promotion of the Average White Band and WAR (*id.* at ¶ 201); [FN168] Mary Flowers's promotion of Tony Bennett (Grosslight Dep., attached as Ex. 29 to Pls.' Resp. WMA Exs., at 163); and Plaintiff Rowe's promotion of the Average White Band (*id.* at 206).

FN167. Plaintiffs dispute Joint 56.1 Statement ¶ 189, but cite no evidence rebutting this claim as to this artist. This statement is considered as if undisputed.

FN168. Plaintiffs dispute this statement, but their response is unresponsive. Joint 56.1 Statement ¶ 201 is considered as if undisputed.

Similarly, Plaintiffs' brief asserts that "WMA does not require bids from its co-conspirators" and that "[t]he dearth of bids in WMA's files demonstrates that WMA does not solicit, receive or entertain competitive bids." (Pls.' Resp. WMA at 1.) This statement again is based on a conclusory statement in Mr. Rowe's affidavit. (*Id.*) Mr. Grosslight's declaration, however, shows that WMA produced to Plaintiffs its electronic database of concert bids received, which reflects 172,309 bids during the period from 1995 to 2001. (Grosslight Decl. II ¶ 13; *see also* Lewis Decl. Exs. 4, 5 (showing copies of alleged dominant promoter Mr. Kelley's two detailed rejected bids in WMA database).) Furthermore, the WMA electronic database shows a total of 87,502 bids were confirmed in the same period, of which only 7,275 bids were from the twenty-three former promoter defendants and 1,127 bids were from Jam and Beaver, while 79,100 confirmed bids were from non-defendant promoters. (Grosslight Decl. II ¶ 15.) The record is clear that WMA receives competitive bids and that 90% of the confirmed bids were from non-defendant promoters. WMA's receipt of 90% of the confirmed bids from non-defendant promoters also contradicts

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Plaintiffs' assertion in their responsive brief that WMA "contact[s] only an elite fraternity of dominant white promoters," i.e., the Promoter Defendants in this action. [FN169] (Pls.' Resp. WMA at 1.)

FN169. Furthermore, Plaintiffs have failed to present any evidence supporting its claims that WMA has "granted market domination to a small fraternity of dominant white promoters" (Pls.' Resp. WMA Mem. at 2) and has "unlawfully nurtured the dominant white promoters to great financial success" (*id.* at 7). To the contrary, Mr. Kapp's testimony, on which Plaintiffs rely as support for this conclusion, does not mention WMA. Mr. Kapp testified that the individual concert promoters, by purchasing venues and promoting as many shows as possible, have achieved dominant positions in each of their territories. (Kapp Dep., Pls.' Joint Mem. Ex. 12, at 230-33.)

*64 Plaintiffs' claim that WMA "withhold[s] unsolicited competing bids from black promoters from its artists" is based apparently on the affidavit of a former WMA employee, who last worked in the industry in 1986. (Pls.' Resp. WMA at 1 (citing R. Johnson Aff., Pls.' WMA Ex. 9, ¶ 3).) Mr. Johnson, however, states that unsolicited bids received by a WMA agent from any "secondary promoter" (white or black) "would likely never leave his or her desk." (R. Johnson Aff., Pls.' WMA Ex. 9, ¶ 3.) Thus, even if the statement in the R. Johnson affidavit was related to a relevant time period, it does not support a claim of racial discrimination because both white and black promoters would have been affected by the practice described.

Plaintiffs also accuse WMA of "withholding information necessary for black promoters to submit competing bids" as part of its "gatekeeping powers." (Pls.' Resp. WMA at 7-8.) Plaintiffs fail to cite any evidence to support this claim. They also fail to note that information about artists' concert plans can be obtained directly from the artists'

manager, whose names and addresses are available in Pollstar directories. (*See* Stoll Dep., in J.A., Vol. VI, at 87 (noting that Amusement Business and Pollstar publish guides on artists' representation).) As to the gatekeeping accusation, the testimony of the artists, artists' managers and WMA witnesses is that all bids are referred to the artists' management or the artist for their consideration. (Brown Dep., in J. Reply A., at 51; Cosby Dep., in J. Reply A., at 13, 33; Grosslight Decl. I ¶ 17; Azoff Decl. ¶ 5; Lewis Decl. ¶ 12; Weisner Dep., in J.A., Vol. VI, at 26-27, 29.) Plaintiffs have presented no contrary evidence.

In support of the claim that they are excluded by WMA, Plaintiffs' brief cites a letter from WMA's Sheldon Schultz to thirty-nine white promoters, dated April 22, 1998, (Pls.' WMA Ex. 117) giving them a year's advance notice of plans for a 1998 tour of Culture Club and inviting them to a VH-1 taping. (Pls.' Resp. WMA at 7-8, n. 19.) [FN170] However, Plaintiffs do not refer to and counter Mr. Schultz's explanation of why Plaintiffs did not receive such a letter. Plaintiffs have offered no evidence to controvert his testimony that the choice of promoters to whom this letter was sent was based on discussions with management along the way and was sent to "the promoters who worked with [Culture Club] in the past." (Dep. of Sheldon Schultz, dated June 11, 2002 ("Schultz Dep."), in J. Reply A., at 16-18.) [FN171] Since any promoter, whether black or white, who had not previously worked with Culture Club in the past did not receive notice, Plaintiffs have failed to show that "similarly situated non-minority members were treated differently." *See Johnson v. New York City Transit Auth.*, 639 F.Supp. 887, 893 (E.D.N.Y.1986), *aff'd in relevant part*, 823 F.2d 31 (2d Cir.1987). Thus, Plaintiffs have failed to meet their prima facie burden for this incident.

FN170. In this same footnote in their responsive memorandum, Plaintiffs cite a number of other letters that they claim demonstrate that WMA only contacted an "elite group of dominant white promoters to inform them of upcoming promotional opportunities and [to] make arrangements

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for their participation." (Pls.' Resp. WMA Mem. at 7-8, n. 19.) Plaintiffs base their assertion that "[n]one of these letters was sent to a single black promoter" on Mr. Rowe's affidavit. (*Id.*) Plaintiffs have chosen not to gather testimony relating to the circumstances relating to those letters and, thus, deprived the Defendants of the opportunity to present a legitimate business reason for contacting those particular promoters. Nor do those letters, selected from thousands of documents, raise an inference of racial discrimination since those letters were also not sent to the over 1,000 of the 1,042 independent white promoters identified in the Saad Study. (Saad Report, J.A., Vol. I, at 14.)

FN171. Plaintiffs chose not to depose management of Culture Club to challenge Mr. Schultz's sworn testimony as pretextual.

*65 Plaintiffs also assert that WMA requires "more onerous deposit terms from black promoters." (Pls.' Resp. WMA at 1, 9-10) As stated *supra* pp. 83- 86, 104-07, the Court's review of the contracts with Promoter Defendants Jam and Beaver shows that, although in some instances the deposit terms for contracts with the concert promoter defendants are 10% or less, instead of the 50% deposit Plaintiffs state is the industry standard and required of black promoters, the Promoter Defendants also are offered contracts by WMA calling for a 50% deposit. [FN172] (*See* Pls.' Rev. Jam Mem. Ex. 15; Pls.' Resp. Beaver Mem. Ex. 6E, 6F.) Plaintiffs claim that a pattern of disparity is evidenced by WMA's systematic exemption of "white promoters from the standard deposit requirements," citing two letters from WMA explaining that certain promoters will not pay a deposit. (Pls.' Resp. WMA Mem. at 10.) The evidence shows that non-concert promoter defendants such as Nederlander Theaters, which own a venue, will not pay a deposit. (Fax from Nancy Vance of WMA to Billie Bullock, manager for the Temptations, dated May 31, 1995 (stating "Nederlander does not pay deposits (never has, never will)"), Pls. WMA Ex. 114.) In this fax,

WMA is merely advising the artist's manager of Nederlander's refusal to pay a deposit. Similarly, the evidence shows that Cellar Door will not pay a deposit for concerts performed at The Bayou. (Letter from Guy Richard of WMA to Dave Kaplan, manager of Brian Setzer Orchestra, dated July 3, 1996, Pls.' Resp. WMA Ex. 52.) Plaintiffs' Response WMA Exhibit 52 merely advises that Cellar Door, as a matter of policy, does not pay deposits on concerts at The Bayou. (Pls.' Resp. WMA Ex. 52.)

FN172. As stated *supra* pp. 105-06, Plaintiffs have not shown that their selection of contracts is representative. Rather, the evidence shows that Plaintiffs choose the contracts that looked interesting to them.

Plaintiffs have not provided evidence to show that the lower deposit is uniformly *offered* to the defendant Concert Promoters by WMA. [FN173] Many WMA form contracts submitted by Plaintiffs show that more favorable terms are the result of negotiations by the concert Promoter Defendants. *See supra* pp. 83-86, 104-07. Accordingly, since the concert Promoter Defendants are offered and often required to pay a 50% deposit, and other white concert promoters and often the alleged dominant white promoters pay the 50% deposit (Liss Dep., in J.A., Vol. V, at 136), no reasonable juror could draw the inference that Plaintiffs, who have not contracted to promote many concerts, are offered contracts calling for a 50% deposit because they are black.

FN173. Plaintiffs, in their Memorandum in Response to WMA's motion, cite a number of exhibits containing contracts on WMA forms between artists and the alleged dominant promoters or letters from WMA to the alleged dominant promoters, which Plaintiffs claim are evidence of the "more onerous contractual terms" required of black promoters by WMA. (Pls.' Resp. WMA Mem. at 9-10.) Plaintiffs cannot show a *prima facie* case of discrimination under *McDonnell Douglas* using these

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exhibits, as they have not submitted any evidence showing they bid on any concerts related to the documents contained in the exhibits. Nor can Plaintiffs use these documents to demonstrate a pattern and practice of discrimination because they have selected these letters and contracts from thousands of documents.

Additionally, Plaintiffs do not cite to any testimony relating to the circumstances relevant to these exhibits by the parties involved or by any WMA employees. Instead, Plaintiffs rely solely on Mr. Rowe's affidavit to assert that "[t]here is no legitimate business reason which can justify these disparate contractual terms WMA requires of black and white promoters." (Pls.' Resp. WMA Mem. at 9.) Plaintiffs evidently chose not to explore the facts and circumstances surrounding these exhibits. Plaintiffs' failure to inquire about these "disparate contract terms" and exhibits during oral discovery deprived the Defendants of the opportunity to show that a valid business reason existed for these disparate terms.

Although there is evidence that many of the Defendants have done business together for years and that some of the individuals doing that business constitute a "fraternity" or "good old boy network" as Plaintiffs argue (Pls.' Resp. WMA at 7), there is no showing that these individuals are referred business by WMA in order to exclude the black promoters. (See Wavra Dep., in Pls.' Resp. WMA Ex. 88, at 39-47; Cooley Dep., in Pls.' Resp. WMA Ex. 85, at 96.) These longstanding relationships just as successfully exclude other white promoters.

*66 Plaintiffs claim that "WMA is responsible for promoter selection by virtue of its power of persuasion." (Pls.' Resp. WMA Mem. at 5.) Plaintiffs have not provided any admissible evidence to show that WMA used its "power of persuasion" in connection with any alleged discrimination against them. Furthermore, Defendants have offered evidence from artists' managers stating that they select the promoters. See

supra note 36. Mr. Grosslight attaches the affidavit of Irving Azoff, dated December 15, 2000, in which Mr. Azoff states that he, and the artists he represents, state preferences for particular concert promoters depending on the local marketplace for each concert and then the artists' talent agent negotiates with one or several of those concert promoters on the artists' behalf. (Azoff Aff., Grosslight Decl. I Ex. 1, ¶ 5.) [FN174] Additionally, Mr. Grosslight points out that all the cities and venues from the Eagles Reunion Tour in the United States and all the promoters for the tour, other than two, were designated by the Eagles manager, Mr. Azoff. [FN175] (Grosslight Decl. I ¶ 9.)

FN174. Mr. Grosslight also states that WMA has written policies setting forth its commitment to equal opportunity and non-tolerance of racial discrimination "in any form at [their] company whether it is by WMA employees, vendors or clients." (Grosslight Decl. I ¶ 12.)

FN175. The two promoters that Mr. Grosslight remembered were not so designated were in Tupelo, Mississippi and Lafayette, Louisiana, not cities allegedly controlled by the dominant promoter defendants, and that in one case, he recommended a black promoter and in the other a Caucasian. (Grosslight Decl. I ¶ 9.)

Plaintiffs argue that "WMA broke the law and acted against the best interest of its clients" by not presenting competitive options to the Spice Girls' management for consideration in February 1998 in relation to the Spice Girls 1998 tour and that WMA took such actions in order to exclude Plaintiffs. (Pls.' Resp. WMA Mem. at 14-17.) Plaintiffs present no evidence to support their contention that WMA took the alleged actions to exclude Plaintiffs. Plaintiffs present no evidence of any communication between Plaintiffs and WMA in relation to the 1998 Spice Girls Tour. Thus, this claim is irrelevant to Plaintiffs claim of a conspiracy to exclude them from concert promotion on the

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basis of race. [FN176]

FN176. Additionally, Plaintiffs evidently chose not to make the documents upon which they base their claim the subject of interrogation during depositions. Thus, there is no testimonial support for their interpretation of the documents. Review of the documents suggests that Plaintiffs' interpretation is misleading. Furthermore, these claims seem to be subject to Magistrate Francis's order of preclusion dated July 8, 2002. (J.A., Vol.II, Ex. 43.)

Similarly, Plaintiffs argue that WMA excluded black promoters from the Smokin' Grooves Tours, which were allegedly awarded to House of Blues (not a defendant in this action) every year until this action, in exchange for illegal remuneration. (Pls.' Resp. WMA Mem. at 17.) Mr. Rowe and Mr. Boseman both claim in their opposing affidavits that Ms. Lewis "rebuffed" their inquiries about the Smokin' Grooves Tours (Rowe WMA Aff., Pls.' Resp. WMA Ex. 1, ¶ 37, Boseman WMA Aff., Pls.' Resp. WMA Ex. 2, ¶ 12), but neither provided any specific facts to support this allegation. Once again, Plaintiffs' claim is irrelevant since Plaintiffs offer no testimony that they sought to bid on the Smokin' Grooves tour. Additionally, Plaintiffs chose not to depose WMA about the documents they cite to obtain testimonial support for their conclusion. (Grosslight Decl. II ¶ 4.) In his declaration dated May 22, 2003, Mr. Grosslight refutes Plaintiffs' claim that House of Blues illegally remunerated WMA. (*Id.* ¶¶ 4-6.) Additionally, Mr. Grosslight explains that House of Blues was a presenter of the tours and that each individual date on the three tours was promoted by local promoters. (*Id.* ¶ 11.) Additionally, Darryl Brooks, a black promoter, promoted all twenty-six shows of the Smokin' Grooves tour in 1998, eliminating any claim that Plaintiffs were somehow denied the opportunity to promote due to their race. (*Id.* ¶ 10.) Finally, this claim of Plaintiffs seems to be precluded under Magistrate Francis's order of preclusion, dated July 8, 2002. (J.A., Vol.II, Ex. 43.)

(viii) *Plaintiffs Have Presented Insufficient*

Evidence to Survive Summary Judgment on Discrimination Claims

*67 Plaintiffs' claims under 42 U.S.C. §§ 1981 and 1985(3) fail as they have not presented any facts from which any rational jury could infer intentional discrimination on the part of WMA, nor have they presented any evidence that WMA was a member of a conspiracy to discriminate against the Plaintiffs because of their race. Plaintiffs also allege a violation of 42 U.S.C. § 1986 against WMA for failure to act or prevent the conspiracy to discriminate against Plaintiffs. Plaintiffs have not shown that WMA had knowledge of any conspiracy to discriminate against Plaintiffs. Furthermore, claims under § 1986 can rest only on a predicate claim made out under § 1985. *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 292 (2d Cir.1992) ("Liability under § 1986 is derivative of § 1985 liability, i.e., there can be no violation of § 1986 without a violation of § 1985."). As the § 1985 claim was unsuccessful, WMA's motion for summary judgment on Plaintiffs' § 1986 claim will be granted.

2. Creative Artists Agency, LLC's Motion for Summary Judgment

The Amended Complaint contains three specific alleged violations of 42 U.S.C. § 1981 by CAA. The first claimed violation consists of CAA's alleged exclusion of Plaintiffs Boseman and Sun Song from promoting concerts, including the 1998 tour by the Artist formerly known as Prince ("Prince"). (Am.Compl.¶ 87(b).) The second incident involves the alleged misrepresentation by CAA to Plaintiff Rowe in October 1996 that minimum artist guarantees of \$225,000 to \$275,000 per show with a 50% deposit were required from Plaintiffs for the 1997 Kenny G/Braxton tour, while the Defendant Promoters were awarded guarantees of only \$150,000 to \$175,000 per show and lower deposit terms. (*Id.* ¶ 87(f).) The third allegation involves CAA's alleged award of the 1998 Janet Jackson tour to Magicworks instead of Plaintiffs. (*Id.* ¶ 87(1).) The Amended Complaint also claims that "CAA has never solicited or permitted any black promoter, including plaintiffs, to promote, or

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even bid to promote a concert of contemporary music by a white act." [FN177] (*Id.* ¶ 19.)

FN177. In the Amended Complaint, Plaintiffs additionally assert:

In or about May 1999, after this lawsuit was filed, CAA recently hired the first black agent in the history of the concert business to participate in booking white contemporary music acts. Dennis Ashley telephoned plaintiff Rowe and thanked him for bringing this lawsuit because, he said, it was the reason he was hired. He told Rowe that he was being treated like a king. (Am. Compl. ¶ 87(o).)

In their motion papers, Plaintiffs cite this statement and other instances involving CAA's hiring policy and work environment as evidence that "bolsters the plaintiffs' allegations of racial discrimination against CAA." (Pls.' Response in Opp'n to CAA's Mot. for Summ. J., dated Apr. 25, 2003 ("Pls.' CAA Mem."), at 21-22.) Mr. Ashley, however, testified that he did not know Mr. Rowe prior to his employment at CAA and never called Mr. Rowe to thank him for this lawsuit or his job. (CAA 56.1 Stmt. ¶ 121.) In any event, CAA's hiring of a black agent to participate in booking white contemporary music acts is not evidence of any discriminatory action by CAA against Plaintiffs. Additionally, CAA has a policy of equality and equal opportunity. (Dep. of Richard Lovett, dated Feb. 26, 2002 ("Lovett Dep."), in Pls.' CAA Dep. Tr., Vol. I, at 99-100.) CAA has a strict policy against discrimination in employment and in all dealings with clients, vendors and the public. (Light Decl. I ¶ 5.)

Additionally, Plaintiffs' motion papers allege that CAA prevented, and conspired to prevent, Plaintiff Jones from obtaining an exclusive promotion contract at Mud Island in violation of 42 U.S.C. §§ 1981, 1985(3) and 1986. (Pls.' CAA Mem. at 19-20; see also Am. Compl. ¶ 87(k).) Also, their papers assert that CAA is part of conspiracy to

exclude Plaintiffs and other black promoters from promoting white artists and superstar black artists. (Pls.' CAA Mem. at 1-7)

(i) Plaintiffs' Claims Regarding Prince

In the Amended Complaint, Plaintiffs allege:

In the late 1970s, plaintiffs Jesse Boseman and Sun Song promoted concerts given by the Artist formerly known as Prince at a time when the Artist was merely the opening act for a then headlining performer, Rick James. In promoting such concerts, those plaintiffs helped the Artist achieve his own following. The Artist has now achieved star status, but his booking agency, CAA, now retains only promoter defendants to promote the Artist's concerts, including his 1998 tour.

*68 (Am. Compl. ¶ 87(b).)

In their motion papers, Plaintiffs claim that CAA represented Prince for tours in 1984, 1988, 1992, and 1994 without providing Plaintiffs the opportunity to bid, even though Mr. Boseman "made many requests [of] CAA to play Prince." (Pls.' CAA Mem. at 19 (relying on Boseman Dep.)). Mr. Boseman's deposition shows, however, that Mr. Boseman believes in 1981 and 1982 he spoke with "someone" at CAA, Inc., not CAA, LLC, on the telephone regarding Prince, but was told there were not any dates available at that time. (Boseman Dep., in J.A., Vol. III, at 920-22.) Mr. Boseman has provided no documentation regarding, or the date of, the telephone call, which took place well beyond the statute of limitations period. At some unspecified point in the mid 1990s, Mr. Boseman states he called either CAA, or WMA, to inquire about Prince, but then decided not to submit a bid because he felt the requested guarantee was too high. (CAA 56.1 Stmt. ¶ 114; Boseman Dep., in J.A., Vol. III, at 562-65.) Mr. Boseman does not claim to have had any other contact with CAA or CAA, Inc. regarding Prince. (*Id.* ¶ 115.) [FN178] Accordingly, Plaintiffs have not shown that Mr. Boseman applied for and was rejected for a concert promotion by CAA, as required to assert a prima facie case against CAA under 42 U.S.C. § 1981.

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FN178. Plaintiffs' reply is non-responsive; CAA 56.1 Stmt. ¶ 115 is considered as if undisputed.

Plaintiffs assert that "[b]lack promoters have rarely promoted Prince ... including while Prince was represented by CAA." (Pls.' CAA 56.1 Stmt. ¶ 236.) They offer no support for this claim except for Mr. Rowe's opposing affidavit. (*See id.* (citing Rowe CAA Aff. ¶ 149).) During his deposition, Mr. Sparks, a black promoter, testified that since 1995 he has advised Prince on which promoters to use, that Prince has not used booking agencies, and that Prince himself decides which promoters to use. (Sparks Dep., in J. Reply A., at 62.) Although Mr. Sparks testified that prior to 1993 the booking agencies chose the promoters (*id.* at 65), he also stated that he and Mr. Perry, another black promoter, were often asked by booking agents at CAA for concert promoter suggestions (*id.* at 66.).

Plaintiffs' only remaining claim is that CAA did not seek them out to represent Prince, but Plaintiffs offer no evidence or expert evidence or legal authority to show that CAA had any obligation to do so. Plaintiffs claim that "Boseman helped Prince achieve his own following" (Pls.' CAA Mem. at 18), and thus, Mr. Boseman should have some right to promote Prince now. However, the only evidence of, or explanation provided for, Mr. Boseman's involvement is a reference to Mr. Boseman's promotion of Prince at some point before 1979. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 268.) CAA, LLC only came into existence in 1995, and Plaintiffs offer nothing to show that CAA, LLC had the benefit of CAA, Inc.'s knowledge of Mr. Boseman's prior involvement with promoting Prince. Although CAA, Inc. did represent Prince from 1984 to 1993 (Sparks Dep., in J.A., Vol. VI, at 83, 89), as Mr. Sparks, his manager testified, Prince stopped using any booking agencies in or around 1993. (CAA 56.1 Stmt. ¶ 117.) Plaintiffs have not attempted to develop any evidence to show that CAA (CAA, LLC), which first entered the booking agency business in October of 1995 (CAA 56.1 Stmt. ¶¶ 1-2; Light Dec. I ¶ 3), is liable for the acts of CAA, Inc. Lastly, paragraph 87(b) of the Amended Complaint makes reference to a 1998

Prince tour, but Plaintiffs admit in their memorandum in opposition that CAA did not represent Prince in 1998. (Pls.' CAA Mem. at 18.) Accordingly, paragraph 87(b) of the Amended Complaint is a totally unfounded claim against CAA.

(ii) Plaintiffs' Claims Regarding Toni Braxton

*69 In paragraph 87(f) of the Amended Complaint, Plaintiffs allege that CAA discriminated against them in connection with the 1997 Kenny G/Toni Braxton tour. [FN179] In their response papers, Plaintiffs claim that CAA misinformed Mr. Rowe concerning the bidding requirements, that black promoters were not given an opportunity to bid, and that white promoters received more favorable terms than those quoted to Plaintiffs. (Pls.' CAA Mem. at 7-13.) Under the undisputed facts reviewed *supra* pp. 73-76, Plaintiffs have not provided evidence that CAA discriminated against them.

FN179. This claim is connected to Plaintiffs' general allegation that even when Plaintiffs have promoted black artists in the past, they are not given opportunity to promote these artists once they reach "star status." (*See Am. Compl.* ¶ 4.) Plaintiffs, however, have provided no evidence showing they in fact ever served as "promoters" for Toni Braxton previously. *See supra* p. 73.

In his deposition, Mr. Rowe testified that his initial conversation with Mr. Piranian of CAA took place in October or November of 1996 and that during this conversation Mr. Piranian demanded concert guarantees of \$225,000 to \$275,000 for major cities. (Rowe Dep., in J.A., Vol. VI, at 1382, 1384.) In his responsive affidavit, Mr. Rowe states that in 1996, before he spoke to Mr. Piranian, he had learned from Al Haymon that CAA was asking for guarantees of \$250,000 to \$275,000. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 215.)

The Defendants do not contest that Mr. Piranian was asking for concert bids containing guarantees within the \$225,000 to \$275,000 range at that time,

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but have provided evidence that in the fall of 1996, CAA was under instructions from Kenny G's manager, Turner Management, to make those demands to all promoters. (See Phillips Dep., in J.A., Vol. V, at 49-50; Light Dep., in J.A., Vol. V, at 472-75.) That other promoters were asked for such terms is buttressed by a contract between Radio City Music Hall and Turner Management, dated August 16, 1996, for six Kenny G/Braxton concerts for a per show guarantee of \$280,000 [FN180] (Light Decl. II Ex. 3) and a letter from Ken Scher of Nederlander to Carole Kinzel of CAA, dated October 25, 1996, confirming the terms and conditions of an agreement between Turner Management and Nederlander, which included a minimum artist guarantee of \$225,000 and a 90/10 artist split, for a concert at Nederlander's auditorium in Anaheim, California (Light Decl. I Ex. 5). Plaintiffs have offered no evidence that CAA asked for lesser guarantees from white promoters when CAA asked for guarantees from Plaintiffs, which would support a prima facie case of discrimination under *McDonnell Douglas*. Even if they had met the burden of showing a prima facie case, Plaintiffs present no evidence to show that CAA's business reason, instructions from its principal, for demanding guarantees between \$225,000 to \$275,000 was a pretext. *McDonnell Douglas*, 411 U.S. at 804. Accordingly, Plaintiffs have offered no evidence showing CAA discriminated against Mr. Rowe and Mr. Boseman concerning the bidding requirements for the 1997 Kenny G/Braxton tour.

FN180. This contract was revised by Dennis Turner, Kenny G's manager, in January 1997 to \$232,597 per show. (Light Decl. II Ex. 4.)

Plaintiffs' second point that black promoters were not given an opportunity to bid is also without an evidentiary foundation. In his responding affidavit, Mr. Rowe discloses that, prior to his discussion with Mr. Piranian, Mr. Haymon had advised him that CAA was asking for \$225,000 to \$275,000 guarantee per concert. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 215.) Mr. Haymon testified that there is no way to prevent a promoter from submitting a bid. (Haymon Dep., McCabe Decl. Ex. 11, at 48-49,

189-90, 252, 438.) Mr. Rowe testified that he discussed CAA's terms with Mr. Haymon, and they both believed the requested guarantee was too high. (Rowe Dep., in J.A., Vol. VI, at 1383.) Toni Braxton's manager testified that other "promoters balked" at these initial guarantees, and subsequently, Turner Management accepted lesser terms. (Phillips Dep., in J.A., Vol. V, at 50.) Thus, Mr. Rowe's own affidavit and his deposition testimony demonstrates that he had the opportunity to bid but chose not to make an offer or a counter offer. Plaintiffs cannot, by other affidavits, seek to override their deposition testimony and claim they were not given an opportunity to bid. *Bickerstaff*, 196 F.3d at 455.

*70 Plaintiffs next argue that the Kenny G/Braxton tour had been sold to white dominant promoters before Mr. Rowe even learned about the tour. (Pls.' CAA Mem. at 7 (citing Rowe CAA Aff. ¶ 215).) Mr. Rowe's affidavit states that concerts in Atlanta, Detroit, and Chicago had been sold at the time of his conversation, [FN181] but he does not state any basis for this belief. As it is not shown to be based on personal knowledge, it cannot be accepted as evidence in this case. Furthermore, the only evidence in the record as to these cities is a contract for Chicago with Defendant Jam, dated November 25, 1996 (Armand Decl. Ex. A), which would have occurred after the date of Mr. Rowe's conversation with Mr. Piranian in October or November 1996. (Rowe Dep., in J.A., Vol. VI, at 1384.)

FN181. Mr. Rowe does not state to which concert he refers.

As for Plaintiffs' claim that white promoters received more favorable terms than those quoted to Plaintiffs, again, this assertion is based on Mr. Rowe's affidavit. Whether it supports Plaintiffs claim depends upon the when the terms were offered. It is undisputed that after Turner Management's initial terms were not accepted, bids were accepted with lower guarantees. (Phillips Dep., in J.A., Vol. V, at 50.) Plaintiffs have failed to present evidence that at the time Mr. Piranian made the quotes containing the \$225,000 to \$275,000 guarantees to them that CAA was

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accepting bids from the dominant white promoters for lower guarantees. Plaintiffs have had access to all the CAA concert files, as well as email and hard drive discovery. Furthermore, Defendants have provided copies of contracts for Kenny G/Braxton concerts containing guarantees in this range. Plaintiffs have failed to provide proof of discriminatory terms being offered by CAA at the time of Plaintiffs' receipt of the terms demanded by Mr. Piranian.

Nor is there any evidence to support the Amended Complaint statement "no white promoter, including any of the promoter defendants promoting this tour, was required to submit a deposit of any more than 0-10% of the \$150,000-\$175,000 guarantee." (Am.Compl.87(f).) CAA has produced twenty concert promotion contracts, in which current defendant Jam and former defendant and non-party concert promoters contracted to pay pre-performance deposits of 50% of the guarantees for concerts on the 1997 Kenny G/Braxton Tour. (Armand Decl. ¶ 2, Ex. A.) [FN182] Thus, the contracts in evidence do not support an inference of race discrimination against Plaintiffs in connection with the Kenny G/Braxton tour in 1997.

FN182. Jam's contract, dated November 25, 1996, with Kenny G and other contracts for the Kenny G/Toni Braxton concerts are on CAA's form contract and require the promoters to provide deposits based on the guarantees for Kenny G and do not provide separate guarantees for Toni Braxton. (See Armand Decl. Ex. A.) Plaintiffs have presented contracts on WMA forms that do not require the promoters to pay deposits for Ms. Braxton. See *supra* note 145. From the Court's review of these documents, the contracts on WMA forms secure Ms. Braxton's appearances at the Kenny G concerts, as required by the promoters' contracts with Turner Management.

Although many of the contracts presented by CAA provide for guarantees below the initial guarantee requested, Ms. Braxton's manager testified that many promoters felt

that the initial guarantees were too high and submitted lesser bids. (Phillips Dep., in J.A., Vol. V, at 50.) Additionally, the evidence shows that black promoter Larry Bailey received a contract with \$65,000 guarantee and 85/15 split with a \$16,250 (25%) deposit by company check on March 11, 1997 (Armand Decl. Ex. B) and a contract for another venue with approximately the same terms on April 11, 1997 (Armand Decl. Ex. C).

(iii) Plaintiffs' Claims Regarding Janet Jackson

(a) Amended Complaint Claim

In the Amended Complaint, Plaintiffs allege:

Defendant Magicworks was given the exclusive contract to promote a tour given by superstar black promoter, Janet Jackson, in 1998, by defendant CAA. Magicworks co-promoted the tour with the other promoter defendants. Several of the plaintiffs had previously promoted Janet Jackson shows in 1994, and had also promoted her superstar brother, Michael Jackson. Plaintiffs protested and were allowed to only co-promote shows in New York and Los Angeles with defendants Delsener/Slater and Magicworks.

*71 (Am.Compl.¶ 87(1).)

(b) Review of Facts [FN183]

FN183. Unless otherwise noted, the following facts are undisputed by testimony, affidavits or declarations of Plaintiffs, which are based on personal knowledge. Fed.R.Civ.P. 56(b).

CAA was Janet Jackson's booking agency in connection with her 1998 concert tour. [FN184] (Light Decl. I ¶ 30; CAA 56.1 Stmt. ¶ 69.) Roger Davies was Ms. Jackson's manager. (Light Decl. I ¶ 30.) Before the tour was sold to a national tour promoter, all material decisions relating to the tour were made by Mr. Davies, on behalf of Ms. Jackson, including decisions regarding financial terms, the selection of concert promoters and approval of routing. (*Id.* ¶ 31; CAA 56.1 Stmt. ¶

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71; [FN185] Light Dep., in J.A., Vol. V, at 118-19; Kinzel Dep., in J.A., Vol. V, at 97-99.) CAA encouraged the involvement of black promoters in Ms. Jackson's 1998 tour, and Mr. Light made this recommendation in several discussions with Mr. Davies. (Light Decl. I ¶ 32; CAA 56.1 Stmt. ¶ 72. [FN186]) Ms. Jackson and Mr. Davies agreed that it was important to involve black promoters in the tour and decided to require black representation on the tour as part of any deal. (Light Decl. I ¶ 32; CAA 56.1 Stmt. ¶ 72.) Therefore, in discussions about the tour, Mr. Light mentioned to prospective buyers that Janet Jackson wanted to have black representation in the marketing and promotion of her concerts. (CAA 56.1 Stmt. ¶ 73; [FN187] Light Dep., in J.A., Vol. V, at 121-22, 128-29; Sparks Dep., in J.A., Vol. VI, at 118-26.) [FN188] Ms. Jackson and Mr. Davies initially asked for guarantees of \$300,000 per concert. (Light Decl. I ¶ 32; CAA 56.1 Stmt. ¶ 74. [FN189]) Mr. Light had a number of conversations with Mr. Rowe regarding Ms. Jackson's 1998 tour and repeatedly encouraged him to submit a bid for the tour. (Light Decl. I ¶ 33; CAA 56.1 Stmt. ¶ 75. [FN190]) Based on the parameters set by Ms. Jackson and Mr. Davies, Mr. Light informed interested promoters, including Mr. Rowe, that Janet Jackson was seeking a guarantee of \$300,000 per show. (Light Decl. I ¶ 32; CAA 56.1 Stmt. ¶ 76. [FN191])

FN184. Plaintiffs claim that the alleged discrimination against them in relation to the 1998 Janet Jackson concert is connected to Plaintiffs' general allegation that even when Plaintiffs have promoted black artists in the past, they are not given opportunity to promote these artists once they reach "star status." (See Am. Compl. ¶ 4.) Al Haymon was lead promoter for the 1994 Janet Jackson tour, and Ms. Jackson was a CAA, Inc. client at that time. (Haymon Dep., in J.A., Vol. IV, at 123-24.) At his deposition, Plaintiff Rowe stated that he didn't know which Janet Jackson concerts he co-promoted in 1994 (Rowe Dep., in J.A., Vol. VI, at 541), but in his affidavit submitted in response to

CAA's motion, Mr. Rowe states that he co-promoted Janet Jackson in 1994 with Mr. Haymon in Atlanta and Detroit (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 271). In his deposition, Mr. Boseman stated he co-promoted Ms. Jackson in 1994 in New York, put up a guarantee on the show, and provided services such as advertising and street production. (Boseman Dep., in J.A., Vol. III, at 1255-57.)

FN185. Plaintiffs dispute this statement, but cite the affidavit of Mr. Rowe for support. (Pls.' Resp. CAA 56.1 Stmt. ¶ 71.) Mr. Rowe has not been shown to have personal knowledge regarding this statement and does not cite any other source for this statement. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 230.) Thus, CAA's 56.1 Statement ¶ 71 is considered as if undisputed.

FN186. Plaintiffs dispute this statement in part, but only cite Mr. Rowe's affidavit submitted in response to this motion. (Pls.' Resp. CAA 56.1 Stmt. ¶ 72.) Mr. Rowe has not been shown to have personal knowledge regarding this statement and does not cite any other evidence for this statement. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 231.) Thus, CAA's 56.1 Statement ¶ 72 is considered as if undisputed.

FN187. Plaintiffs dispute this statement based on Mr. Rowe's affidavit stating that he was not told Ms. Jackson insisted on black promoter involvement. (Pls.' Resp. CAA 56.1 Stmt. ¶ 73 (citing Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 232).) However, in the letter Mr. Light sent Mr. Rowe on March 4, 1998, Mr. Light mentioned that there must be black involvement in each date. (Letter from Rob Light to Leonard Rowe, dated Mar. 4, 1998, Light Decl. I Ex. 13.) CAA's 56.1 Statement ¶ 73 is accepted as if undisputed.

FN188. Brad Wavra of Magicworks

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testified that someone at CAA raised the concern of involving black promoters on the 1998 Janet Jackson tour with him during negotiation of the Magicworks/Jackson contract, but he could not remember when, or whether they specified Ms. Jackson's concern about this. (Wavra Dep., in J.A., Vol. VI, at 135-36.) Prior to the 1998 Janet Jackson tour, Mr. Wavra had not included black promoters when he promoted black artists. (*Id.* at 141.)

FN189. Plaintiffs dispute this statement as based on inadmissible hearsay. The statement is offered only for the fact that it was made and therefore is not hearsay. *See infra* note 197. If admissible, Plaintiffs do not dispute that \$300,000 was the amount, but dispute that Mr. Light was instructed about this. (Pls.' Resp. CAA 56.1 Stmt. ¶ 74.) Plaintiffs base this objection on Mr. Rowe's affidavit. Plaintiffs present no evidence to show that Mr. Rowe has personal knowledge of instructions given to Mr. Light, and, thus, Mr. Light's statement is considered as if undisputed.

FN190. Plaintiffs dispute this statement in part. Specifically, Plaintiffs deny that Mr. Light "encouraged" Mr. Rowe to send in a bid, but they admit Mr. Light provided information about the tour to Mr. Rowe. (Pls.' Resp. CAA 56.1 Stmt. ¶ 75 (citing Rowe CAA Aff. ¶ 325).)

FN191. Plaintiffs dispute this statement in the same manner they dispute CAA's 56.1 Statement ¶ 74.

In January 1998, CAA received a written proposal from Magicworks, dated January 27, 1998, to purchase the rights to produce a tour of forty shows by Ms. Jackson, supported by Boyz II Men, for a \$16 million guarantee, including support talent. (Light Decl. I ¶ 34, Ex. 8; CAA 56.1 Stmt. ¶ 77.) CAA conveyed this offer to Mr. Davies. (Light Decl. I ¶ 34.) Magicworks's proposal called for

Magicworks to act as producer of "a minimum of 40 dates in mutually agreed upon markets" and "an option of two 10 date additions at Four Million Dollars per [each 10 date] addition." (Light Decl. I Ex. 8.)

Around February 2, 1998, TNA International Ltd. ("TNA"), another large concert promoter company, submitted an offer directly to Ms. Jackson's management. (CAA 56.1 Stmt. ¶ 78.) TNA proposed to promote a fifty show tour by Ms. Jackson with a guarantee of \$11.5 million. (*Id.*) TNA proposed cash sufficient to cover tour start up costs on signing with the balance of the guarantee to be paid by letter of credit drawn on a mutually acceptable bank. (*Id.*; *see also* Light Decl. I ¶ 32, Ex. 9.)

*72 On or about February 10, 1998, Mr. Light received a letter from Mr. Rowe, on behalf of Rowe Productions, stating:

It was indeed a pleasure speaking to you yesterday.

I would like to make a firm offer of Three Hundred Thousand Dollars (\$300,000) all inclusive to your respective Artist, Janet Jackson for the markets listed. We are also open to the idea of co-promoting with Pop Promoters [FN192] in some markets. The markets are as follows: [listing twenty-nine cities].

FN192. Mr. Rowe in his deposition refers to white promoters as Pop promoters.

Please give this matter your immediate attention. (Light Decl. I Ex. 10.) [FN193]

FN193. The letter constitutes an offer to produce a tour for Janet Jackson but does not contain dates or information relating to proposed financing, ticket prices or other items included in written offers for individual concerts. (Light Decl. I ¶ 36.) The total of this offer is \$8.7 million.

CAA forwarded Mr. Rowe's offer to Gillian and Rusty Hooker of Mr. Davies's office. (*Id.*; CAA 56.1 Stmt. ¶ 79; [FN194] Kinzel Decl. ¶ 5.)

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FN194. Plaintiffs dispute this statement, citing Mr. Rowe's affidavit stating that Mr. Rowe has not seen any document demonstrating that Mr. Light forwarded his offer. (Pls.' Resp. CAA 56.1 Stmt. ¶ 79 (citing Rowe CAA Aff. ¶ 234).) Plaintiffs claim that the "truth of Mr. Light's testimony is a question of fact for the jury." (*Id.*; see also Pls. CAA Mem. at 14 n. 22.) Ms. Kinzel states in her declaration, dated May 20, 2003, that Mr. Light forwarded her Mr. Rowe's letter and that she wrote "fax Gillian and Rusty" on the letter as an instruction to her assistant, who then faxed the letter to Rusty Hooker, who worked with Mr. Davies. (Kinzel Decl. ¶ 5.) Ms. Kinzel attaches a copy of the letter with a note, undisputedly in her handwriting, to her declaration. (Kinzel Decl. Ex. 2.) Plaintiffs have presented no evidence to contradict the testimony of Mr. Light or Ms. Kinzel, and, thus, the truth of statement is not controverted. See *Berman*, 986 F.Supp. at 200.

In his declaration, Mr. Light states that he recommended to Mr. Rowe that he submit a more complete and definite offer. (Light Decl. I ¶ 37; CAA 56.1 Stmt. ¶ 80.) Mr. Rowe states to the contrary, that after his February 10, 1998 letter, Mr. Light did not contact him by letter or phone to recommend he send a more complete and definite offer. (Rowe CAA Decl. ¶ 236; Pls.' 56.1 Stmt. ¶ 80.) [FN195]

FN195. Mr. Rowe's letter of February 20, 1998, (Light Decl. I Ex. 11), demonstrates that Mr. Rowe's statement in paragraph 236 of his responsive declaration is untrue.

Nonetheless, on or about February 20, 1998, Mr. Light received another letter on BPA letterhead from Mr. Rowe, indicating that they had had a conversation after Mr. Rowe's February 10, 1998 letter and this time expressing the BPA's interest in being involved in twenty-eight markets on Ms. Jackson's 1998 tour. (Light Decl. I ¶ 38, Ex. 11.) The BPA letter states:

Per our conversation I am submitting to you these markets that we would like to be involved in. Since you have no knowledge of whether the tour will be sold to a Tour Promoter or individual Promoters, I can not discuss the financial arrangement that I am willing to make at this time. But from my previous offer, you know that I am willing to offer a sizeable guarantee. I will provide more details concerning the guarantee when you provide me with more information about the tour. The markets are as follows: [listing 28 cities.]

Please give this matter your immediate attention.
(Light Decl. I Ex. 11.)

Between January 25 and February 20, 1998, Magicworks submitted a number of revised proposals to produce Ms. Jackson's tour. (Light Decl. I ¶ 39; CAA 56.1 Stmt. ¶ 82.) [FN196] On February 25, 1998, CAA received a revised bid from Magicworks offering an \$11 million guarantee for forty shows by Janet Jackson supported by Usher, with a substantial up-front cash payment (\$5 million to be paid at least forty-eight hours prior to first offer of tickets for sale) and \$6 million secured by an irrevocable letter of direction to each of the venues to hold receipts of ticket sales totaling \$150,000 in the name of Janet Jackson. (Light Decl. I ¶ 40, Ex. 12; CAA 56.1 Stmt. ¶ 83.)

FN196. The head of CAA's Music Department recommended to Don Passman, Ms. Jackson's attorney, that Ms. Jackson would be better served by using individual promoters rather than a national tour promoter such as Magicworks. (Dep. of Thomas Ross, dated Jan. 29, 2002 ("Ross Dep."), in J. Reply. A, at 152-54.)

Mr. Davies instructed CAA to inform the interested promoters that Ms. Jackson was looking for offers for forty dates with half the guarantee up front (prior to the first on sale date) and the remainder secured with an irrevocable letter of credit. (Light Decl. I ¶ 41; CAA 56.1 Stmt. ¶ 84.) [FN197] In his declaration, Mr. Light states, "[t]hereafter, I had another discussion with Mr. Rowe concerning the tour and, in accordance with Mr. Davies's

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instructions, informed him of the deal terms that Ms. Jackson was seeking and urged him to submit a comprehensive offer. I also told Mr. Rowe that we had received an offer for \$11 million. CAA also continued to negotiate with Magicworks." (Light Decl. I ¶ 42; CAA 56.1 Stmt. ¶ 85.)

FN197. Plaintiffs claim that Mr. Davies's instructions to Mr. Light are hearsay is rejected. Mr. Light's declaration states it is based on personal knowledge (Light Decl. I ¶ 2), and statements of instructions received are admissible in evidence, not to prove the truth of the statements contained in those instructions, but rather to prove the fact that the instructions were received. Fed.R.Evid. 801(c); see Advisory Committee's Notes Subdivision (c) ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir.1950), *rev'd on other grounds*, 340 U.S. 558.")

*73 Mr. Light wrote a confirming letter, dated March 4, 1998, to Mr. Rowe, which reads as follows:

As per our discussion, Janet Jackson has decided to use a national tour producer for her 1998 North American Tour. We are talking to all interested parties and inviting them to make an offer. As I mentioned, the basic parameters are as follows:

- 40 dates
- 10 truck show
- sellable seat to 180 degrees
- producer to pay for and contract support
- 50% deposit to Artist prior to first on sale date, balance in a irrevocable letter of credit prior to first on sale date
- advertising must use both pop and urban media outlets

- there must be black representation in each date

As I told you when we spoke, it is the Artist's desire to have all the offers in by the close of business Wednesday, March 4, 1998. The urgency is to allow a press conference to take

place on March 12th and to go on sale quickly thereafter.

The decision to use a national producer was reached over this past weekend and all interested parties are being given the same parameters. We appreciate your quick response.

(Light Decl. I Ex. 13 (Letter from Rob Light to Leonard Rowe, dated Mar. 4, 1998).)

Mr. Rowe did not respond to Mr. Light's letter of March 4, 1998. (Rowe Dep., in J.A., Vol. VI, at 1443.)

(c) Plaintiffs Have Failed to Present a Prima Facie Case of Discrimination with Respect to Mr. Light's Presentation of Tour Deal Terms to Mr. Rowe

Mr. Light's testimony that Ms. Jackson's management instructed him to present the deal terms for this tour to all interested promoters, including Mr. Rowe, constitutes a valid business reason for his presentation of these terms to Mr. Rowe. *McDonnell Douglas*, 411 U.S. at 804. Plaintiffs provide no evidence that Mr. Light's business reason was a mere pretext. Instead, Plaintiffs state in their response to CAA's 56.1 Statement that "Plaintiffs have no way on [sic] knowing whether Mr. Davies gave Mr. Light these instructions." (Pls.' Resp. CAA 56.1 Stmt. ¶ 84.) However, Plaintiffs could have utilized third party discovery. When Mr. Light was deposed on December 18, 2001, he was questioned about a declaration he had evidently executed previously, in which he stated that the basic parameters had been set by Ms. Jackson through her management for the Jackson tour and included forty dates, a 50% deposit prior to the first on-sale date, and the balance to be paid in an irrevocable letter of credit. (Light Dep., in J.A., Vol. V, at 118-119.) Plaintiffs also suggest that CAA did not propose to white promoters a guarantee of 50% in cash and the remainder secured by a letter for credit. (Pls.' CAA Mem. at 15.) Mr. Light, however, testified that the same proposal was given to other promoters interested in producing the tour and testified as to the identity of the other interested promoters he remembered--Magicworks, TNA, Metropolitan and BGB. (Light Dep., in J.A., Vol. V, at 119.)

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Plaintiffs offer no testimony from Mr. Davies or these entities contradicting Mr. Light's testimony. That Ms. Jackson's management was attempting to obtain a letter of credit for the balance of the guarantee from Magicworks is confirmed by the cover letter, dated March 3, 1998, from Don Passman of Gang, Tyre, Ramer & Brown, attorneys for Janet Jackson and Mr. Davies, to Ms. Kinzel of CAA enclosing a draft deal memo (Light Dep., in J.A., Vol. V, at 130; Pls.' CAA Ex. 53 (stating "we have to resolve the letter of credit/guarantee issue before we can finalize"); see also Kinzel Dep., in J. Reply. A, at 189.) Accordingly, all the evidence shows that when Mr. Light conveyed Ms. Jackson's and Mr. Davies's instructions to Mr. Rowe on or before March 4, 1998, WMA was also seeking a letter of credit for the balance of the guarantee from Magicworks.

(d) Plaintiffs Have Failed to Present a Prima Facie Case of Discrimination in Relation to the "Delay" of Information

*74 At his deposition, Mr. Rowe testified that he did not respond to Mr. Light's request to put up \$11 million before the first ticket went on sale because he thought the terms were so outrageous and were intended to exclude black promoters. (Rowe Dep., in J.A., Vol. VI, at 1442-43.) He also testified that he discussed the terms Mr. Light relayed to him with BPA members, and they agreed with his decision not to pursue the matter. (*Id.* at 1443.) Mr. Rowe did not testify that he had not responded because he was not in a position to raise the funds for the requested guarantee terms by the end of the day. Also, Mr. Rowe did not claim lack of timely notice of Mr. Davies's terms in his letter to Mr. Light, dated April 9, 1998, on BPA letterhead. (Pls.' CAA Ex. 30.) Nevertheless, based on Mr. Rowe's responsive affidavit, Plaintiffs argue that CAA discriminated against them based on their race in relation to the 1998 Janet Jackson tour because, they allege, Mr. Light delayed communicating the "basic parameters" of the tour to Mr. Rowe. [FN198] (Pls.' CAA Mem. at 15.)

FN198. Plaintiffs also claim that Mr. Light's March 4, 1998 letter was

duplicitous because CAA had already sold the tour to Magicworks. (Pls.' CAA Mem. at 15; Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 243.) It appears that on March 3, 1998, Ms. Jackson and Mr. Davies still wanted a letter of credit for the balance of the guarantee from Magicworks. On March 3, 1998, Don Passman of Gang, Tyre, Ramer & Brown, Inc. (attorneys for Ms. Jackson and Mr. Davies) (Light Dep., in J.A., Vol. V, at 130) sent a draft deal memo to Ms. Kinzel of CAA, the cover letter to which states, "we have to resolve the letter of credit/guarantee issue before we can finalize. I need your input on a few points as well." The draft deal memo was for finalization "tomorrow." (Pls.' CAA Ex. 53.)

However, the evidence submitted on this motion demonstrates that the tour had not already been sold to Magicworks on March 4, 1998, as alleged by Mr. Rowe. On the afternoon of March 6, 1998, CAA received a copy of a letter from Gang, Tyre, Ramer & Brown, Inc., Ms. Jackson's attorneys, to Magicworks's attorneys, attaching an execution draft of the deal memo containing the provision for letters of direction, not letters of credit. (Light Decl. I Ex. 14.) So as of that date, the deal memo had not been executed. The formal contract with Magicworks was dated April 7, 1998. Mr. Rowe states that the final contract between Janet Jackson and Magicworks does not provide either for an irrevocable letter of credit or letter of direction. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 246 (citing Pls.' CAA Ex. 47); Pls.' CAA 56.1 Stmt. ¶ 357.) The Court's review of Plaintiffs' CAA Exhibit 47 shows that in fact letters of direction were required. (Pls.' CAA Ex. 47 at 4, 11.)

In his answering affidavit, Mr. Rowe states he did not receive any notice of Ms. Jackson's proposed terms until March 4, 1998, and was given a deadline of the close of business on that same day to respond, less than 5 hours away. (Rowe CAA Aff.,

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Pls.' CAA Ex. 1, ¶ 239.) Mr. Rowe also states that this time frame was not a fair chance to respond and that he was not given a chance to respond because Mr. Light knew that no black promoter could raise \$12 million in five hours. [FN199] (*Id.* ¶ 241).

FN199. Although Mr. Rowe's answering affidavit states that Mr. Light told him that the total guarantee was \$12 million, in his deposition, Mr. Rowe testified that the total guarantee he had to meet was \$11 million, all cash up front with no letter of credit. (Rowe Dep., in J.A., Vol. VI, at 1441-45.) By his declaration in April 24, 2003, Mr. Rowe cannot, by stating another amount contradicting his deposition testimony in 2001 and the terms contained in the March 4, 1998 letter to Mr. Rowe from Mr. Light, create a triable issue of fact on that issue. *Bickerstaff*, 196 F.3d at 455.

Mr. Light's letter of March 4, 1998, states that the decision to use a national promoter was reached during the previous weekend, but the letter does not state when the decision about the "basic parameters" was made. (Light Decl. I Ex. 13.) On March 3, 1998, one of the attorneys for Ms. Jackson and Mr. Davies (Light Dep., in J.A., Vol. V, at 130) sent a draft deal memo to Ms. Kinzel of CAA for internal purposes only, the cover letter to which states, "we have to resolve the letter of credit/guarantee issue before we can finalize." (Pls.' CAA Ex. 53.) Although this letter may not reflect upon the terms conveyed to Mr. Light by Mr. Davies, it indicates that on March 3, 1998, it was still an open question as to what the terms of the contract in regards to the letter of credit/guarantee issue would be, at least for Magicworks. Mr. Rowe, in his affidavit submitted in response, states that he first learned of these the terms on March 4, 1998 (which was a Wednesday), during a conversation with Mr. Light, which would have occurred, at the earliest, at noon in Atlanta. [FN200] (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 239.)

FN200. In his deposition, Mr. Rowe stated that this conversation occurred sometime

after February 20, 1998, but did not specify a date. (Rowe Dep., in J.A., Vol. VI, at 1440.)

Although Plaintiffs have shown that Mr. Rowe submitted a bid for the 1998 Janet Jackson tour, Plaintiffs have failed to show that any "similarly situated non-minority individuals were treated differently" in relation to notification of terms. *Johnson v. New York City Transit Auth.*, 639 F.Supp. 887, 893 (E.D.N.Y.1986), *aff'd in relevant part*, 823 F.2d 31 (2d Cir.1987); *see also Hodge v. RCA Global Communications*, Nos. 93-261, 93-347, 1994 WL 240373, (S.D.N.Y. May 26, 1994). Plaintiffs had a full opportunity, during extensive discovery, to develop evidence demonstrating that a non-minority promoter received the "basic parameters" prior to Mr. Rowe's receipt of these terms. Thus, Plaintiffs have failed to present evidence raising an inference of racial discrimination due to Mr. Rowe's treatment by Mr. Light, including the alleged late notice of Ms. Jackson's terms.

(iv) *Plaintiffs' Claims Regarding the Magicworks Tour*

*75 Plaintiffs further allege that CAA discriminated against them after Magicworks was awarded the 1998 Janet Jackson tour by refusing them promotion opportunities. (Pls.' CAA Mem. at 16.) Mr. Light states that from the beginning, he believed that Magicworks would partner with local promoters in certain markets to offset some of the risk it had assumed by agreeing to pay the financial guarantee for the entire national tour. (Light Decl. I ¶ 49; CAA 56.1 Stmt. ¶ 96. [FN201]) Magicworks deal memo, drafted by Ms. Jackson's law firm, contained a provision requiring Magicworks to "meaningfully involve black promoters in the tour." (Light Decl. I ¶ 48, Ex. 14; Light Dep., in J.A., Vol. V, at 131-33; CAA 56.1 Stmt. ¶ 95.)

FN201. Plaintiffs dispute this statement by stating that "whether [this] is true requires a credibility determination by the jury" (Pls.' Resp. CAA 56.1 Stmt. ¶ 96) and

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claim that Mr. Rowe's statement that Mr. Light never told Mr. Rowe he could offset his risk by partnering supports that Mr. Light's assertion is not true (*id.* (citing Rowe CAA Aff. ¶ 258).) The Court finds that this is not a genuine issue of material fact. Mr. Rowe's bids for 29 cities with a \$300,000 guarantee per city totaling \$8.7 million would lead one to assume he would partner with local promoters to offset this risk. In fact Mr. Rowe states, "We are also open to the idea of co-promoting with Pop Promoters in some markets." (Light Decl. I Ex. 10.) As stated *supra* note 194, Plaintiffs must cite evidence to controvert Defendants' assertion, not merely claim credibility issues. *Berman*, 986 F.Supp. at 200.

After the Magicworks deal memo was finalized, Mr. Light informed Magicworks that Mr. Rowe had expressed interest in the tour and recommended that Magicworks consider involving Mr. Rowe. (Light Decl. I ¶ 50; CAA 56.1 Stmt. ¶ 97.) [FN202] On or about March 13, 1998, Mr. Wavra discussed the tour with Mr. Rowe and on several occasions invited Mr. Rowe and other members of the BPA to make concrete offers for any show. (Rowe Dep., in J.A., Vol. VI, at 1446; Light Decl. I Exs. 15, 16; Wavra Dep., in J.A., Vol. VI, at 145-48; CAA 56.1 Stmt. ¶ 99.)

FN202. Mr. Rowe maintains that the "only reason Mr. Light informed Magicworks that [he] had expressed an interest in the tour and 'recommended' that Magicworks consider involving him was because [Mr. Rowe], in a letter dated March 31, 1998, on behalf of the Black Promotion [sic] Association had threatened to boycott and picket." (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 259; Pls.' Resp. CAA 56.1 Stmt. ¶ 97; see Pls.' CAA Ex 54; Light Decl. I, Ex. 17.) However, Mr. Rowe does not demonstrate he has personal knowledge of when Mr. Light recommended to Mr. Wavra that he involve Mr. Rowe. Mr. Rowe's claim is conclusory and

argumentative and must be disregarded. The rest of Mr. Light's declaration, that he had also suggested that Magicworks consider involving black promoters, Billy Sparks and Quentin Perry on the tour, is confirmed by these gentlemen. (Light Decl. I ¶ 50; Sparks Dep., in J.A., Vol. VI, at 33-34; CAA 56.1 Stmt. ¶ 98.)

On March 16, 1998, Mr. Rowe wrote a letter to Mr. Wavra, on BPA letterhead, asking him to "do the right thing with the Black Promoters." (Light Decl. I ¶ 52, Ex. 15; CAA 56.1 Stmt. ¶ 100.) Mr. Wavra responded the same day offering the BPA the opportunity to participate in the tour, stating they were taking offers from local promoters and asking the BPA and its members to state which markets they were interested in. (Light Decl. I Ex. 16; CAA 56.1 Stmt. ¶ 101. [FN203]) The terms requested were a \$375,000 guarantee, a 75/25 split for the "A" markets like New York, Chicago, Detroit, Washington D.C. and others, and a \$325,000 guarantee and a 75/25 split for the other markets with 50% of the guarantee paid before the tickets go on sale and the balance due before the date of play or a letter of direction assigning the remaining receipts to Magicworks. (Light Decl. I Ex. 16). As recommended by Mr. Light, Magicworks hired Quentin Perry and Billy Sparks, both African Americans, as marketing consultants and promoters for certain dates around that same time. (CAA 56.1 Stmt. ¶ 103; [FN204] Light Decl. I ¶ 4, Ex. 22; Wavra Dep., in J.A., Vol. VI, at 150; Sparks Dep., in J.A., Vol. VI, at 37, 45.)

FN203. Plaintiffs do not dispute the above statement, although they dispute CAA 56.1 Statement ¶ 101 in part.

FN204. Plaintiffs dispute that Mr. Perry and Mr. Sparks were hired as promoters and cite Plaintiffs' CAA Exhibit 55, which states "[w]e have hired Quinton [sic] Perry and Billy Sparks as our tour-marketing consultants," and the deposition of Mr. Sparks at page 96. (Pls.' Resp. CAA 56.1 Stmt. ¶ 103.) However, Mr. Sparks's statement on page 96 is in relation to

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Prince, not Janet Jackson, and at page 37 of this deposition he states he did promotions for the 1998 Janet Jackson tour. Additionally, Mr. Rowe admits that Mr. Perry co-promoted Janet Jackson concerts in Washington D.C. and Los Angeles. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 266.)

On March 31, 1998, Mr. Rowe sent Mr. Wavra a letter on BPA letterhead expressing concern about the fairness of the Janet Jackson tour and threatening to publicly label CAA and the tour as "discriminatory." Mr. Rowe attached a list of actions to be taken, including purchasing radio spots denouncing Janet Jackson's upcoming tour and calling for a boycott of the concerts on the tour. (Light Decl. I ¶ 55, Ex. 17; CAA 56.1 Stmt. ¶ 105; Rowe Dep., in J.A., Vol. VI, at 1446-47.)

*76 Mr. Rowe received a responsive letter from Mr. Wavra the same day stating, in pertinent part, that:

[a]s you know we have hired Quinten Perry and Billy Sparks to act as marketing consultants for this tour.... As far as promoters are concerned, I have stated before that we welcome all offers for Janet Jackson. The offers need to be in writing with appropriate scaling and ticket prices, building expenses, the guarantee and the back end of the deal. Until we have this we cannot respond. To date we have not received any offers from any of the members of the Black Promoters Association.

Please forward the offers as soon as possible, as we are making decisions now.

(Light Decl. I Ex. 18; *see also* Rowe Dep., in J.A., Vol. VI, at 1448.)

By letter dated April 1, 1998, Mr. Boseman made an offer for 50% involvement in co-promotion for Janet Jackson's concerts on October 11 and 12, 1998 at Madison Square Garden at a guarantee of \$400,000 and a 90/10 back end split. (Light Decl. I ¶ 57, Ex. 19; Boseman Dep., in J.A., Vol. III, at 354-55.) Attached to Mr. Boseman's letter is a memo from the BPA to Janet Jackson Management copied to civil rights leaders, accusing Ms. Jackson

of betraying the African American community entrepreneurs who launched her career. (Light Decl. I Ex. 18.)

On April 3, 1998, Mr. Wavra sent another letter to Mr. Rowe encouraging members of the BPA to submit offers for any market and reiterating the financial terms being offered to all promoters. (Light Decl. I ¶ 58, Ex. 20; CAA 56.1 Stmt. ¶ 108.) Then, on April 6, 1998, Mr. Rowe, on behalf of the BPA for the first time presented Mr. Wavra with a written proposal for a share of the Washington, D.C. concert and a share of the Los Angeles concert. (Light Decl. I ¶ 59, Ex. 21; Rowe Dep., in J.A., Vol. VI, at 1450; CAA 56.1 Stmt. ¶ 109.)

Mr. Light discussed Mr. Rowe's proposal with Mr. Wavra and persuaded Magicworks to involve the BPA in Los Angeles and New York to overcome their threats to boycott, picket and disrupt the tour. (Light Decl. I ¶ 60; CAA 56.1 Stmt. ¶ 110.)

Mr. Light also spoke to Mr. Sparks and Mr. Perry, and they agreed to pay the BPA a fee of \$100,000 out of their consulting fees. (CAA 56.1 Stmt. ¶ 111; [FN205] Light Decl. I ¶ 61; Sparks Dep., in J.A., Vol. VI, at 44-46.) A memo from Magicworks, received by Mr. Light on or about April 10, 1998, confirmed that Mr. Sparks and Mr. Perry agreed to compensate BPA \$100,000 from their marketing budget as co-promoters in those markets. (Light Decl. I ¶ 61, Ex. 27.) Mr. Rowe participated in concerts in Los Angeles and in New York through Mr. Boseman. (CAA 56.1 Stmt. ¶ 112; [FN206] Rowe CAA Aff. ¶ 265.)

FN205. Plaintiffs dispute this statement, but cite only paragraph 264 of Mr. Rowe's affidavit submitted in opposition to this motion. Mr. Rowe has not been shown to have personal knowledge as to what Mr. Light asked Mr. Perry and Mr. Sparks and, thus, CAA 56.1 Statement ¶ 264 is considered as if undisputed.

FN206. Plaintiffs dispute this only to add that they were given different terms by

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Magicworks than Magicworks received from CAA. However, Magicworks contract was with Ms. Jackson's management and drafted by her attorneys.

Plaintiffs state that they were not allowed to participate in the promotion of the concerts produced by Magicworks on the 1998 Janet Jackson tour and that there was not "meaningful black involvement" in the promotion of each Janet Jackson concert on that tour. (Pls. CAA Mem. at 16-17.) Plaintiffs have failed to produce any evidence that CAA took any action detrimental to Plaintiff. Nor have they produced any evidence that CAA was in a position to control any action by Magicworks after Magicworks purchased the production of the tour and with whom Plaintiffs then communicated directly about possible involvement in the tour. Plaintiffs' denouncement of Ms. Jackson and her manager and their failure to present timely bids to Magicworks for additional concerts raise an inference that Plaintiffs were not seeking to maximize their participation in the promotion of the 1998 Janet Jackson tour.

*77 Plaintiffs have submitted no evidence showing that CAA took any actions in connection with Magicworks production of the 1998 Janet Jackson tour that were discriminatory against Plaintiffs. Plaintiffs' claims against Magicworks are not before this Court.

(v) Plaintiffs' Claims Regarding Mud Island

As discussed previously in the sections concerning Beaver and WMA, Plaintiffs have presented no evidence of discrimination involved with the Plaintiff Jones's failure to contract for an exclusive arrangement at Mud Island Amphitheater, or that any of the defendants, including CAA, took any action that affected the Mayor's decision not to award an exclusive promotion contract for Mud Island. Even if evidence of discrimination by other Defendants had been found, Plaintiffs have presented no evidence showing any connection between CAA and any of the Defendants alleged to be involved.

Although Mr. Jones sent the fax describing his exclusive at Mud Island to an agent at CAA (See Pls.' Beaver Ex. 1A (documents P00719, P007201)), the mere fact that CAA was notified by Mr. Jones of the anticipated exclusivity agreement is too tenuous a link to create even an inference that CAA somehow influenced Beaver's decision to open an office in Memphis, which occurred prior to the sending of the fax, or Mayor Herenton's decision. Plaintiffs have made no showing that CAA took any action to discriminate against Plaintiff Jones with respect to Mud Island.

(vi) Other Claims Against CAA

Plaintiffs also assert in their motion papers that CAA discriminated against them in the selection of concert promoters. There is very little evidence, however, that Plaintiffs were active in the market and made bids on concerts with CAA. Mr. Rowe admits that he "never contacted anyone at CAA prior to October or November of 1996" and has produced no copies of a bid for a concert to CAA. [FN207] (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶¶ 200-08.) Plaintiffs admit that: (1) Mr. Boseman has never submitted a bid to CAA for concerts of a white artist represented by CAA and has only made oral bids to CAA for CAA's black artists (Pls.' CAA 56.1 Stmt. ¶ 293); [FN208] (2) Mr. King has never submitted a bid to promote an artist represented by CAA (*id.* ¶ 289); and (3) Mr. Jones has never submitted a bid to promote an artist represented by CAA (*id.* ¶ 298).

FN207. As discussed earlier, Mr. Rowe did submit two letters of interest for the 1998 Janet Jackson tour. (Light Decl. I Exs. 10, 11.) Also, Mr. Rowe did submit written bids to Magicworks for Janet Jackson concerts in Los Angeles and Washington, D.C. (Light Decl. Ex. 21; *see also* Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 262.)

FN208. Mr. Boseman did submit a bid to Magicworks for 50% involvement in a New York concert on the 1998 Janet Jackson tour. (Boseman CAA Aff., Pls.' CAA Ex. 1, ¶ 262.)

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CAA Ex. 3, ¶ 19; *see also* Light Decl. Ex. 19.)

Mr. Light testified that since late 1996, when Mr. Rowe first contacted CAA, he has encouraged Mr. Rowe to submit bona fide offers to promote. (Light Decl. I ¶ 16.) Prior to bringing this suit, Mr. Rowe had submitted only the two letters in reference to the 1998 Janet Jackson tour to CAA. In July 2002, Mr. Light informed Mr. Rowe that Gloria Estefan was planning an October 2002 tour and offered Mr. Rowe an opportunity to bid. (*Id.* ¶ 18; CAA 56.1 Stmt. ¶ 38.) By letter of July 26, 2002, Mr. Light provided Mr. Rowe with the terms set forth by Ms. Estefan's management. (*Id.* ¶ 18, Ex. 2.) Mr. Rowe did not submit a bid because he did not think the tour would be profitable. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 207.) [FN209] In September 2002, Mr. Light spoke with Mr. Rowe and Mr. Boseman on the telephone to inform them that Stevie Wonder was planning to tour and asked them to submit a bid for any market. (CAA 56.1 Stmt. ¶ 38; Light Decl. I ¶ 19.) On September 6, 2002, Mr. Rowe for Rowe Entertainment submitted an offer for two shows at the Fox Theatre with guarantees of \$200,000 per show and an 85/15 artist split but included no date. (Pls.' CAA Ex. 45.) Shortly thereafter, however, Mr. Wonder cancelled his tour. (Light Decl. I ¶ 19.)

FN209. Mr. Light has made another attempt to solicit bids from Plaintiffs. On June 27, 2002, Mr. Light forwarded Mr. Rowe a list of CAA clients who might be touring and invited Mr. Rowe to call him or submit offers for any artist. (CAA 56.1 Stmt. ¶ 38.) This statement is undisputed by Plaintiffs. (Pls.' Resp. CAA 56.1 Stmt. ¶ 38.) In the June 27, 2002 letter to Mr. Rowe, Mr. Light stated that the enclosed list "is an internal document which we do not normally send out to buyers [but] ... is being provided as a springboard for discussion." (Light Decl. I Ex. 1 (emphasis in original).) Mr. Rowe has not submitted any bids in response to this letter. (*Id.* ¶ 17.)

*78 Dennis Ashley of CAA contacted Mr. Rowe about submitting bids for black artists Kelly Price, Mary J. Blige and K-Ci & Jo Jo. (Pls.' CAA 56.1 Stmt. ¶ 308.) Again, Mr. Rowe did not submit an offer because he states he did not think these artists would be profitable. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 208.)

Furthermore, contrary to Plaintiffs' allegations in paragraph 4 of the Amended Complaint, there is evidence that some of CAA's white artists have been promoted by black promoters. Larry Bailey has promoted Kiss, Harry Connick, Jr., Styx, and Three Dog Night, as well as Kenny G. (Joint 56.1 Stmt. ¶ 201; [FN210] *cf.* Pls.' CAA 56.1 Stmt. ¶ 166, 198, 218, 221.) Bill Washington has also promoted Santana (Joint 56.1 Stmt. ¶ 203), a Latin artist whom Plaintiffs cite as never having been promoted by a black promoter (Pls.' CAA 56.1 Stmt. ¶ 230).

FN210. Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 201 is considered as if undisputed.

Plaintiffs have submitted no evidence implicating CAA in the conspiracy alleged in the Amended Complaint. The vast majority of the Plaintiffs' Revised 56.1 Statement depends solely on statements in Mr. Rowe's affidavit [FN211] that are on matters outside the personal knowledge of Mr. Rowe, in violation of the requirements of the Federal Rules of Evidence and Local Civil Rule 56.1. Plaintiffs' Revised Statement of Undisputed Material Facts on this motion deals primarily with the concert promotion industry as a whole, reciting broad allegations, with an occasional insert of "including CAA." [FN212] There is no evidence that deals with specific actions on the part of CAA and any other defendant that infers the conspiracy alleged in the Amended Complaint.

FN211. Almost half of Plaintiffs' CAA 56.1 Statement is based on Rowe's testimony. (See Pls.' CAA 56.1 Stmt. ¶¶ 1-5, 11-17, 19-37, 41, 43-44, 46-48, 50-51, 53, 55-56, 58-59, 61-62, 145, 151-243, 261-65, 272-73, 276, 282-85,

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287, 299, 300-02, 304-5, 307-08, 312-13, 318, 323-24, 326-27, 329-30, 332-33, 336-37, 340-42, 345-47, 349, 351-53, 355-56, 358-61, 363, 366, 370, 372, 376-78, 421-23 (relying solely on Mr. Rowe's CAA Aff. for evidentiary support).)

FN212. *See, e.g.*, Pls.' CAA 56.1 Stmt. ¶ 8, 13-37, 39, 41, 44, 47, 49-70, 72-127, 129-41, 144-50, 244-45, 251-59, 312-13.

One of Plaintiffs' claim of discrimination by CAA is that since CAA provides notice to some promoters of concert tours, as it did in order to procure venue holds in 1997 (*see* Pls.' CAA Ex. 22), they have an obligation to provide notice to all promoters. [FN213] In their motion papers, Plaintiffs assert:

FN213. Plaintiffs make additional allegations against CAA, but submit no evidence to support these statements beyond Rowe's affidavit, consisting of conclusory or irrelevant allegations. (*See, e.g.*, Pls.' Resp. CAA 56.1 Stmt. ¶ 9 ("CAA often allows the dominant white promoters to cut a side deal with Ticketmaster whereby the price of the ticket is increased by several dollars."); Pls.' Resp. CAA 56.1 Stmt. ¶ 9 (alleging that CAA contracts with corporate sponsors, such as The Coca-Cola Company, to the detriment of its artists).)

Moreover, because CAA provides advance notice of its artists' concerts to the dominant white promoters (*see* Comp. Ex. 22), it has a duty to provide that same notice in a non-discriminatory fashion to both black and white promoters. CAA's claim that it could not give advance notice to all active concert promoters is untrue because all it would have to do is send the same letter exemplified in Comp. Ex. 22 to all concert promoters instead of just the handful white chosen few. This would not be a herculean task; all it would require is additional postage and the proper programming of a computer to include more names and addresses.

(Pls.' Resp. CAA 56.1 Stmt. ¶ 12 (citations omitted).)

Plaintiffs cite Mr. Rowe's affidavit rather than any legal authority to support their contention that CAA has a duty to notify all promoters of the artists interest in various venues in the following year. Plaintiffs' claim that CAA has such a duty overlooks the fact that CAA is an agent for each of their artist clients, and has a duty to act at the direction of, and in the best interest of, each of its clients, not the promoter. Plaintiffs present no evidence indicating that contacting the full list of independent contractors, which contains over 1,000 names (Saad Report, in J.A., Vol. I, at 14), would benefit artists in any way. Providing advance notice to all promoters of all concerts would be a formidable and costly endeavor. Additionally, while perhaps not a Herculean task, this widespread notice may create a heavy burden on artists' management who would then have the task of weighing the merits of each of the offers. It is within the discretion of the artists and their managers to decide whether such widespread notice to promoters would be in the artists' best interests.

(vii) *CAA, LLC's Successor Liability for CAA, Inc.*

*79 Plaintiffs have not sought to make CAA, Inc., which is now known as OMH, Inc. ("OMH"), a party to this action. Plaintiffs nevertheless argue that CAA, LLC "is essentially the same company as CAA, Inc.," stating that CAA, LLC is "the same employees (minus Mike Ovitz and Bill Haver), the same business, the same clients, the same management, the same agents, [and] the same building." (Pls.' CAA Mem. at 22.) Plaintiffs, however, fail to cite evidence supporting each of these allegations.

Plaintiffs and Defendants agree that federal common law, which governs the issue of successor liability for Title VII claims, should govern for claims under §§ 1981, 1985(3) and 1986. (CAA Mem. at 23; Pls.' CAA Mem. at 23 n. 36.) Plaintiffs argue that this Court should apply the test for successor liability first developed by the Sixth Circuit Courts in *EEOC v. MacMillan Bloedel*

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Containers, Inc., 503 F.2d 1086, 1094 (6th Cir.1974), as applied in *EEOC v. Local 638*, No. 71-287(RLC), 1988 WL 25151, at *7 (S.D.N.Y. Mar. 9, 1988). *Local 638*, however, involved successor liability following a merger, not a purchase of assets, as in this case. [FN214] *Local 638*, 1988 WL 25151, at *3.

FN214. CAA is a Delaware limited liability company that was created on or about August 18, 1995. (CAA 56.1 Stmt. ¶ 1.) On or about October 1, 1995, CAA acquired certain assets of Creative Artists Agency, Inc., a California corporation now known as OMH, and commenced conducting a talent agency business. (Light Decl. I ¶ 3.) CAA's motion papers state, "CAA acquired *certain* assets of Creative Artists Agency, Inc." (CAA 56.1 Stmt. ¶ 2; Light Decl. I ¶ 3 (emphasis added).) Plaintiffs cite to CAA's Answer to the Amended Complaint, in which CAA stated that they "acquired *the* assets of Creative Artists Agency, Inc. as of October 1, 1995." (Answer and Defenses of CAA to the Am. Compl., dated Aug. 15, 2000, ¶ 19 (emphasis added).) Since neither statement indicates that CAA, LLC acquired the liabilities of CAA, Inc. or merged with CAA, Inc., and since there is no showing that the owners of CAA, Inc. even became part of CAA, LLC, this argument over language is meaningless.

Courts considering the appropriateness of imposing successor liability on a purchaser of assets (as distinguished from a purchaser of stock, who acquires the assets and liabilities of the seller) have focused on only two factors from *MacMillan Bloedel*. See *EEOC v. Barney Skanska Constr. Co.*, No. 99- 2001(DC), 2000 WL 1617008, at *3 (S.D.N.Y. Oct. 27, 2000) (applying a two factor test used in *Shevack v. Litton Applied Tech.*, No. 95-7740(JSM), 1998 WL 512959, at *2 (S.D.N.Y. Aug. 19, 1998) to a Title VII case involving a purchase of selected assets.) To establish successor liability, two conditions must be satisfied: "(1) the successor had notice of the claim before acquisition;

(2) there was a substantial continuity in the operation of the business before and after the sale." *Shevack*, 1998 WL 512959, at *2 (citations omitted). The Plaintiffs have presented evidence that there has been some continuity in the operation of the business, even though the principals of CAA, Inc., Mike Ovitz and Bill Haver, have never been principals of CAA, LLC. (Dep. of Thomas Ross, dated Jan. 29, 2002 ("Ross Dep."), in Pls.' CAA Dep. Tr., Vol. II, at 12.) Many of the nine individuals, if not all, who became partners and took an equity interest in CAA, LLC, Lee Gabler, Kevin Heuvein, Bryan Lourd, Richard Lovett, Jay Maloney, Rick Nacita, David O'Connor, Jack Rapke and Thomas Ross (*id.* at 13-14), were employed by CAA, Inc.

Plaintiffs, however, have failed to present any evidence that the partners of, or anyone else at, CAA, LLC had notice of Plaintiffs' claims against CAA, Inc. before the purchase of assets took place. Plaintiffs have the burden of affirmatively showing that CAA, LLC "had notice of the claims." *Barney Skanska Constr.*, 2000 WL 1617008, at *3. Plaintiffs argue, without any citation to evidence, that CAA, LLC had notice because CAA, Inc. "had for years been violating the civil rights of black promoters." (Pls.' CAA Mem. at 24.) Not only does this conclusory statement provide no support for Plaintiffs' allegation of CAA, LLC's notice of these claims, which were not brought against it until November 18, 1998, it also does not provide any evidence of any discrimination based on race by CAA, Inc. In any event, Plaintiffs have provided no evidence in any submission to this Court of any acts of discrimination against them based on race by CAA, Inc. and, thus, in this action, there is no evidence of any liability that could be acquired from CAA, Inc.

3. *Renaissance Entertainment, Inc.'s Motion for Summary Judgment*

*80 Rather than allege that Renaissance committed any specific overt act of discrimination against Plaintiffs based on their race in violation of §§ 1981, 1985(3) and 1986, Plaintiffs allege general claims of discrimination and of participation in a

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conspiracy to discriminate against Plaintiffs by Renaissance. Plaintiffs claim that "Renaissance has excluded [them] from competing in the concert promotion industry [1] by contacting only an elite fraternity of dominant white promoters to promote its artists; [2] by requiring more onerous deposit terms for black promoters; and [3] by persuading its artists that they should use dominate white promoters to the exclusion of black promoters." (Pls.' Response to Renaissance's Mot. for Summ. J., dated Apr. 24, 2003, ("Pls.' Resp. Renaissance Mem.") at 1.) Plaintiffs also claim that Renaissance participated in the alleged conspiracy to exclude Plaintiff Fred Jones from securing an exclusive agreement at Mud Island and conspired to install Beaver as the dominant promoter in Memphis. (*Id.* at 13.)

In opposing Renaissance's motion for summary judgment, Plaintiffs state "there is overwhelming evidence that Renaissance engaged in unlawful discrimination ... aimed at preventing the Plaintiffs from promoting concerts by white artists and major black artists whom it represented." (*Id.* at 1.) However, not only have Plaintiffs failed to present evidence of a prima facie case of discrimination by Renaissance in violation of § 1981, but they have also failed to present any evidence supporting any of their claims under §§ 1985(3) and 1986.

(i) *Review of facts*

Renaissance Entertainment, Inc. was formed in February 1996, but did not begin active concert promotions in this country until 1997. (Renaissance 56.1 Stmt. ¶ 1-2.) [FN215] Prior to Renaissance's commencement of operations in 1997, Mr. David Zedeck, the sole principal of Renaissance, had been working for the Famous Artists Agency in Europe and "had almost no experience as a booking agent in the United States and limited experience working with domestic concert promoters." (*Id.* ¶ 8.) [FN216] Renaissance ceased acting as a booking agency at the end of 1999, when Mr. Zedeck and a partner formed non-party Evolution Talent Agency, LLC ("Evolution") and purchased the assets of Renaissance. (*Id.* ¶ 4; Zedeck Dep., Pls.' Renaissance Ex. 25, at 9.) [FN217]

Renaissance Ex. 25, at 9.) [FN217]

FN215. Plaintiffs dispute when Renaissance began active operations, asserting that active operations began in 1996. Plaintiffs cite some hearsay and the deposition of Mr. Zedeck to support their contention. Mr. Zedeck did testify that he booked dates for a few artists in 1996. (Zedeck Dep., in Pls.' Renaissance Ex. 25, at 36, 44-46.)

FN216. Pls.' Resp. Renaissance's 56.1 Stmt. ¶ 8 is rejected as based on third party hearsay relating to Zedeck's earlier activities.

FN217. Plaintiffs now claim that Mr. Zedeck's current agency Evolution should be joined in this action as a defendant. (Pls.' Resp. Renaissance Mem. at 11.) However, the only evidence before the Court is that Evolution acquired the assets of Renaissance as of December 31, 1999, and that Evolution cannot be claimed to be Renaissance's alter ego as it has other business and is owned by two separate individuals, one of whom is Mr. Zedeck. Plaintiffs offer no evidence to demonstrate that Evolution can be found to be the alter ego of Renaissance. Nor have they offered evidence that Evolution took any discriminatory actions against them or were members of the conspiracy alleged in the Amended Complaint.

(ii) *Plaintiffs Have Failed to Present Any Evidence of a Violation of §§ 1981, 1985(3) or 1986*

(a) *Plaintiffs Have Failed to Present a Prima Facie of Discrimination by Renaissance*

To prove a prima facie case of discrimination under the *McDonnell Douglas* test, Plaintiffs must prove that that they applied for a position for which they were qualified and that they were rejected. In this case, Plaintiffs provide no evidence showing that they bid for Renaissance's artists' concerts or

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tours. Mr. Zedeck states that before this action was filed in November 1998, Plaintiffs Rowe, King and Boseman never made an offer to promote a concert by an artist represented by Renaissance. (Zedeck Decl. I ¶¶ 12-13.) After meeting Mr. Rowe and Mr. Boseman for the first time on August 24, 2000, Mr. Zedeck sent Mr. Boseman a copy of the roster of artists represented by Evolution, his present agency, and stated, "I look forward to hearing from you." Mr. Boseman never responded. (*Id.* ¶ 15(d), Ex. B.)

*81 Furthermore, Mr. Zedeck states that he had not spoken to Plaintiffs Rowe, Boseman or King prior to November 1998 and that in fact he had never heard of Mr. Rowe, Mr. Boseman or Mr. King. (*Id.* ¶ 13.) Additionally, Mr. Zedeck states he did not know that they were concert promoters and had no reason to believe that they were concert promoters who would be capable of promoting, or available to promote, concerts by the artists Renaissance represented. (*Id.* ¶¶ 13, 17.) Plaintiffs' response, which relies solely on Mr. Rowe's responsive affidavit stating that Plaintiffs dealt with Famous Entertainment during the period Mr. Zedeck worked there (Rowe Renaissance Aff. ¶ 12), that "Renaissance knew exactly who the plaintiffs were" (Pls.' Resp. Renaissance Mem. at 6) is conclusory, not supported by evidence, and is an insufficient contradiction of Mr. Zedeck's statements. Lastly, Plaintiff King testified that he could not recall ever speaking to an agent at Renaissance to promote a white artist or a black artist, nor could he identify one artist Renaissance represented. (King Dep., in J.A., Vol. V, at 814-16, 828.)

Mr. Zedeck acknowledges that before this action was filed in November 1998, he was aware of Plaintiff Jones, but knew him not as a concert promoter but rather as an events producer in Memphis who produced corporate-sponsored events, like the Southern Heritage Classic and Memphis Blues Festival, which did not require Mr. Jones to put his own personal capital at risk. (Zedeck Decl. I ¶ 14.) Mr. Zedeck's recollection is that before this action was filed, Mr. Jones never made an offer to promote a concert by an artist Renaissance represented or even contacted him

about such a possibility. (*Id.*) [FN218]

FN218. Plaintiffs maintain that Mr. Jones was known to Mr. Zedeck as a concert promoter because "Jones had previously promoted Renaissance's black artist, Solo." (Pls.' Resp. Renaissance at 6 (citing Pls.' Renaissance Ex. 28).) Plaintiffs' Renaissance Exhibit 28 (which is in Exhibit 29) contains copies of Summitt's contract, dated March 14, 1996, for services of Solo with Pyramid Entertainment during the 1996 Marlboro Military Tour. Pyramid Entertainment is not shown have been controlled or operated by Mr. Zedeck. Plaintiffs do not raise a genuine issue of material fact. The tour appears to be sponsored by Marlboro cigarettes, consistent with Mr. Zedeck's statement that he believed Mr. Jones was not an independent promoter but produced corporate events.

Mr. Zedeck acknowledges that in December 1998 Mr. Jones was involved with a concert of Deborah Cox, an artist represented by Renaissance at the time. However, he states that Ms. Cox, who performed as an opening act, did so as a result of agreement between her manager and the Isley Brothers (artists), not negotiations conducted by Renaissance. (*Id.* ¶ 14 n. 1.)

Mr. Zedeck also acknowledges that, after the action was filed, Plaintiff Fred Jones did send a fax to Renaissance on January 13, 1999, reading as follows:

We noticed in the January 11, 1999 issue of Pollstar that there was no mention of a concert schedule for N'Sync in Memphis.

Whenever you decide to play Memphis we would like to make an offer.

Let me hear from you.

(Zedeck Decl. I Ex. A.)

Mr. Zedeck responds that this inquiry is not a concert offer as it mentions no particular dates, venue, or price, and that at the time he could not make N'Sync available to play Memphis because

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N'Sync already was engaged in a tour based on a confirmed national tour agreement in place with a national tour promoter. (Zedeck Decl. I ¶ 15(b).) At oral argument, Plaintiffs did not seek to show that this offered business reason for not responding to Mr. Jones was a pretext. *McDonnell Douglas*, 411 U.S. at 804.

*82 As for post-suit contacts with Plaintiffs Rowe and Boseman, Mr. Zedeck acknowledges having two or three telephone conversations, in at least one of which both Mr. Rowe and Mr. Boseman participated, but he states, without dispute, that neither made an offer to promote any artist represented by Renaissance. (*Id.* ¶ 15(c).) Mr. Zedeck states that some, if not all, of the conversations occurred after 1999 when Renaissance was no longer was an operating business. Mr. Zedeck also states that Mr. Rowe and Mr. Boseman expressed an interest in promoting concerts of only three particularly prominent artists, Britney Spears, N'Sync and The Backstreet Boys, but never proposed any particular date, venue, or price. (*Id.*) Mr. Zedeck states that he accurately told Mr. Rowe and Mr. Boseman that these artists were not available for concert promotions as the national tour agreements were already in place. (*Id.*) Mr. Rowe and Mr. Boseman have not provided any evidence from which it can be inferred that Mr. Zedeck's answer was a pretext. *McDonnell Douglas*, 411 U.S. at 804.

Because Renaissance's statement that it was not aware of any of Plaintiffs' availability as concert promoters prior to this action is un rebutted by Plaintiffs, and because N'Sync, the Backstreet Boys and Britney Spears were unavailable to do national tours, Mr. Boseman's and Mr. Rowe's failure to seek out concerts for Renaissance's lesser artists and failure to submit bids creates the inference that Plaintiffs were not making a serious effort to promote concerts by artists represented by Renaissance.

Plaintiffs state that they "have identified numerous [Renaissance] contracts that were denied Plaintiffs that were instead awarded to dominant white promoters." (Pls.' Resp. Renaissance Mem. at 10.)

However, the Plaintiffs have not shown that they bid on any of these contracts or that Renaissance took any action to prevent them from bidding on the contracts. Plaintiffs' further argument that they did not make bids on concerts because their experience has been that making offers would have been futile (*id.*) is not applicable to Renaissance. Plaintiffs argue that "where, as here, there is a proven history of systemic discrimination by the defendant" bids for the concerts would be futile. (*Id.* at 10 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367-68 (1977)).) However, Plaintiffs' allegation of a proven history of systemic discrimination overlooks the fact that Renaissance only commenced its operations as an artist's agency in 1997, approximately one year before this action was commenced, and thus, had no promotion history of systemic discrimination. Nor can Plaintiffs rely on language in *PAS Communications, Inc. v. Sprint Corp.*, 139 F.Supp.2d 1149 (D.Kan.2001) because Plaintiffs have not shown that Renaissance "deliberately kept Plaintiffs from learning about bid opportunities (by keeping Plaintiffs' names off bid lists) on the basis of race." *PAS* at 1176 n. 34. Renaissance has not been shown to have had bid lists, nor has it been shown to have notified more than several large promoters in a territory of an upcoming tour. Many white promoters in these territories, as well as black promoters, did not receive notice of the artist's planned concerts, not just the four Plaintiffs. Furthermore, Mr. Zedeck swears that he generally did not know the race of many of the promoters he did business with since he conducted negotiations by fax and over the telephone. (Zedeck Decl. I ¶ 11.) Under these facts, Plaintiffs have not presented a prima facie case of discrimination against them by Renaissance because of their race.

(b) General Claims of Conspiracy Participation

*83 Plaintiffs have offered no evidence as to when the conspiracy started, who the members of the conspiracy were, how Renaissance joined the conspiracy, and how Renaissance was aware of the conspiracy's objectives as required for liability under § 1986.

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As with the other Booking Agency Defendants, Plaintiffs state that "Renaissance has not produced a single contract demonstrating that a black promoter has ever promoted a white artist whom it represented. Not one." (Pls. Resp. Renaissance Mem. at 1.) To support this claim, Plaintiffs do not cite the discovery record but rather paragraph 11 of the Mr. Rowe's affidavit submitted as an exhibit to Plaintiffs' Response to Renaissance's Motion for Summary Judgment. (*Id.* (citing Affidavit of Leonard Rowe, dated Apr. 21, 2003 ("Rowe Renaissance Aff."), attached as Ex. 1 to Pls.' Resp. Renaissance, ¶ 11).) Whether Rowe conducted a systematic and knowing search of the thousands of contracts produced by Renaissance is problematic. [FN219] Furthermore, this representation by Mr. Rowe contradicts the testimony of Al Haymon, a prominent black promoter, that he promoted Dream, a white artist represented by Renaissance. (Haymon Dep., in J.A., Vol. IV, at 263.)

FN219. Mr. Rowe also concludes that Renaissance does not require the Promoter Defendants to submit bids and bases this conclusion on his review of the thousands of documents Renaissance submitted to Plaintiffs. (Rowe Renaissance Aff., Pls.' Renaissance Ex. 1, ¶ 9.) Mr. Rowe made a similar statement in other affidavits and declarations. The other Defendants have proved the falsity of this claim by producing contracts. Defendant WMA has produced evidence of bids as well as contracts from its computerized files to Plaintiffs. Beaver also produced bids at the hearing. (Court Ex. A) The record shows that Plaintiffs' former counsel (along with other attorneys and paralegals), Mr. Rowe, and Mr. King examined the files. (See Decl. of Laura L. Mall, Esq., dated Apr. 22, 2003, attached as Ex. 7 to Pls.' Resp. Mem. in Opp'n to Defs.' Mot. to Exclude Pls.' Expert Witness Dr. Gerald D. Jaynes's Affidavit, dated Apr. 24, 2003, ¶¶ 9-10.) There is no showing Mr. Rowe examined all files. This statement that Defendant Promoters are not required to submit written bids is conclusory. Also, the race

of a promoter does not appear on the contract.

With respect to the Plaintiffs' first general claim that Renaissance contacted "*only* an elite fraternity of *dominant* white promoters to promote its artists," (Pls. Resp. Renaissance Mem. at 1 (emphasis added)), the record does not support Plaintiffs' claim. Mr. Zedeck, the sole principal and owner of Renaissance, did not testify that he had sought out white promoters, but rather testified that he had located promoters by calling the promoter suggested by the artist's manager, or by calling a radio station and asking them for a promoter. (Zedeck Dep., Pls.' Renaissance Ex. 25, at 46, 68.) He also stated that he located promoters by calling someone with whom he had a pre-existing relationship (*id.* at 76), or calling the building or radio station or record promotion representative in the specific market (*id.* at 78).

Mr. Zedeck testified that he contacted "dominant promoter" Don Law in Boston, but also that he contacted non-defendant concert promoter Mass Concerts in Boston. (*Id.* at 116.) He also stated that in Chicago he contacted three promoters, non-defendants The Entertainment Group and Scott Gelman, as well as Jam. (*Id.* at 90.) He testified, "I don't have a guy anywhere." (*Id.* at 88.) Furthermore, a number of the promoters used by Renaissance are not among Plaintiffs' alleged dominant promoters. Plaintiffs' Renaissance Exhibit 34 shows contracts on Renaissance contract forms between artists and non-dominant promoters GSAC Partners, Beach Concerts, Inc., and Metropolitan Entertainment. Additionally, Exhibit 1 of Zedeck's Declaration II contains Renaissance contracts of artist Deborah Cox with promoters Junior Vasquez, C & J Promotions, Manny Lehman, FUSION, Jason McCarthy, Richard Grant, David Delissa, and David Marvisi, among others, none of whom are allegedly dominant promoters.

*84 Accordingly, Mr. Zedeck's testimony and the exhibits produced are not supportive of Plaintiffs' claim of a conspiracy between Renaissance and the Promoter Defendants "by contacting only an elite fraternity of dominant white promoters to promote

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its artists." Plaintiffs rely on no other testimony but rely on declarations that are conclusory and not based on personal knowledge. These conclusory statements are not admissible as evidence under Rule 56(b) of the Federal Rules of Civil Procedure.

Plaintiffs also cite, as support for the above claim, correspondence sent by Renaissance in early May 1997 and October 1997 to specific promoters regarding promotion opportunities for white artists and the lack of such correspondence with Plaintiffs. (Pls.' Resp. Renaissance Mem. at 4 (citing Pls.' Renaissance Ex. 15 (which should read Ex. 16)).) However, Mr. Zedeck explained he had sent these five or six faxes because the addressees were not familiar with him or The Backstreet Boys, and this was his method for stimulating offers for The Backstreet Boys. (Zedeck Dep., Pls.' Resp. Renaissance Ex. 25, at 82, 88.) The content of the letters in Exhibit 16 are consistent with Mr. Zedeck's explanation. These letters only function as an attempt to interest the recipients in the promotion of The Backstreet Boys. Plaintiffs do not provide any evidence to dispute this legitimate business reason for Mr. Zedeck's action.

The Plaintiffs' second argument that the evidence shows that Renaissance required less onerous contractual obligations from white promoters than black promoters (Pls.' Resp. Renaissance Mem. at 1) is unsupported by the evidence. Plaintiffs ask the Court to compare Plaintiff Jones's contract with artist Deborah Cox, requiring a 50% deposit on the guarantee (Pls.' Renaissance Ex. 30), with Ms. Cox's contract with white concert promoter Nederlander Anaheim Inc., in which no deposit was required (Pls.' Renaissance Ex. 33). (Pls.' Resp. Renaissance Mem. at 2-3, 7-8.) Based on these two documents, Plaintiffs assert that "[e]ven when a Plaintiff managed to promote a lesser black artist represented by Renaissance, Plaintiff was treated differently than its white counterparts" and that "Renaissance ... required less onerous contractual obligations from white promoters who promoted Ms. Cox during the same time frame." (*Id.* at 7.)

These arguments by Plaintiffs' counsel are highly misleading. As Zedeck's Declaration II shows,

Plaintiffs chose not to disclose to the Court that Renaissance had produced thirty-two contracts, not two contracts, for concert performances by Deborah Cox. (Zedeck Decl. II ¶ 3, Ex. 1). Of those contracts, twenty-nine promoters (almost all of whom were white) required deposits of 50% just like Plaintiff Jones. (*Id.* ¶ 4, Ex. 1.) Moreover, Mr. Jones admitted at deposition that Renaissance did not set the terms of his contract with Ms. Cox, but rather that he negotiated those terms directly with Ms. Cox's tour manager and that Renaissance merely issued the paperwork confirming the deal. (Jones Dep., J.A. Vol. IV, at 1046-47.)

*85 Furthermore, Mr. Zedeck points out that two of the remaining three Cox contracts involved concerts at venues, the South Florida Fair and Six Flags Astroworld, which generally will not agree to pay deposits. (Zedeck Decl. II ¶ 4; *see also* Fax from Nancy Vance of WMA to Billie Bullock, manager for the Temptations, dated May 31, 1995 (stating "Nederlander does not pay deposits (never has, never will)"), Pls. WMA Ex. 114; Letter from Guy Richard of WMA to Dave Kaplan, manager of Brian Setzer Orchestra, dated July 3, 1996, Pls.' Resp. WMA Ex. 52 (stating that, as a matter of policy, Cellar Door will not pay a deposit for concerts performed at The Bayou).) The third contract, which was with Nederlander Anaheim Inc., involved a special situation in which Nederlander Anaheim agreed to pick up Deborah Cox as a guest star in its theater in Anaheim when her concert tour with another promoter was cancelled. [FN220] Nederlander agreed to pick up responsibility for the concert expense if Ms. Cox agreed to be paid \$15,000 in cash [FN221] on the concert date, i.e., without receiving any deposit. (Zedeck Decl. II ¶ 5; Pls.' Renaissance Ex. 33.) Plaintiffs have not offered any evidence to show that this business reason for the terms of the Nederlander Theatre contract is a pretext or sham. *McDonnell Douglas*, 411 U.S. at 804.

FN220. The contract is dated June 2, 1999 for a concert on June 6, 1999. (Pls.' Renaissance Ex. 33.)

FN221. Mr. Jones agreed to pay Ms. Cox

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only \$8,000 per concert. (*Id.* Ex. 31.)

Plaintiffs submit two additional composite exhibits (Plaintiffs' Renaissance Exs. 34, 35), which purport to contain contracts showing that the "dominant" white promoters were offered contracts containing 10% or no deposits, not the standard deposit of 50% of the artist's guarantee. (Pls.' Resp. Renaissance at 7, 15.) Plaintiffs maintain that this disparity in contract terms is evidence from which an inference of discrimination against them can be drawn. However, Plaintiffs have not offered any evidence that they bid for any of these contracts. No inference of discrimination can be drawn from the departure from the standard deposit of 50%. These more favorable terms would impact competing white promoters as much as any black promoter. Furthermore, Plaintiffs' Renaissance Exhibits 34 and 35, which contain many duplicates, actually show only 114 contracts culled from the thousands of contracts Renaissance has produced to Plaintiffs. [FN222] These better terms received by the "dominant white promoter" can be attributed to their better bargaining position, e.g., control of desirable venue (*see* Am. Compl. ¶ 82), recognized financial strength, or relationship with the artist. Many of the contracts submitted by Plaintiffs reveal that the concert promoters rejected the terms Renaissance or the artist's management proposed and negotiated lesser terms, which the artist's manager then accepted. Mr. Zedeck states that managers accepted these terms based on many years of relationship with the promoter, or the promoter's history, reputation or apparent financial wherewithal. (Zedeck Decl. II ¶ 12.) Other such contracts are for small venues with small guarantees or venues for which 50% deposits would be understandably waived. (*Id.* ¶ 11.) At oral argument, Plaintiffs did not seek to offer rebuttal of Mr. Zedeck's statements.

FN222. As shown by Mr. Zedeck's declaration, 138 of the 252 contracts contained in Exhibits 34 and 35 are duplicates, leaving only 114 contracts in all. (Zedeck Decl. II ¶ 7.) Of the 114, twenty were for concert dates covered by tour deposits of 50% of the minimum artist

guarantees in a tour agreements with Metropolitan Entertainment and with SFX Entertainment, who paid tour deposits of \$450,000 and \$1,156,000 respectively. (Zedeck Decl. II ¶¶ 8, 9, Exs. 3, 4)

*86 Plaintiffs' third argument that Renaissance "persuad[es] its artists that they should use the dominant white concert promoters" (Pls.' Resp. Renaissance Mem. at 1), a totally conclusory statement, is unsupported by any evidence from an artist, artist's manager, or admission of Renaissance. Plaintiffs, without offering any evidentiary support, state that "Renaissance and the other agency Defendants contact only the dominant white promoters on behalf of its white artists and do not contact multiple promoters to solicit competing bids to secure the best possible price for its artists." (Pls.' Resp. Renaissance at 1 (citing R. Johnson Aff., Pls.' Renaissance Ex. 7, ¶ 3).) Plaintiffs' citation to the affidavit of Richard Johnson, who last worked in the concert promotion field in 1986 for WMA, (R. Johnson Aff. ¶ 9) does not support their claim. Renaissance was formed in 1996 and owned by Mr. Zedeck, who had previously been engaged in concert promotion almost entirely outside the United States for non-defendant Famous Artists Agency. (Zedeck Decl. I ¶¶ 2-4.) There is no showing by Plaintiffs that Richard Johnson had any experience with Renaissance or that Mr. Johnson knew or was aware of Mr. Zedeck while Mr. Johnson was employed by WMA. Thus, Plaintiffs' citation to this evidence is misleading.

As to Plaintiffs' claim that Renaissance was involved in an alleged conspiracy to deprive Fred Jones of an exclusive agreement for Mud Island and to install Beaver in Memphis as a dominant promoter to the further exclusion of Plaintiff Jones, Plaintiffs' provide no evidence of Renaissance's involvement in this alleged incident or any evidence from which an inference of involvement could be inferred. Mr. Zedeck testified that he had no knowledge of Mr. Jones's application for, or denial of, an exclusive agreement regarding Mud Island. (Zedeck Decl. II ¶ 16.) Mr. Zedeck also denies any communication with Beaver about Mr. Jones or Mud Island. (Zedeck Decl. I ¶ 18.) [FN223]

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Plaintiffs have presented no contradicting evidence. Furthermore, in Mr. Jones's deposition he admitted that he did not send a letter announcing his "exclusive agreement" for Mud Island to Renaissance, although he sent the letter to other booking agencies. (Jones Dep. at, in J. Reply A., 1062-66.) Plaintiffs cite Renaissance's contracts with Beaver in Memphis as evidence that it was complicit in the conspiracy. (Pls.' Resp. Renaissance Mem. at 14 (citing Pls.' Renaissance Exs. 39, 40, 41).) These four contracts merely show that Renaissance and Beaver contracted for promotion of four concerts and do not raise an inference of conspiracy or discrimination based on race in these circumstances.

FN223. Mr. Zedeck also points out that Renaissance could not have conspired to bar Plaintiff Rowe from obtaining an exclusive promotion arrangement at the Chastain Amphitheater in the early 1980s (Am.Compl. ¶ 87(p)) since Renaissance did not exist at that time. (Zedeck Decl. I ¶ 19.)

Mr. Zedeck states that "Renaissance never made an agreement with anyone—not another booking agency, not any concert promoter, not anyone else—to exclude anyone from the concert promotion industry, let alone on the basis of race. Nor did Renaissance ever even discuss making any such agreement with anyone." (Zedeck Decl. I ¶ 6.) Plaintiffs have offered no evidence that would form the basis for an inference to the contrary. Mr. Zedeck further points out that "Renaissance and its clients benefited from vibrant and vital competition between and among concert promoters. Such competition was critical to Renaissance and its artists' ability to obtain the best possible prices for the artists' performances. Further, participating in the conspiracy alleged in the complaint would have driven Renaissance's top artists to other competing booking agencies." (Zedeck Decl. I ¶ 7.)

*87 Plaintiffs have presented no evidence that Renaissance discriminated against or participated in a conspiracy to discriminate against or knew of any alleged conspiracy to discriminate against Plaintiffs

in violation of §§ 1981, 1985(3) or 1986. Therefore, summary judgment is granted on these claims.

V. CONCLUSION

The Court concludes, after weighing all the evidence in this case and drawing all inferences in favor of the Plaintiffs, that Plaintiffs have raised no genuine issue of material fact and that no rational trier of fact could find for Plaintiffs on any of the myriad of claims made in this action. Accordingly, Defendants' motions for summary judgment are granted. Defendants shall enter judgments for five days notice.

IT IS SO ORDERED.

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Motions, Pleadings and Filings (Back to top)

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- 2003 WL 23951600 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of the Booking Agency Defendants' Motion to Strike Plaintiffs' Amended Local Rule 56.1 Counterstatements (Aug. 25, 2003)
- 2003 WL 23951500 (Trial Pleading) Plaintiffs' Response in Opposition to the Booking Agency Defendants' Motion to Strike Plaintiffs' Amended Local Rule 56.1 Counterstatements (Aug. 08, 2003)
- 2003 WL 23951595 (Trial Motion, Memorandum and Affidavit) The Booking Agency Defendants' Reply Memorandum of Law in Further Support of Their Motion to Strike (Jul. 08, 2003)
- 2003 WL 23951594 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of the Booking Agency Defendants' Motion to Strike

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- 2003 WL 23951587 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of William Morris Agency, Inc.'s Motion for Summary Judgment Dismissing Plaintiffs' Complaint in Its Entirety (Jun. 02, 2003)
- 2003 WL 23951589 (Trial Motion, Memorandum and Affidavit) The Booking Agency Defendants' Memorandum of Law in Support of Their Motion to Strike (Jun. 02, 2003)
- 2003 WL 23951591 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Support of Defendant Renaissance Entertainment Inc.'s Motion for Summary Judgment (Jun. 02, 2003)
- 2003 WL 23951580 (Trial Motion, Memorandum and Affidavit) Creative Artists Agency, LLC's Reply Memorandum of Law in Support of Its Motion for Summary Judgment (May. 28, 2003)
- 2003 WL 23951584 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of the Booking Agency Defendants' Joint Motion for Summary Judgment (May. 28, 2003)
- 2003 WL 23951578 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of Defendants' Motion to Strike the Affidavit of Dr. Gerald Jaynes, Dated March, 19, 2003 (May. 07, 2003)
- 2003 WL 23951576 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendant Renaissance Entertainment Inc.'s Motion for Summary Judgment (Apr. 25, 2003)
- 2003 WL 23951573 (Trial Motion, Memorandum and Affidavit) Creative Artists Agency, LLC's Memorandum of Law in Support of Its Motion for Summary Judgment (Apr. 24, 2003)
- 2003 WL 23951577 (Trial Motion, Memorandum

and Affidavit) Plaintiffs' Response Memorandum of Law in Opposition to Defendants' Reply Motion to Exclude Plaintiffs' Expert Witness Dr. Gerald D. Jaynes's Affidavit (Apr. 24, 2003)

- 2003 WL 23951570 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants' Motion to Strike the Affidavit of Dr. Gerald Jaynes, Dated March 19, 2003 (Apr. 09, 2003)
- 2003 WL 23951567 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of Defendants' Motion to Exclude the Proposed Testimony of Plaintiffs' Expert Witness, Dr. Gerald Jaynes (Apr. 07, 2003)
- 2003 WL 23951564 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of William Morris Agency, Inc.'s Motion for Summary Judgment Dismissing Plaintiffs' Complaint in Its Entirety (Apr. 03, 2003)
- 2003 WL 23951565 (Trial Motion, Memorandum and Affidavit) The Booking Agency Defendants' Joint Memorandum of Law in Support of Their Motions for Summary Judgment (Apr. 03, 2003)
- 2003 WL 23951562 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Revised Memorandum of Law in Opposition to Defendants' Motion to Exclude Plaintiffs' Expert Witness, Dr. Gerald D. Jaynes, or Alternatively to Exclude Proposed Testimony of Dr. Gerald D. Jaynes (Mar. 28, 2003)
- 2003 WL 23951559 (Trial Motion, Memorandum and Affidavit) Defendant Jam Productions, Ltd.'s Reply Memorandum of Law in Support of Its Motion for Summary Judgment on Claims Three Through Six of Plaintiffs' Amended Complaint (Mar. 25, 2003)
- 2003 WL 23951554 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Defendants Motion to Exclude Plaintiffs' Expert Witness, Dr. Gerald Jaynes, or, Alternatively, to Exclude Proposed Testimony of Dr. Gerald Jaynes (Mar. 20, 2003)

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- 2003 WL 23951550 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Revised Memorandum of Law in Opposition to Defendant Jam Productions, Ltd.'s Motion for Summary Judgment on Claims Three, Four and Six of Plaintiffs' Amended Complaint (Mar. 18, 2003)
- 2003 WL 23951544 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Plaintiffs' Unopposed Motion for Extension of Time to Respond to Defendant Jam Production Ltd.'s Motion for Summary Judgment (Feb. 14, 2003)
- 2003 WL 23951542 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of Defendants' Motion to Exclude Plaintiffs' Expert Witness, Professor Joe R. Feagin or, Alternatively, to Exclude Proposed Testimony of Professor Feagin (Jan. 30, 2003)
- 2003 WL 23951538 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Supplement to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Exclude Expert Witness, Professor Joe R. Feagin, or, Alternatively, to Exclude Proposed Testimony of Professor Joe R. Feagin and Supplemental Affidavit (Jan. 22, 2003)
- 2002 WL 32768793 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants' Motion to Exclude Plaintiffs' Expert Witness, Professor Joe R. Feagin or, Alternatively, to Exclude Proposed Testimony of Professor Feagin (Dec. 20, 2002)
- 2002 WL 32768792 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants' Motion to Compel Ujaama Entertainment, Inc. to Produce Documents in Response to the Subpoena Served on January 18, 2002 (Apr. 15, 2002)
- 2002 WL 32768791 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants' Motion to Compel Famous Artists Agency, Inc. to Produce Documents in Response to the Subpoena Served on January 30, 2002 (Apr. 10, 2002)
- 2002 WL 32768790 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply Memorandum of Law in Further Support of Their Objections to the January 15, 2002 Order of U.S. Magistrate Judge Francis with Respect to Email Communications (Mar. 07, 2002)
- 2002 WL 32768789 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Defendants William Morris Agency, Inc., Creative Artists Agency, LLC, Monterey Peninsula Artists, Inc., and the SFX Defendants in Opposition to Plaintiffs' Written Objections to Magistrate Judge Francis' January 15, 2002 Order (Feb. 27, 2002)
- 2002 WL 32768804 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants' Motion to Exclude the Proposed Expert Testimony of Dr. Gerald Jaynes (Feb. 24, 2002)
- 2001 WL 34727654 (Trial Motion, Memorandum and Affidavit) Defendants' Reply Memorandum of Law in Support of Their Cross-Motion for an Award of Costs and Attorneys' Fees (Nov. 27, 2001)
- 2001 WL 34727652 (Trial Motion, Memorandum and Affidavit) WMA's Reply Memorandum of Law in Further Support of Its Motion for a Protective Order Concerning E-Mail (Nov. 13, 2001)
- 2001 WL 34727648 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum of Law in Opposition to the Dismissal of the Claims of Bernard Bailey and Bab Productions, Inc. Without Reimbursement of Costs and Attorneys' Fees and in Support of Defendants' Cross Motion for Costs and Fees (Nov. 08, 2001)
- 2001 WL 34727643 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Protective Orders with Respect to Email Communications (Nov. 02, 2001)
- 2001 WL 34727639 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Motion for Protective Order on Behalf of William Morris Agency, Inc. Concerning Plaintiffs' Request

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for Restoration and Production of Electronic Mail (Sep. 25, 2001)

- 2001 WL 34727641 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendant Monterey Peninsula Artists, Inc., in Support of Motion for a Protective Order Relating to the Production of Emails (Sep. 21, 2001)
- 2001 WL 34727637 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Plaintiffs' Motion to Compel Compliance with the Court's March 19, 2001 Order and to Compel Responses Pursuant to Fed.R.Civ.P. 36 to Plaintiffs' Requests to Admit (May. 09, 2001)
- 2001 WL 34727634 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Plaintiffs' Motion to Compel Compliance with the Court's March 19, 2001 Order, and in Opposition to Defendants' Motion to Compel (Apr. 22, 2001)
- 2001 WL 34727632 (Trial Motion, Memorandum and Affidavit) The Booking Agent Defendants' Reply Memorandum of Law in Support of Their Motion for a Protective Order (Jan. 26, 2001)
- 2001 WL 34727630 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply Memorandum of Law in Further Support of Their Motion to Compel and for a Protective Order, and in Opposition to Defendants' Motion to Compel and for a Protective Order (Jan. 19, 2001)
- 2000 WL 34474928 (Trial Motion, Memorandum and Affidavit) The Booking Agent Defendants' Memorandum of Law in Support of Their Motion for a Protective Order and in Opposition to Plaintiffs' Motion to Compel (Dec. 20, 2000)
- 2000 WL 34474930 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of the Concert Promoter Defendants in Support of Their Cross-Motion for a Protective Order and to Compel Discovery, and in Opposition to Plaintiffs' Motion (Dec. 20, 2000)
- 2000 WL 34474927 (Trial Motion, Memorandum

and Affidavit) Memorandum of Law in Support of Plaintiffs' Motion for an Order Compelling Defendants to Respond to Plaintiffs' Discovery Requests, and for a Protective Order (Nov. 22, 2000)

- 2000 WL 34474933 (Trial Pleading) Answer and Affirmative Defenses of Renaissance Entertainment, Inc., to the Amended Complaint (Aug. 21, 2000)
- 2000 WL 34474932 (Trial Pleading) Answer to Amended Complaint (Aug. 16, 2000)
- 2000 WL 34474929 (Trial Pleading) Answer and Defenses of Defendant William Morris Agency, Inc. to Amended Complaint (Aug. 15, 2000)
- 2000 WL 34474926 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss (Jan. 21, 2000)
- 1999 WL 33919661 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss All or Portions of the Amended Complaint (Nov. 23, 1999)
- 1999 WL 33919659 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Motion to Dismiss (Oct. 05, 1999)
- 1999 WL 33919663 (Trial Pleading) Answer (Oct. 01, 1999)
- 1999 WL 33919662 (Trial Pleading) Amended Complaint (Aug. 09, 1999)
- 1999 WL 33919657 (Trial Motion, Memorandum and Affidavit) Defendant Premier Talent Agency's Memorandum of Law in Support of Its Motion to Dismiss the Third, Fourth, Fifth and Sixth Causes of Action (Feb. 16, 1999)
- 1999 WL 33919658 (Trial Pleading) Answer of Defendant Belkin Productions, Inc. (Feb. 16, 1999)
- 1999 WL 33919660 (Trial Pleading) Answer of

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Defendant Jam Productions Ltd. (Feb. 16, 1999)

- 1998 WL 34311476 (Trial Pleading) Complaint
(Nov. 19, 1998)

- 1:98CV08272 (Docket)
(Nov. 19, 1998)

- 1998 WL 34311478 (Trial Motion, Memorandum
and Affidavit) Plaintiffs' Sur-Reply Memorandum
of Law in Opposition to Defendants' Reply Motion
to Exclude Plaintiffs' Expert Witness, Dr. Gerald D.
Jaynes (1998)

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
 Delores TAYLOR, Plaintiff,

v.

Polygram RECORDS, Independent Label
 Sales/Polygram Group Distribution
 Defendant.

No. 94 CIV. 7689(CSH).

March 8, 1999.

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District J.

*1 In this action alleging employment discrimination, Defendants move after full discovery for summary judgment dismissing the complaint pursuant to Rule 56, Fed.R.Civ.P. For the reasons explained below, I conclude that the Plaintiff has failed to raise a disputed issue of material fact as to whether the Defendants' legitimate explanation for firing her was a pretext for invidious discrimination, and therefore grant Defendants' motion to dismiss the claim of racial discrimination. However, because I conclude that Plaintiff has raised issues of material fact regarding whether her discharge was motivated in part by retaliation against her, Plaintiff's claim of retaliatory discharge survives the motion for summary judgment.

BACKGROUND**1. The Parties**

The Plaintiff is Delores Taylor, an African-American woman. She alleges that

Defendants discriminated against her on the basis of her race, and then discharged her in retaliation for filing a charge of discrimination with the EEOC and retaining counsel to protect her rights. The complaint, from which the above caption is taken, is imprecise with respect to the number and status of the parties defendant. In certain paragraphs of the complaint, Plaintiff refers to one singular defendant. See Complaint at ¶ 12 ("Defendant PolyGram Records, Independent Label Sales/PolyGram Group Distribution, (hereinafter referred to as "PolyGram") is engaged"). In others, Plaintiff pluralizes the defendants. See ¶ 33 ("as a result of the foregoing acts of the defendants ..."). Some paragraphs are internally inconsistent, referring to defendants in both the singular and the plural. See ¶ 13 ("defendants PolyGram are employers ... in that said defendant is engaged in an industry that employs more than fifteen (15) persons").

The confusion engendered by the complaint's imprecision is cleared up by reference to the parties' Rule 56.1 Statements of Material Facts Not in Dispute (each, a "Rule 56.1 Statement"). According to Defendants' Rule 56.1 Statement, PolyGram Group Distribution, Inc. ("PGD") is a corporation involved in record label distribution in the music industry, and was the Plaintiff's employer at the pertinent times. Independent Label Sales ("ILS") is a division of PGD that distributes independent record labels on a smaller scale than PGD. Although the complaint refers to PolyGram Records, Inc. ("PolyGram Records"), Defendants' Rule 56.1 Statement explains, without subsequent contradiction by the Plaintiff, that PolyGram Records never employed Plaintiff and that PolyGram Records is a separate corporate entity from PGD.

I will on occasion refer to these entities as "the Defendants," although it would appear that only PGD bears a potential corporate liability to Plaintiff.

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2. Analysis of the Facts

There has been extensive discovery in this case. The principal witnesses, including Plaintiff, have been deposed. Every document of any conceivable relevance has been produced. The analysis that follows is based upon the parties' Rule 56 affidavits, as supported and amplified by that discovery.

*2 Delores Taylor was hired as a sales assistant in August of 1990 by PGD. At PGD, Taylor acted as the liaison between artists' development representatives and recording labels within PolyGram Records. Her responsibilities included the preparation of various reports detailing the results of record promotions. During the two years she was employed by PGD, Taylor received two written evaluations nearly identical in substance, each concluding that her overall performance was "average. Meets position requirements." Affidavit of Delores Taylor dated March 29, 1998 ("Plaintiff's Aff.") at Ex. 4, 5.

It is common ground that PGD terminated Taylor in October of 1992 for reasons, not reflected in this record, which were unrelated to her race or her performance. In November of 1992, shortly after her discharge, Taylor was hired to work at ILS, a small division of PGD with approximately six staff members at the pertinent times. Taylor was interviewed and hired by Pat Monaco, the Vice President of ILS. Monaco is Caucasian. Some uncertainty exists as to whether Taylor's precise title at ILS was "administrative assistant" or "senior secretary." But, given that Taylor's duties and performance were apparently unaffected by her title, the dispute is immaterial. It is agreed that Taylor's responsibilities in her new position included answering telephones for other staff members, collecting and distributing mail, making travel arrangements, assisting staff members with promotional mailings, preparing the "ILS report," and distributing other reports. At the pertinent times, the ILS report was a document generated weekly that reflected, among other things, the record sales and airplay of ILS artists as reported in information collected by Taylor.

In Taylor's opinion, her new job proceeded smoothly for the first three months. This initial period of purported tranquility was shattered when Betsy Grant, a Caucasian, was hired as Director of Sales and Marketing at ILS in February of 1993. Grant reported to Monaco and became Taylor's supervisor, a fact of which Taylor says she was initially unaware. Problems between Grant and Taylor arose almost immediately after Grant joined ILS. Grant came to ILS from PGD. Although Grant's tenure at PGD had overlapped with Taylor's, the two women had never worked together and had no personal relationship while at PGD. Shortly after Grant commenced work at ILS, she allegedly began to treat Taylor in a disdainful manner that Taylor "equated with racial bias." Plaintiff's Aff. at ¶ 26. According to Taylor, Grant:

would toss work on my desk with yellow "post-its," demanding that "I want this done by the end of the day," refusing to engage with me verbally, or to give me any instruction or guidance in these tasks. In addition, it was unclear to me whether she understood (or cared) for whom I was working, or what I was doing. For example, several weeks into her tenure, she told me that the ILS report contained inaccurate information, implying that the fault was mine; [when] the information from the report came from Donna Cornell.

*3 Plaintiff's Aff. at ¶ 21.

Although Taylor suggests that there were continual conflicts with Grant, her Affidavit highlights several incidents. Some are useful to recount here because they are reflected or discussed in evaluations of Taylor and relevant memoranda generated during her employment.

On March 30, 1993, Taylor and Grant had their first of numerous heated altercations. On that day, Grant confronted Taylor about Taylor's tardy completion of a report Grant had asked her to prepare. During their conversation, Taylor challenged Grant's authority over her, at which point Grant informed Taylor that she was her supervisor, a fact which surprised Taylor. Several days later, in a conversation with Taylor, Monaco confirmed that Grant was indeed her immediate

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supervisor.

Approximately a month later, on May 6, 1993, Taylor received her first written performance evaluation at ILS, prepared and signed by Grant and reviewed by Monaco. In her three months at ILS prior to Grant's arrival, Plaintiff was given no written or oral evaluation and no memoranda evidently exist concerning her job performance for that period. Her first evaluation, covering the period from February 1, 1993 to May 4, 1993, identified numerous deficiencies in Taylor's performance, such as, "shows minimal initiative and basically does only what is required", "work needs frequent checking," "willingness to comply with assignments highlights a level of resentment with authority," and "Rather slow worker. Volume of work below average." The evaluation assessed her overall performance as "marginal. Meets minimum position requirements"; the fourth-lowest out of five categories. The evaluation concluded by acknowledging only one strength: "Good attendance;" but recognized the following areas needing development:

Needs to take initiative • Needs to ask questions when she doesn't understand task • Needs to pay attention to detail • Needs better time management skills • Needs a better attitude

Plaintiff's Aff. At Ex. 11.

Taylor avers that she verbally disputed all of the negative conclusions in a meeting with Grant on May 6, 1993 to discuss the evaluation. She then signed the evaluation after making the following written comment:

This review by Betsy Grant with input from Pat Monaco is premature and biased. [FN1] While Betsy has been employed with ILS for three months and I have been employed with ILS for 6 months the latter 3 month duration is the premise by which I am being evaluated. There are numerous inaccuracies and generalities in this review which are the results of lack of communication and supervision of my duties by Betsy Grant. While Betsy and I are still learning and fine tuning the many responsibilities of our jobs, increased communication, supervision and tolerance, but most importantly a display of

respect and professionalism in our daily interaction will alleviate any problems that may currently exist.

Plaintiff's Aff. at Ex. 11.

*4 Their relationship did not improve after the evaluation; nor did the perception of her deficiencies. Donna Cornell, the Production Manager at ILS, was Taylor's co-worker and, according to Taylor, also one of her supervisors. On September 21, 1993, Cornell, a Caucasian, sent a memorandum to Grant with a copy to Monaco relating certain problems she had experienced with Taylor's work performance and personality. The memo states in pertinent part:

As per our conversations regarding our assistant, I am quite perturbed. Initially, you had asked me to memo you all problems, and because of my work load I have written down many instances. However, I feel things have gotten quite intolerable, therefore here is yet another.

* * *

Last week she screamed at me thinking I was in her way while she was packing a box, when in fact I was only standing to her side so that I was not. This morning I came in to find my desk opened and light on and, I simply asked her "Delores, have you seen anyone here at my desk?". I was confronted with a screaming "NO", as if I were accusing her. After giving several efforts and treating her with kid gloves, and receiving primarily negative responses, I feel this behavior will ultimately hurt my performance.

Furthermore, when I ask her to do the smallest of duties it often takes twenty four hours (all of which you have been memoed on) because it is placed on the end of her priority list. Additionally, her efforts must constantly be reviewed by myself because of regular errors.

Plaintiff's Aff. At Ex. 13.

Taylor's "most disastrous encounter" with Grant, one which "most clearly evinced to [Taylor] the pattern of discrimination which operated at ILS" occurred on November 17, 1993. Plaintiff's Aff. at ¶ 33. At the end of the previous day, Grant had asked Taylor to send a package via Airborne

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Express to a new account. Taylor mistakenly mailed only part of the package. The next day Grant reprimanded her for embarrassing the company by leaving out part of the package, admonishing that "you had better not let this happen again, is this understood?" *Id.* Taylor responded by sending Grant a memo referring to the incident as a "miscommunication" and proposing that all overnight packages be provided to her by 5:00 p.m. to ensure that they would be sent out on time. *Id.* at ¶ 34.

Yet another incident occurred on December 3, 1993, when Taylor took a lunch break after Grant informed her that she must stay to cover the phones until other staff members returned from lunch. Taylor explains that she disregarded Grant's instruction because she had not eaten in a long time and was feeling sick. Plaintiff's Aff. at ¶ 37. When she returned from lunch, Taylor was reprimanded by Grant who accused her of insubordination. Shortly afterwards on that same day, Taylor related the incident to Felicia Wax in the PolyGram Human Resources Department whom she approached in an effort to explore the possibility of seeking a different position within the company.

*5 On the heels of these incidents, Monaco and Grant prepared a "Final Written Warning" on December 14, 1993 and provided it to Plaintiff on January 3, 1994. In this report, Monaco and Grant observed that Taylor's performance had not sufficiently improved in several of the areas in which the May 1993 evaluation noted deficiencies. After describing the areas of concern under the headings "Quantity and Quality of Work," "Initiative" and "Attitude and Cooperativeness," the report concluded in substantial part:

The problems detailed above have a negative impact on the department and will no longer be tolerated. We will be reviewing your performance over the next month and expect to see immediate and lasting improvement in all areas of your performance *or we will have no alternative but to recommend your termination.*

Plaintiff's Aff. at Ex. 18 (emphasis added). Taylor did not sign or directly respond to this Warning. Instead, on January 4, 1994 Taylor contacted an

attorney, C. Vernon Mason, and later informed Felicia Wax of this fact. Wax, in turn, related this to Monaco and Grant, as she memorialized in a memorandum dated January 7, 1994:

After receiving her Final Written warning on 1/4/94, Delores came to meet with me and inform me that she had retained C. Vernon Mason as her attorney.

I met with Betsy Grant and Pat Monaco on 1/6/94 to advise them of Delores' actions and coach them on maintaining accurate documentation and on the best termination scenario (i.e. incident related).

Betsy or Pat will call me prior to terminating Delores.

Plaintiff's Aff. at Ex. 19.

About a month later, in February of 1994, Grant provided Taylor two self-evaluation forms. The first, which Defendants say was mistakenly provided to Taylor, was a form that applied to managers; the second was for hourly employees like Taylor. Taylor completed and returned both evaluations. There is no indication in the record of any discussion between Grant and Taylor concerning her self-evaluations.

On March 4, 1994, Plaintiff filed a charge of discrimination against PolyGram Records with the EEOC. A copy of the charge was served on PolyGram Records.

On May 26, 1994, Grant and Monaco gave Taylor her second written performance evaluation. This evaluation, dated February 25, 1994 and signed by Grant, purported to cover Taylor's performance during the nearly nine month period from May 4, 1993 through February 25, 1994. Plaintiff's Aff. at Ex. 24. The evaluation recognized that in certain respects Plaintiff's performance and attitude had improved. For example, it noted "no recent problems with insubordination" and recognized that Taylor's "attitude has improved quite a bit in the past (5) weeks, with much more willingness towards supervision (since given Final Written Notice)." However, the evaluation also contained descriptions of her shortcomings in very similar terms as the May 1993 evaluation. For example, it

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acknowledged that while her quantity of work and dependability had improved somewhat, "volume is not at the level that it should be" and "Delores still needs to focus on details. Careless mistakes, (i.e. sending out packages correctly, faxing information properly to accounts, typing memos in a timely fashion) make it difficult to completely depend upon her efforts." The evaluation also stated that "much more initiative needs to be shown." The overall appraisal it gave Taylor was the same as in the 1993 evaluation: "marginal." *Id.* In connection with this review, Taylor received a \$10.00 per week raise effective as of May 1, 1994. *Id.* at Ex. 25.

*6 Taylor did not sign or directly comment on the contents of this evaluation. As she states, she was advised by her attorney not to respond to a "stale" evaluation, and believed that the two detailed self-evaluations she provided Grant in February, at around the time the evaluation was prepared, could effectively serve as a response to her supervisors' assessment.

The denouement of Taylor's ill-fated history with ILS occurred during June and July of 1994. On June 9 and June 30, 1994, Grant wrote two memoranda to Felicia Wax complaining about two separate episodes in which Taylor failed to provide certain important information to SoundScan, an industry report that discloses the retail sales of music releases based on bar code data. Plaintiffs Aff. at Ex. 28. In addition, Donna Cornell wrote Grant (with a copy to Monaco) an undated memorandum detailing eight examples of poor performance by Taylor between June 7 and June 17, 1994. *Id.* On June 15, 1994, Wax sent a memorandum to Gloria Feliciano in the PolyGram Human Resources Department stating as follows:

Per our conversation regarding Delores Taylor, please be advised that per Craig Benson [a PolyGram lawyer], we will *not* be proceeding with her termination at this time. He felt that the incident for which we were going to terminate her was not serious enough and that combined with her most recent review (which indicated improvement in certain areas), would work against us if we went to court.

He recommended that we review her work

carefully and collect more documentation of recent problems to support our position.

I have advised Betsy Grant, Delores' supervisor, of our recommendation.

Id. at Ex. 27 (emphasis in original).

Less than a month later, on July 11, 1994, Monaco and Grant prepared and furnished to Taylor a second Final Written Warning, stating that there had been insufficient improvement in her performance and attitude since the first Final Written Warning and the last performance evaluation. The Warning also described the two SoundScan incidents as evidence that her performance had declined, and chastised her for her "habit of looking away or at the floor when talking to" Grant. It concluded that if immediate and lasting improvement were not made, they would recommend her termination. Plaintiffs Aff. at Ex. 29. Taylor signed the Warning on July 18, attaching a response letter which explained the SoundScan incidents as the fault of another employee who failed to provide Taylor the omitted information, and disputed the charge that she purposefully did not make eye-contact with Grant. *Id.* at Ex. 30. Her response also accused Grant and Monaco of engaging in unspecified "actions" that constituted "unnecessary harassment." *Id.*

Grant fired Taylor on July 22, 1994. Promptly following the issuance of a Right to Sue Notice from the EEOC, Taylor initiated the present action on October 24, 1994. The complaint, brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, alleges that Defendants discriminated against Taylor in connection with her employment on the basis of her race, and terminated her in retaliation for filing a charge of discrimination.

DISCUSSION

*7 The principles governing the grant or denial of summary judgment are well established. "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of*

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New York, 132 F.3d 145, 149 (2d Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2075 (1998). In addressing a motion for summary judgment, "[t]he court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in his favor." *L.B. Foster Co. v. American Piles, Inc.*, 138 F.3d 81, 87 (2d Cir.1998) (citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once such a showing is made, the party opposing the motion must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In so doing, the "non-moving party may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). Moreover, while the party resisting summary judgment must show a dispute of fact, it must also be a material fact in light of the substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient" to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 252. Instead, the non-movant must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." *Id.* at 256. Summary judgment should only be granted if no rational factfinder could find in favor of the non-moving party. *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 721 (2d Cir.1994).

In the employment discrimination context, a trial court must be "cautious" about granting summary judgment, given that direct evidence supporting a plaintiff's claim of intentional discrimination is rare. *Gallo v. Prudential Residential Services Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir.1994); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir.1994). However, summary judgment is

not necessarily precluded in an employment discrimination case, even when the employer's intent or state of mind is at issue. *Chambers*, 43 F.3d at 40; *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir.1988); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985).

I. Title VII Discrimination Claim

Consideration of Taylor's claim of employment discrimination on this summary judgment motion properly falls within the burden-shifting analysis the Supreme Court has established and refined in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-08 (1993). Under this framework, to defeat a motion for summary judgment, a plaintiff must initially bring forward admissible evidence to set forth a prima facie case of discrimination. To do this, a plaintiff must show that: (1) she belongs to a protected class; (2) she satisfactorily performed the duties of her job; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination. See *Chambers*, 43 F.3d at 37. The burden of production a plaintiff must carry in demonstrating its prima facie case in order to defeat a summary judgment motion is *de minimis*. *Id.*

*8 Once the plaintiff has met this burden, a presumption of discrimination arises and the burden falls to the employer to articulate a legitimate and specific non-discriminatory reason for the discharge. *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2d Cir.1996). If the employer meets this burden, the presumption of discrimination drops out and the plaintiff must carry the ultimate burden of establishing that the stated reason is false and that the employer was actually motivated in whole or in part by prohibited discrimination. "A proffered 'reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Grady v. Affiliated Central, Inc.*, 130 F.3d 553, 560 (2d Cir.1997) (quoting *Hicks*, 509 U.S. at 515), *cert. denied*, 119 S.Ct. 349 (1998).

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It is therefore not enough for the plaintiff to create an issue of material fact as to the validity of the proffered explanation; there "must also be evidence that would permit a rational factfinder to infer that the discharge was actually motivated, in whole or in part, by discrimination". *Grady*, 130 F.3d at 561. "In so doing, a plaintiff may rely on the evidence constituting the prima facie case, together with supportable inferences to be drawn from the false or erroneous character of the employer's proffered reason for the adverse action." *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir.1997) (en banc), cert. denied, 118 S.Ct. 851 (1998). Because the burden of persuasion always remains with the plaintiff to prove "that any seemingly legitimate reason proffered by the employer is, in reality, a pretext for unlawful discrimination," *de la Cruz v. New York City Human Resources Admin. Dep't of Social Services*, 82 F.3d 16, 20 (2d Cir.1996), I must determine whether Plaintiff has adduced credible evidence that raises a genuine issue of material fact as to whether she was the victim of discrimination. *Grady*, 130 F.3d at 560.

Defendants submit that Taylor has not met her initial burden of establishing her prima facie case because she cannot show that her job performance was satisfactory or that her termination occurred under circumstances giving rise to an inference of discrimination. Defendants argue in the alternative that even assuming her prima facie case were established on this record, Taylor cannot demonstrate with credible, admissible evidence that Defendants' legitimate explanation for firing her due to sub-par performance is worthy of disbelief, or that the true motivation for its conduct was unlawful discrimination.

Viewing the evidence on the record as a whole and in the light most favorable to Taylor, I hold that no rational factfinder could conclude that Defendants' proffered explanation was false or that her termination was motivated by racial enmity.

A. Unsatisfactory Performance

Because the ultimate dispositive issue is whether Defendants' decision was motivated at least in part

by a discriminatory motive, for purposes of this motion the Court will assume *arguendo* that Plaintiff's prima facie case has been established. See, e.g., *Lapsley v. Columbia Univ. College of Physicians*, 999 F.Supp. 506, 515 (S.D.N.Y.1998) (recognizing that many courts assume that a prima facie case has been made for purposes of summary judgment so that they can turn directly to the third and crucial stage in the burden-shifting analysis).

*9 Defendants contends that Plaintiff was fired because her job performance was not satisfactory, and have has provided documentation substantiating the claim that Taylor's job performance was rife with deficiencies. Taylor's evaluations and Warnings repeatedly asserted, from nearly the beginning of her tenure, that her performance was substandard. Plaintiff never received an overall positive evaluation at ILS. During her two years at ILS, Taylor was given two formal written performance evaluations, prepared by Grant with review and input from Monaco, each of which identified significant areas in which her attitude and performance were lacking and accorded her overall performance the second lowest out of five ratings: "marginal". Taylor's performance did not merely result in poor reviews. One year into her tenure, Taylor received her first (perhaps inaptly-termed) Final Written Warning, which outlined specific performance and attitude problems, and informed Taylor that she would be fired if the problems were not ameliorated. Taylor received a second Final Written Warning six months later, just before she was fired.

In addition to the evaluations and Warnings, Defendants have furnished two memoranda by Taylor's co-worker, Donna Cornell, detailing certain of her contemporaneous complaints of Taylor's negative attitude and performance difficulties, and two memoranda from Grant to Felicia Wax describing two incidents in which Taylor purportedly failed to perform her job, causing ILS some embarrassment.

The evidence amassed by Defendants amply supports their proffered race-neutral reason for discharging Plaintiff: her failure to perform her job

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to its satisfaction. The submission of evaluations and memoranda critical of Taylor's performance constitutes permissible support for the Defendants' proffered explanation. *Cf. Mieri*, 759 F.2d at 995 ("In determining whether an employee's job performance is satisfactory, courts may--as they often must-- rely on the evaluations rendered by supervisors."); *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 28 (2d Cir.1996) (noting that employer had adduced substantial evidence, including letters and memos critical of plaintiff, to support its claim that it was unhappy with plaintiff's performance).

1. Factual Basis of Evaluations

Unsurprisingly, Taylor challenges this explanation as mere pretext for racial discrimination. In so doing, Taylor has not submitted direct evidence (such as a positive review or laudatory memorandum) to demonstrate that, contrary to the conclusions drawn in the evaluations, Warnings and memoranda submitted by Defendants, she was performing adequately. Instead, Taylor initially challenges the explanation as false by disputing many of the incidents upon which some of the criticism contained in the evaluations and Warnings is based. Taylor's Affidavit and certain of its attached exhibits, including a memorandum she wrote in response to her last Final Written Warning and a memorandum she wrote to Grant on November 19, 1993, furnish Taylor's account of several incidents, including the lunch incident, the Airborne Express incident, and the SoundScan incidents described above. In addition, Taylor submits a copy of the self-evaluation she completed in February of 1994 which offers her own more positive assessment of her performance and the quality of her work.

*10 Taylor's attempt to rebut Defendants' proffered explanation by parsing the details of selected incidents, generally disputing her supervisors' assessments, and providing her own contrary appraisal of her work, is unavailing. Her Affidavit and memoranda may raise issues concerning the reasons *why* she failed to perform her job--such as why certain reports were late, why she failed to

provide crucial information to SoundScan, and why she went to lunch when she was told to wait. However, this evidence does not raise an issue of fact regarding the overall legitimacy of the proffered explanation.

As a preliminary matter, Taylor does not dispute the fact that these incidents actually occurred. Taylor does not deny that she in fact failed to provide information to SoundScan, that she in fact went to lunch in direct disobedience to Grant's orders, or that she in fact failed to mail out the full contents of a package to a new account. The evidence, even if viewed most favorably to Plaintiff, merely serves to shift the blame for, or rationalize, these incidents to show that the criticism was undeserved. But, faulting others for, or otherwise rationalizing, problems legitimately perceived by her employer does not establish pretext. *Cf. McLee v. Chrysler Corp.*, 109 F.3d 130, 135 (2d Cir.1997) (plaintiff's rationalizations for his deficiencies did not serve to demonstrate any triable issue of material fact regarding his employer's explanation that he was fired for unsatisfactory performance including tardiness; his excuses for his tardiness served to confirm the validity of his employer's criticisms).

Taylor's fundamental disagreement with the conclusions her supervisors drew from incidents which she admits occurred, and her subjective belief that they should not have reflected badly on her performance because they were someone else's fault, is not evidence that her supervisors' appraisals were a sham, invented to mask discrimination. *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991) ("The fact that an employee disagrees with an employer's evaluation of him does not prove pretext."); *Reilly v. Metro-North Commuter R.R. Co.*, No. 93 Civ. 7317(PKL), 1996 WL 665620, at *9 (S.D.N.Y. Nov. 15, 1996) ("An employee's opinion that a performance review was unfair, supported only by her own conclusory statements to that effect, cannot bootstrap her claims into a Title VII claim of discrimination."); *Shabat v. Blue Cross Blue Shield of Rochester Area*, 925 F.Supp. 977, 987-88 (W.D.N.Y.1996) ("An employee's mere dissatisfaction with the pace of his career progress,

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based on his subjective assessment of his own performance, is not enough to make out a prima facie case under Title VII.") (citation omitted), *aff'd without published opinion*, 108 F.3d 1370 (2d Cir.1997); *Holt*, 95 F.2d at 130 (plaintiff's "personal belief that she was the most qualified person for the various positions" failed to show pretext where the facts indicated that the promotions which plaintiff had sought were given to people with greater experience than plaintiff). Whether or not her supervisors should have drawn a negative conclusion from these incidents vis-a-vis Taylor's performance is a subjective determination that her employer was entitled to make without the intrusion of third-party hindsight. The determination of whether a plaintiff's job performance was satisfactory is not measured by an objective standard, but, rather "depends on the employer's criteria for the performance of the job." *Thornley*, 104 F.3d at 29. So long as the employer does not apply the criteria in bad faith or arbitrarily, the reasonableness of the criteria cannot be second-guessed by the judge or jury. *Id.*

*11 Even assuming that a jury were to credit Taylor's version of the incidents she describes, and find that her supervisors improperly lay the blame for the mistakes upon her, her argument would not undermine the validity of the proffered explanation. The criticism in the evaluations, Warnings and memoranda encompassed far more than the discrete incidents which Taylor claims were not her fault. Taylor does not specifically refute many of the other major deficiencies noted in the evaluations. For example, a significant concern that weaves throughout the evaluations and Warnings is Taylor's alleged lack of initiative. Addressing this criticism in her Affidavit, Taylor simply contends that her job was too demanding to allow her to take on new projects. Although she thus explains why she failed to ask for more work, she does not deny that she failed to exhibit many of the other components of initiative which her supervisors found lacking, such as asking follow-up questions or seeking out information that was missing from a report. To be sure, in her Affidavit, Plaintiff disputes in wholesale fashion all of her supervisors' criticism. But, other than as described above, she fails to identify with

particularity the allegedly unwarranted criticism, or offer an evidentiary basis for disputing it. This conclusory refutation of an employer's negative assessments is not sufficient to challenge the legitimacy of the evaluations. *Cf. McLee*, 109 F.3d at 135 (plaintiff did not raise a factual issue regarding the validity of negative evaluations where he failed to dispute nearly one-third of the rated areas as to which his performance was found unsatisfactory).

2. Bad Faith

In addition to challenging the validity of the evaluations by disputing the factual basis underlying her performance assessments, Taylor challenges the evaluations as illegitimate on the basis that Grant's demands of her were "arbitrary and unrealistic", Plaintiff's Aff. at ¶ 25, and that "the harassment by Grant and Monaco prevented her" from adequately performing her job. [FN2] Plaintiff's Memorandum of Law in Opposition to Defendants' Motion ("Plaintiff's Mem.") at p. 5. In other words, Taylor contends that the assessments were not made in good faith. Taylor derives this argument from *Mieri v. Dacon*, in which the Second Circuit recognized that although courts and juries generally may not second-guess an employer's conclusion that an employee's performance does not meet its legitimate expectations, employees may challenge the conclusion by showing that "the employer's demands were illegitimate or arbitrary." 759 F.2d at 995 (quotation omitted).

Taylor avers that her uniformly negative ILS evaluations and Warnings are unworthy of credence because her position had nebulous and ever-changing duties and she was not provided adequate training, ostensibly because Grant was attempting to thwart her performance. This argument fails to persuade. Taylor provides no factual support for her sweeping assertions that Grant prevented her from performing her duties. She has furnished no evidence to show that she was trained or treated differently from other employees in comparable positions at ILS. Moreover, Taylor does not explain why a failure to receive training is material to the legitimacy of her evaluations. Taylor

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does not identify what training she should have received or what criteria would have been applied differently if she had received it.

*12 As for her assertion that her duties were constantly changing, Taylor provides no factual support for her argument that Grant continuously altered her responsibilities so as to prevent her from adequately performing her job. The only duty that she specifically identifies as fitting within that category is the preparation of the ILS report. But Taylor fails to explain how the absence of any established description of her position containing this or any other duty, or the fact that her duties may have evolved, affected her ability to perform her job as reflected in the evaluations. Even if there were no established duties for her position, that does not in itself establish that Grant's expectations were arbitrary and the evaluations illegitimate. Taylor admits that she knew it was her responsibility to prepare the ILS report and to provide the relevant information to SoundScan, two of the specific duties from which criticism arose. But, while her evaluations criticized her failure to *adequately perform* these duties, there is no indication that the criticism arose from any misunderstanding as to whose responsibility it was to prepare the report or to submit the information to SoundScan.

The only other non-conclusory allegation Taylor makes concerning the manner in which Grant may have sabotaged her performance is her claim that Grant imposed an arbitrarily tight deadline for the submission of the ILS report. Taylor argues that it was because of this unrealistic deadline that she could not provide the report on a timely basis, a subject of some criticism in her evaluations. Again, however, Plaintiff fails to provide support for her suggestion that Grant imposed the deadline in *bad faith* in an effort to sabotage her performance. Taylor's Affidavit alleges that Grant changed the deadline from bi-weekly to weekly, and that in Taylor's view, the task of retrieving the information and preparing the report was too monumental to complete on a weekly basis. Nothing in that allegation, however, reasonably supports an inference of bad faith or caprice on the part of Grant, as opposed to a legitimate (or even

ill-conceived) business reason. Moreover, even if Taylor's subjective opinion were sufficient to raise an issue of fact regarding whether Grant imposed the deadline in bad faith, and therefore whether the criticism stemming from her untimely submissions was unjustified, it would serve to undercut only one of the host of criteria on which Taylor rated poorly in the evaluations.

Plaintiffs' argument that the evaluations are illegitimate reduces to a conclusory claim that Grant's bad faith actions caused Taylor to receive bad performance reviews, and that therefore the reviews cannot support Defendants' proffered reason for firing her. Such a vague allegation is insufficient to demonstrate pretext. *Cf. Collazo v. BBDO NY*, No. 96 Civ. 9508(HB), 1997 WL 746447, *3 (S.D.N.Y. Dec. 3, 1997) (rejecting plaintiff's attempt to demonstrate pretext by conclusory, unsupported allegation that performance evaluations were "a racist device which permit managers to freely express their personal biases"), *aff'd without published opinion*, ___ F.3d ___, 1998 WL 781165 (2d Cir. Nov. 9, 1998); *Gray v. The Robert Plan Corp.*, 991 F.Supp. 94, 103 (E.D.N.Y.1998) ("Plaintiff's conclusory allegation of a conspiracy by [defendant] to terminate him on account of his age, under the guise of poor work performance, does not constitute evidence that [defendant] discriminated against him.").

*13 Plaintiffs' reliance on *Mieri v. Dacon*, 759 F.2d 989, and *Walker v. Rochester Telephone Corp.*, No. 90-1066L, 1992 WL 518685 (S.D.N.Y. April 14, 1992), in support of her argument does not compel a different conclusion. Mieri alleged that her employer had failed to adequately supervise her and had never explicitly set forth its expectations of her. The court held that the plaintiff had established the "satisfactory performance" element of her prima facie case by challenging the legitimacy of her negative performance evaluations in this way. The court nonetheless held that although these allegations were sufficient to establish her prima facie case, they were insufficient to rebut the employer's proffered explanation that she was terminated for inadequate job performance. Because

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the employer's explanation was supported by "a veritable arsenal of undisputed, documented examples of Meiri's inappropriate actions at work," *Id.* at 997, the plaintiff's "conclusory allegations" were insufficient to demonstrate the falsity of this explanation. *Id.* At 997-98. Given this conclusion, *Mieri* furnishes Taylor no support for her argument.

In *Walker*, on the other hand, the court held that the plaintiff had raised a triable issue of fact regarding the validity of his employer's claim that he had been fired for poor performance. The plaintiff was a telephone company technician who had been promoted after 19 years in another position with the defendant for which he earned generally positive performance evaluations. When the plaintiff was demoted only months after his promotion with the explanation that his performance was unsatisfactory, the plaintiff challenged the explanation as pretext, claiming that his supervisors sabotaged his work by providing him inadequate technical training, giving him intentionally difficult assignments, making false incident reports and arbitrarily imposing performance goals which none of the other employees in comparable positions had to achieve. The court held that these allegations, together with the allegation that his immediate supervisor disparaged him with racial remarks and evidence of plaintiff's previous positive evaluations, raised an issue of fact regarding whether his supervisor "stacked-the-deck" against plaintiff such that he was not "given a chance to succeed in his new position." 1992 WL 518685, *7.

Although *Walker* concluded that the plaintiff's allegations of sabotage by his supervisor shielded his claim from summary judgment, the same conclusion is not required here. The facts in *Walker* are distinguishable from those in the case at bar. *Walker*'s long-standing history of positive reviews abruptly changed as soon as he was promoted to work with new supervisors; his work in his new position was predominately supervised by one man who was alleged to have made racist remarks to him and to have issued false incident reports about his work; he was singled out to achieve performance goals that no one else had to meet; and his position required highly technical skills for which the proper

training was crucial to his performance. The circumstances giving rise to a suggestion of bad faith in *Walker* are not analogous, in scale or kind, to those in the case at bar. That is so, despite the limited extent to which both *Walker* and *Taylor* allege sabotage by a supervisor, and the existence of some similarities between the allegations. It is not possible to reconcile every decision in the discrimination context, as each case rests upon its own distinct set of facts. Obviously, whether the plaintiff raises a disputed issue of fact demonstrating pretext differs from case to case, based on the particular allegations and the evidence adduced. In this case, although *Mieri* and *Walker* support the proposition that a plaintiff may challenge negative evaluations as pretext by demonstrating that a supervisor in bad faith thwarted a plaintiff's job performance, *Taylor* has not established any basis for such an inference in the circumstances of the case at bar.

3. Previous Evaluations

*14 Taylor points to her performance evaluations during her two years at PGD as raising a disputed issue of fact regarding the legitimacy of the subsequent negative ILS evaluations. I cannot accept this contention. The fact that Taylor may have received prior positive evaluations cannot in itself demonstrate that her later negative evaluations, and the concomitant proffered explanation, are unworthy of credence. See, e.g., *Billet v. CIGNA Corp.*, 940 F.2d at 826 ("[P]rior good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual"); *Jensen v. Garlock, Inc.*, 4 F.Supp.2d 219, 223 (W.D.N.Y.1998) ("While a lengthy period of satisfactory performance may raise an inference of discrimination for purposes of establishing a prima facie case, by itself, such a factor is insufficient to suggest that an employer's amply supported reasons for terminating an employee are pretextual.").

In any event, Taylor admittedly held a different position at PGD than at ILS. Some of her duties at PGD overlapped those she had at ILS, such as collecting material to generate reports. Nevertheless, a number of her responsibilities were

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different; indeed, she acknowledged that to a certain extent "exact dynamics of the position I held with PGD were not the same as the later job with [ILS]". Plaintiff's Aff. at ¶ 5. That being the case, the evaluations of her performance in the position of sales assistant at PGD are not a sound basis upon which to invalidate her later evaluations at ILS. As courts have recognized, previous evaluations in a different department or company offer little probative value regarding the legitimacy of subsequent evaluations in a different position with different responsibilities. Cf. *Gray*, 991 F.Supp. at 101 (plaintiff's evidence of prior satisfactory reviews in a different job in another section of the company had "little or no probative value on the issue" of his performance in the job from which plaintiff claimed he was discriminatorily terminated); *Zenni v. Hard Rock Café Intern., Inc.*, 903 F.Supp. 644, 651 & n. 9 (S.D.N.Y.1995) (security company's evaluations of plaintiff's performance as a security guard on premises of restaurant were not relevant to assess the legitimacy of restaurant's later reviews of plaintiff's performance as restaurant host).

Finally, and perhaps most importantly, the evaluations at PGD do not contrast markedly with those she received at ILS. To the contrary, Taylor received a total of two written evaluations at PGD, each of which gave Taylor an overall rating of "average"—three on a scale of one-to-five—only one level higher than the overall ratings Taylor received at ILS. Plaintiff's Aff. at Ex. 4, 5. Even drawing all inferences in Plaintiff's favor, the evaluations cannot be considered glowing reviews. While they identified some positive aspects of Taylor's performance, they also noted some shortcomings. Significantly, the second evaluation, given on September 8, 1992, recognized one of the same problems that her evaluations at ILS later identified, that Taylor "needs to be more proactive and to take the initiative". *Id.* at Ex. 5. Thus, this is not a situation where an employee had a lengthy period of positive reviews which could conceivably serve to cast doubt on a later, abruptly negative evaluation by a new supervisor. Plaintiff's two average performance reviews for a different job at PGD do not raise an issue of fact regarding the validity of

her negative performance evaluations at ILS.

*15 Although Plaintiff has argued that the evaluations are unfair and cannot be relied upon, I conclude that she has presented no particularized, credible evidence which raises an issue of material fact regarding the validity of the evaluations. Plaintiff has accordingly failed to satisfy her burden of rebutting Defendants' amply supported race-neutral explanation for terminating her.

B. Inference of Discrimination

Even if Taylor's evidence had managed to create an issue of fact concerning whether the evaluations were unfairly negative, Taylor could not withstand summary judgment. A plaintiff cannot avoid summary judgment by merely raising issues of fact regarding the validity of the proffered explanation. It is Taylor's burden to demonstrate not only that the negative evaluations (and therefore the proffered explanation) were illegitimate, but that the evaluations, and her ensuing termination, were the result, at least in part, of invidious discrimination. As the Second Circuit has repeatedly instructed:

[T]he creation of a genuine issue of fact with respect to pretext alone is not sufficient. There must also be evidence that would permit a rational factfinder to infer that the discharge was actually motivated, in whole or in part, by discrimination on the basis of [race]. *Grady*, 130 F.3d at 561; see also *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir.1993) ("[W]e believe it is important to emphasize that a Title VII plaintiff does not necessarily meet its burden of persuasion by convincing the factfinder that the employer's non-discriminatory explanation is not credible; rather, the trier of fact must find that the plaintiff has proven its explanation of *discriminatory intent* by a fair preponderance of the evidence.") (emphasis added). Thus, Taylor's disagreement with the assessments of her work, and her assertion that Grant treated her unfairly, even if true, fails to satisfy Taylor's ultimate burden of establishing that the decision to terminate her was motivated at least in part by a discriminatory motive. Taylor has failed to adduce any evidence that, in light of the record as

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a whole, could possibly show that discrimination played a role in her termination.

The Second Circuit has provided guidance in evaluating whether the facts underlying an employee's discharge give rise to an inference of discrimination:

Circumstances contributing to a permissible inference of discriminatory intent may include the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position, or the employer's criticism of the plaintiff's performance in ethnically degrading terms, or its invidious comments about others in the employee's protected group, or the more favorable treatment of employees not in the protected group, or the sequence of events leading to the plaintiff's discharge, or the timing of the discharge.

Chambers, 43 F.3d at 37 (citations omitted). The record at hand is devoid of credible evidence suggesting the presence of any of the described factors, or any other evidence supporting an inference of bias.

*16 Taylor has not offered any direct evidence of discrimination, which is certainly not uncommon and will not be held against her. However, Taylor offers no circumstantial evidence suggesting the presence of a discriminatory motive. She does not allege that there were any comments made by anyone at ILS towards Taylor in reference to her race, whether derogatory or not. Nor has she offered any evidence that anyone connected with her termination ever made any stray racial comments. Moreover, Taylor does not offer evidence to show that she was treated differently, in a material way, from Caucasians at ILS, and the record is silent as to the racial background of Taylor's successor, if any.

What Taylor does offer in support of her claim of discrimination is her own supposition that Grant's often abrupt and rude behavior towards her was an expression of her racial bias. In her Affidavit, Taylor cites as an example the fact that in March of 1993 Grant chastised her for completing an assignment late. According to Taylor, with "words

and tone that were condescending and provocative," Grant yelled at her, "I am your boss and you report to me." With no basis other than her own intuition, Taylor concludes from this incident that Grant was expressing not just hostility, but *racial* hostility. In Taylor's view, Grant's tone and manner "made it clear to me that Grant perceived me, quite literally, as a slave." Plaintiffs Aff. at ¶ 23 n. 7. In a later altercation stemming from the Airborne Express incident, Grant criticized Taylor's memorandum that explained the incident. Taylor interpreted Grant's criticism is as follows: "She also told me she was offended by my memo, *which meant to me* that she was angry that *I, the black secretary*, had attempted to make an improvement to her way of doing things." *Id.* at ¶ 36 (second emphasis in original).

Taylor contends that a factfinder should be permitted to draw the same conclusion from these incidents as she did—that Grant was biased. I disagree. Taylor's belief, based on no evidence other than gut instinct, that Grant treated her with hostility because of her race, cannot justifiably support an inference of discrimination when nothing in the record remotely links Grant's treatment of her to her race. See *Moorer v. Grumman Aerospace*, 964 F.Supp. 665, 674 (E.D.N.Y.1997) (plaintiffs unsupported "subjective feeling of 'racial tension'" from his supervisor failed to raise inference of discrimination), *aff'd without published opinion*, 162 F.3d 1148 (2d Cir.1998); *accord Shabat*, 925 F.Supp. at 988 ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate non-discriminatory reason.") (quoting *Douglas v. United Serv. Auto. Ass'n*, 65 F.3d 452, 459 (5th Cir.1995)); *Simmons v. AT & T*, No. 96 Civ. 2844(MBM)(LB), 1998 WL 751659, *9 (S.D.N.Y. Oct. 28, 1998) ("Although [plaintiff] alleges discriminatory animus, she provides no evidence of differential treatment during the relevant time period.... Plaintiff's subjective belief is not enough."); *cf. Grady*, 130 F.3d at 561 (plaintiff's allegation that her supervisor "smiled at her less approvingly" failed to infer age discrimination).

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*17 Viewing the evidence in the light most favorable to Plaintiff, the record shows that Grant on occasion criticized and berated Taylor for work-related matters. The record therefore permits an inference that, at most, Grant may have treated Taylor with hostility. But, Grant's criticism of Taylor, and accompanying lack of cordiality, is not evidence of racism. *Cf. Lapsley*, 999 F.Supp. at 520 (plaintiff's allegation of a "racially hostile atmosphere" supported by nothing other than the fact that she was occasionally berated by a supervisor "does not suffice to establish a racially hostile work environment"). In any event, any inference the facts might conceivably allow that Grant's hostility was the result of racism is undercut by the considerable evidence showing that Grant, Monaco and Cornell were displeased with Taylor because of her poor performance and attitude. [FN3]

Apart from her own speculation that Grant was prejudiced, Taylor attempts to meet her burden of demonstrating circumstances allowing an inference of discrimination by alleging that Grant made two facially-neutral comments that suggested she was biased. These comments, considered singly or together, do not afford a basis for the denial of summary judgment.

The first is a remark Betsy Grant allegedly made to Taylor's former colleague at PGD, Leighton Singleton, after Grant had accepted the position at ILS but before she had started to work there. Taylor's Affidavit states that in discussing her forthcoming move to ILS, Grant told Singleton that she would be "working with Delores, and I [Grant] don't want to work with her." Plaintiff's Aff. at ¶ 18. Because she had never worked with Grant and allegedly only knew her by sight, Taylor surmises that "the remark revealed racial bias on her part." *Id.* This evidence furnishes no assistance to Taylor in demonstrating an inference of discrimination. It is well-established that only *admissible* evidence may serve to support or defeat a motion for summary judgment. *See Hicks*, 509 U.S. at 506 (citing *Burdine*, 450 U.S. at 254-55 & n. 8); *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir.1997). Taylor has submitted neither Singleton's affidavit nor his deposition testimony to prove what

Singleton told her about a conversation that Taylor did not hear. [FN4] Instead, Taylor offers only her own Affidavit to prove Singleton's statement. However, Taylor's statement about what Singleton told her is inadmissible hearsay because it is offered to prove that Singleton actually made the statement. As such, it may not be used to defeat a summary judgment motion. *See, e.g., H. Sand & Co. v. Artemp Corp.*, 934 F.2d 450, 454-55 (2d Cir.1991) (hearsay assertion that would not be admissible if testified to at trial is not proper material for a Rule 56 affidavit) (citation omitted). Therefore, this comment cannot support an inference of unlawful discrimination.

Even if the statement were admissible, however, is not probative of invidious discrimination. If, in fact, Grant expressed the feeling that she did not want to work with Taylor, that feeling could have been based on innumerable factors, including things Grant heard about Taylor's work at PGD or a sense of Taylor's attitude or personality that she may have ascertained through encounters with her while they were working on the same floor at PGD. Given the ambiguity of the statement itself and the fact that it could have arisen from any number of conceivable bases, it is sheer speculation to infer that the comment, if made, was somehow linked to Taylor's race. The comment is only minimally probative of Grant's bias, if at all, and will not permit an inference of discrimination with respect to Taylor's termination.

*18 Grant's second alleged comment suffers from the same lack of probative value. Pat Monaco testified at his deposition that shortly after Grant started work at ILS, she came into his office and "voiced concern about having Delores work there." "Specifically, she said 'I might have a problem working with Delores.'" Plaintiff's Aff. at Ex. 6, p. 39. Grant did not explain why she was concerned about working with Taylor, and Monaco did not ask. As with the Singleton remark, this race-neutral, ambiguous comment, made after they had been working together for several days, does not remotely suggest that Grant was hostile toward, or unhappy with, Taylor on account of her race. No rational factfinder could infer from this comment a

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discriminatory motivation on the part of Grant.

In an effort to show that PolyGram Records "represented a hostile environment for African-Americans," and apparently to show circumstances suggesting discrimination, Taylor's Affidavit further alleges that two former employees of PolyGram Records were terminated under circumstances that led to rumors of discrimination. Plaintiffs Aff. at ¶ 6. These allegations are nothing more than baseless speculation and hearsay. Taylor provides almost no information concerning these people, their jobs or their termination. She does not explain where these colleagues worked, who their supervisors were, when they were fired, or any of the facts surrounding their discharge. These rumors and the conclusions that Taylor draws from them have absolutely nothing to do with this case and are, in any event, inadmissible hearsay, providing no assistance in satisfying her burden of proving discrimination.

Along the same lines, Taylor asserts that two other facts suggest that a racially-charged environment existed at PolyGram Records. Plaintiffs Aff. at ¶ ¶ 8-9. These facts include a comment made by Polygram's former Chief Operating Officer, Eric Kronfeld, during a deposition in an entirely unrelated lawsuit, in which he implied that all African Americans are criminals; and a lawsuit alleging discrimination brought by Lisa Cortes, an African American woman, who was the head of a discontinued PolyGram record label. Again, however, Plaintiff wholly fails to reveal the relevance of these facts to this case. None of the key players in the lawsuit at bar is alleged to have had any connection to the Cortes lawsuit, and Kronfeld is not alleged to have had any involvement in Taylor's termination. Cortes' lawsuit and Kronfeld's remark are simply not probative of whether discrimination was present in the narrow circumstances of this case. In any event, even if these facts were minimally relevant, the only evidence that Plaintiff furnishes to demonstrate that the Kronfeld remark and the Cortes allegations were made are newspaper and magazine articles which constitute inadmissible hearsay, and thus fall short of the evidentiary showing necessary. See

Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir.1997) (newspaper article offered to prove that the statements reported in the article were actually made was inadmissible hearsay that could not be used on summary judgment motion). [FN5]

*19 In the end, the record is devoid of evidence suggesting that Grant, or anyone else connected to Taylor's termination in any way, harbored any racial bias toward Taylor or African-Americans in general. Taylor has failed to come forward with "concrete particular" allegations which would allow an inference of discrimination sufficient to preclude summary judgment. *Mieri*, 759 F.2d at 998. No reasonable jury could conclude that the admissible evidence presents circumstances giving rise to an inference of discrimination. This conclusion is reinforced by the Taylor's concession that two of the people at ILS who worked closely with her within the small division, had first-hand knowledge of her work and attitude, and concurred in her evaluations or contributed to the criticism of her work, did not have any improper discriminatory animus. Cf. *Kenner v. Glasheen*, No. 92 Civ. 0653(DAB), 1997 WL 651477, *6 (S.D.N.Y. Oct. 17, 1997) (in finding no issue of fact regarding the legitimacy of the employer's proffered explanation of poor performance, court noted that many of the complaints about the plaintiff's performance came from the plaintiff's co-workers and staff, not just the allegedly biased supervisor). In this regard, Taylor admits that the head of the department, Pat Monaco, who provided input into and reviewed both evaluations and participated in preparing and giving both Warnings, did not harbor any racial animus. See Transcript of Taylor Deposition, at p. 186, Exhibit D to Affidavit of Elyse S. Goldweber dated March 11, 1998 ("Goldweber Aff."). Further, Taylor acknowledges that Donna Cornell, who wrote two memoranda containing a litany of complaints about Taylor's work, had no discriminatory motive. See Plaintiffs Aff. at ¶ 31 ("I have never claimed that Ms. Cornell, whatever else her problems, was motivated by racial hostility.").

Grant is the only person whom Taylor identifies as having a racially biased motive. Yet, it is not

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plausible that Grant could have discriminated against Taylor by means of undeserved performance reviews and sabotage, when her sentiments about Taylor's work performance were shared by the non-biased observers Cornell and Monaco. It is not reasonable to infer that Taylor's termination was the result of invidious discrimination, even in part, when two of the three people who concurred in her negative assessments, and one of the two supervisors who made the ultimate decision to terminate her, admittedly lacked the requisite discriminatory intent. Even if Grant herself was biased, a proposition which I have held is not adequately supported on this record, there is no indication in the record that she convinced Monaco or Cornell to unwittingly share her allegedly unjustified, race-based regard for Plaintiff's performance. Rather, the record indicates that Monaco and Cornell formulated their own opinions about Taylor and would have been in a position to know whether Grant's assessment was unjustified. Thus, even if Taylor's evidence furnished some arguable indicia of discrimination on the part of Grant, Taylor's acknowledgment that two of the three key players in her negative reviews lacked an invidious motive belies an inference of discrimination.

*20 On the record before me, I conclude that there is no possibility that any rational jury could infer that Plaintiff was fired because of her race. Thus, whether the criticism of her work was entirely justified or whether her discharge was entirely fair, there is no evidence that Defendants' were motivated in doing so by racial animus. Plaintiff's claim must therefore be dismissed.

II. Title VII Retaliation Claim

Retaliatory discharge in violation of Title VII occurs "when a retaliatory motive plays a part" in an adverse employment action, "whether or not it was the sole cause," or "when an employer is motivated by retaliatory animus, even if valid objective reasons for the discharge exist." *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir.1993). The burden shifting framework applicable to Plaintiff's discrimination claim also governs Plaintiff's claim of retaliatory discharge.

See, e.g., *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 764 (2d Cir.1998). Under this familiar model, if the plaintiff demonstrates her prima facie case, a presumption of retaliation arises which falls away if the defendant sets forth a legitimate reason for her termination. The burden then falls to the plaintiff to rebut the proffered explanation as pretext for retaliation.

To establish a prima facie case of retaliation, a plaintiff must show: (1) that she was engaged in a protected activity of which the employer was aware, (2) that she was discharged, and (3) that a causal connection existed between the protected activity and her discharge. *Tomka v. The Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir.1995).

In the present case, Defendants argue that Taylor has failed to establish a prima facie case of retaliation because she has not demonstrated the requisite causal nexus between her termination, on the one hand, and her retention of C. Vernon Mason as counsel or her filing of a charge of discrimination (together, the "protected activity" or "protected conduct") on the other. [FN6] I disagree. Taylor has submitted certain evidence which I conclude would allow a rational jury to conclude that retaliation may have played a role in her termination.

As an initial matter, it is useful to describe the evidence that does not aid the Plaintiff in establishing such a link. One way in which a causal connection may be shown is indirectly through temporal proximity between the protected activity and the discharge. See *Quinn*, 159 F.3d at 769; (citing *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir.1988)). In the case at bar, Taylor received her first evaluation at ILS in May of 1993. Eight months later, on January 3, 1994, she received her first Final Written Warning and contacted Mason the next day. Three months after that, in March of 1994, Taylor filed her EEOC charge. In July of 1994, six months after filing the EEOC charge, she was fired. Despite Taylor's argument to the contrary, the timing of her discharge does not suggest a correlation between her protected conduct and her termination.

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*21 This sequence of events, standing alone, does not suggest a retaliatory link. If anything, it suggests a reverse correlation: Plaintiff did not engage Mason or file her EEOC charge until *after* she learned her job was in jeopardy. She retained Mason the day after she received the first Warning, which, in turn, was eight months after her first negative review. The first negative review and the first Warning, which specifically notified that she would be fired if her performance did not improve, preceded her protected activity. Given that Taylor's position was already demonstrably at risk *before* she hired Mason or filed the charge, Plaintiff cannot show on the basis of temporal proximity alone that her termination resulted from that conduct. See *McLee*, 109 F.3d at 135-6 (no causation where plaintiff contacted civil rights offices *after* he learned he would be discharged; "Since ... [the defendant] was preparing to discharge McLee before McLee contacted any of the civil rights offices, it is not a permissible inference that McLee was discharged because he contacted those offices."); accord *Padob v. Entex Information Service*, 960 F.Supp. 806, 814 (S.D.N.Y.1997) (fact that plaintiff was fired three months after filing an EEOC charge did not establish causal connection, given that plaintiff had been placed on a "performance improvement plan" prior to filing the charge); cf. *Philippeaux v. Fashion Institute of Technology*, No. 93 Civ. 4438(SAS), 1996 WL 164462, *9 (S.D.N.Y. April 9, 1996) (student's academic dismissal eight months after engaging in protected activity did not provide the requisite causal nexus; "temporal proximity alone is not necessarily dispositive of a causal connection evidencing a retaliatory motive"), *aff'd without published opinion*, 104 F.3d 356 (2d Cir.1996); cf. *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir.1990) (despite fact that alleged retaliatory action occurred only several months after filing of EEOC charge, plaintiff could not show causal nexus).

Taylor further suggests that her second negative evaluation was *backdated* to February 25, 1994 in order to make it appear that it was written *before* her charge of discrimination, instead of a date closer to May 26, 1994 when she actually received

it. Taylor argues that if the evaluation was backdated, it might evince a "culpable consciousness" on the part of the Defendants with respect to a retaliatory motive. Plaintiff's Mem. at p. 10. If this were the only evidence proffered by Plaintiff she would fail to demonstrate a retaliatory link because it is entirely without foundation. The sole support Taylor identifies for this speculative claim is the fact that two copies of this evaluation exist: each copy is dated February 25, 1994, but one refers to her position as "Administrative Assistant," and the other has that title crossed out and "Senior Secretary" written next to it. This furnishes no basis for an inference that the evaluation was backdated. While two drafts of the document may exist, they both reference February 25, 1994 as the evaluation date, and neither contains any facial indication of an alteration in the date.

*22 Beyond its lack of factual support, Taylor's suggestion strains logic. It would make little sense for Grant or anyone else at PGD, ILS or PolyGram Records to backdate the evaluation to a date that preceded the EEOC charge, but *post-dated* Taylor's hiring of a high-profile civil rights attorney. Under Plaintiff's scenario, the alteration would not have achieved its intended purpose of shielding the Defendants from the appearance of retaliation, since February 25, 1994 still post-dates some of Taylor's protected activity.

Notwithstanding the noted deficiencies in her other proffered evidence, Taylor has successfully raised a dispute of fact as to whether a retaliatory motive existed. Taylor argues, and I agree, that a possible inference of retaliation emerges from two memoranda written by Felicia Wax in the Human Resources Department, which, according to Plaintiff, suggest that Wax and others (including Grant and Monaco) may have been "orchestrating" Plaintiff's termination in response to Taylor's protected activity.

The first memorandum was written to "file" on January 7, 1994 just days after Plaintiff informed Wax of her contact with Mason. In this document, Wax writes that she met with Grant and Monaco "to advise them of Delores' actions [in retaining Mason]"

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and *coach them* on maintaining accurate documentation and *on the best termination scenario* (i.e. incident related)." Plaintiff's Aff. at Ex. 19 (emphasis added).

The second memorandum was written on June 15, 1994 to another employee in the Human Resources Department. In this memo, Wax explains that based on the advice of counsel "we will *not* be proceeding with [Taylor's] termination at this time. [Counsel] felt that the incident for which we were going to terminate her was not serious enough He recommended that we review her work carefully and *collect more documentation of recent problems to support our position.*" *Id.* at Ex. 27 (emphasis added). This latter memo was swiftly followed by a memo from Grant describing to Wax a recent example of Taylor's poor performance; a memo to Grant from Cornell identifying eight problems with Taylor's performance occurring between June 7 and June 17, 1994; and within a month, the second Final Written Warning and Plaintiff's dismissal.

Drawing all permissible inferences in Plaintiff's favor, I conclude that the Wax memos and the catalogue of complaints following the second memo, constitute evidence that would permit a rational jury to conclude that Plaintiff's discharge, or its timing, was influenced at least in part by her protected activity. The first memo immediately followed, and discusses, Plaintiff's retention of a renowned civil rights attorney. In it, Wax notes that she "coached" Monaco and Grant on maintaining accurate documentation and on the "best termination scenario." *Webster's Deluxe Unabridged Dictionary* (1979) at 1032 defines the word "scenario" as "an outline or synopsis of a play," and at 212 includes one definition of "coach" as "to direct the movements of (a player)." Given their common usage, these words could reasonably be interpreted as suggesting that Wax and others were manufacturing a justification for Plaintiff's discharge. Similarly suggestive language appears in the later memo in which Wax states that an attorney advised that they shouldn't fire Plaintiff yet, but should collect more documentation to "support our position."

*23 While these phrases could easily be understood to mean that once Taylor had retained a high profile civil rights lawyer and filed her EEOC claim, the Human Resources Department and counsel were even more determined to process her predetermined discharge in strict compliance with the law, one could also reasonably interpret the language as evincing a desire to get rid of a troublemaking employee by scrutinizing her performance and "finding" incidents to justify her termination. This interpretation finds support in the fact that on the heels of the memo from Wax advising the collection of "more documentation," and, as if on cue, Cornell and Grant documented myriad complaints about Taylor's performance. One could plausibly conclude that the memos of Cornell and Grant demonstrated an effort to proliferate complaints as part of a manufactured paper trail to justify Plaintiff's discharge.

Whether the memos suggest that the Defendants were in fact *creating* a justification, or were merely documenting legitimate performance deficiencies out of an abundance of caution, gives rise to a genuine issue of material fact. Because this evidence would permit a rational jury to draw the former inference, and the conclusion that her discharge was at least partially motivated by a retaliatory animus, summary judgment is not appropriate.

If Plaintiff demonstrates that retaliation in fact was a motive in the timing or manner of her discharge, Defendants may still prevail if they demonstrate that they would have made the same decision based on Taylor's performance alone. *See Cosgrove*, 9 F.3d at 1040 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989)). Drawing all permissible inferences in Taylor's favor, however, I cannot conclude on this record that a rational factfinder must decide that Taylor's termination was a foregone conclusion and would have happened even in the absence of her protected activity. Based on her first evaluation and her first Final Written Warning, both of which were generated before her protected activity, it seems very likely that she would have been fired in any event. Indeed, it is quite plausible that her retention of Mason and

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filing of the EEOC claim may have extended her employment by engendering a fair amount of trepidation about discharging her. But that determination is for the factfinder—it is by no means the only permissible conclusion to be drawn on this record. Indeed, while the evidence shows that Defendants found serious deficiencies in Plaintiff's performance before her protected conduct, the Wax memos allow an inference that, at the least, Plaintiff's retention of Mason and subsequent EEOC complaint were the proverbial "straw that broke the camel's back" and accelerated, or ensured, her termination.

Accordingly, I conclude that Plaintiff has demonstrated the existence of triable issues of fact concerning whether the Defendants were motivated, at least in part, by retaliation in discharging her. Summary judgment dismissing her claim of retaliatory discharge is therefore denied. As a result, the retaliation claim will be tried even though the discrimination claim does not survive, making this yet another member of the group of cases the Second Circuit has described as follows:

*24 It sometimes happens—more frequently than might be imagined—that an employee whose primary claim of discrimination cannot survive pre-trial dispositive motions is able to take to trial the secondary claim that he or she was fired or adversely affected in retaliation for asserting the primary claim. This is such a case.
Quinn, 159 F.3d 759, 762 (2d Cir.1998).

III. 42 U.S.C. § 1981 Claims

Plaintiff advances claims of discriminatory and retaliatory discharge pursuant to both Title VII and 42 U.S.C. § 1981. Although the parties have focused exclusively on Title VII, I must also address the Section 1981 claims because Defendants ask for summary judgment dismissing the complaint in its entirety.

Allegations of employment discrimination or retaliatory discharge under Section 1981 are analyzed under the same framework as Title VII claims. *Choudhury v. Polytechnic Inst.*, 735 F.2d 38, 44 (2d Cir.1984) (Title VII analysis applies to Section 1981 claims); *Taitt v. Chemical Bank*, 849

F.2d 775, 777 (2d Cir.1988) ("The elements required to make out a claim of retaliatory discharge under 42 U.S.C. § 1981 are the same as those required to make out such a claim under Title VII.").

As discussed above, I have determined that Taylor has failed to carry her burden on her Title VII discrimination claim because she has not demonstrated that Defendants' legitimate explanation for her discharge is a pretext for racial discrimination. The same analysis resulting in dismissal of the Title VII discrimination claim requires dismissal of the Section 1981 discrimination claim as well. *See Ngwu v. The Salvation Army*, Nos. 96 Civ. 0058(DAB), 96 Civ. 0059(DAB), 1999 WL 2873, *6 (S.D.N.Y. January 4, 1999) (granting defendant summary judgment on Section 1981 claim because plaintiffs failed to establish claim for discrimination under Title VII). Accordingly, Taylor's claim of discrimination brought pursuant to 42 U.S.C. § 1981 does not withstand summary judgment and must be dismissed. By the same token, however, because I have allowed her Title VII claim of retaliatory discharge to go forward, I likewise decline to dismiss her claim of retaliation advanced under Section 1981.

IV. Damages

Finally, Defendants move for summary judgment (1) dismissing Plaintiff's claim for punitive damages on the ground that she cannot meet the standard for an award, (2) limiting any back pay award to the period between her dismissal and December of 1994, when she rejected an offer for comparable employment by a third-party, and (3) subtracting from any potential back pay award the amount of unemployment benefits Plaintiff received, and any income she earned from temporary work prior to December of 1994.

1. Punitive Damages

Punitive damages are available under Title VII and Section 1981 "whenever a plaintiff proves that a defendant discriminates 'with malice or with reckless indifference to the [plaintiffs] federally

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protected rights." *Luciano v. Olsten Corp.*, 110 F.3d 210, 219 (2d Cir.1997) (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(1)). Defendants argue that summary judgment dismissing the claim for punitive damages should be granted because even assuming that Plaintiff proves liability, she cannot prove that the Defendants acted with the malice or reckless indifference sufficient to meet the standard. Defendants do not offer any evidence in support of this argument beyond that offered in support of their argument that Plaintiff cannot prove liability under Title VII. Plaintiff has not opposed summary judgment on this ground.

*25 Despite Plaintiff's inexplicable silence, I cannot conclude on the record before me that the conduct of Defendants, if it is violative of Title VII and Section 1981, did not rise to the level of malicious or reckless behavior required under the law. The question whether to allow a jury to consider an award of punitive damages is more appropriately made under Rule 50(a), Fed.R.Civ.P., after submission of the proof at trial. Accordingly, I deny Defendants' motion for summary judgment dismissing Plaintiff's punitive damages claim in advance of trial. If so advised, Defendants may move for judgment as a matter of law on the issue under Rule 50(a) at the end of Plaintiff's case-in-chief.

2. Limitation of Back Pay Award

A plaintiff denied or deprived of employment "in violation of the civil rights laws is ordinarily entitled to an award of back pay from the date of the discriminatory action until the date of judgment." *Sands v. Runyon*, 28 F.3d 1323, 1327 (2d Cir.1994). Victims of employment discrimination have a duty to mitigate damages by taking reasonable steps to find other "suitable employment". *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir.1998) (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-22 & n. 15 (1982)). It is the employer's burden to show that the plaintiff failed to use "reasonable diligence in his search for comparable employment and, where he has rejected an offer of employment, whether such rejection was reasonable." *Reilly v. Cisneros*, 835 F.Supp. 96, 99 (W.D.N.Y.1993),

aff'd, 44 F.3d 140 (2d Cir.1995). The failure to exercise reasonable diligence generally results in the reduction of the amount of damages by the amount that could have been earned during the period in which the plaintiff failed to mitigate. See *Greenway*, 143 F.3d at 54-55. When the plaintiff rejects an offer of substantially similar employment, he typically loses the right to back pay after the time of such rejection. *Reilly*, 835 F.Supp. at 99-100 (citing *Ford Motor Co.*, 458 U.S. at 231-32). "Where the positions are not exactly the same ... a court must review their differences and determine whether they are sufficiently comparable as to equate the plaintiff's non-acceptance of such to the forfeiture of his right to further pay. The basic question is whether a plaintiff's rejection was unreasonable." *Reilly*, 835 F.Supp. at 101 (finding that employee's unreasonable rejection of comparable offered position resulted in forfeiture of his right to further pay after the date of rejection).

In the present case it is undisputed that in December of 1994, five months after Taylor was dismissed from ILS, she was offered, and rejected, an administrative sales position with Eden Toys, a Manhattan toy wholesaler, for an annual salary of \$33,000. Defendants' Rule 56.1 Statement ¶¶ 66-7. This salary was approximately \$5,500 greater than her salary at ILS upon her termination. In her deposition, Plaintiff explained why she rejected this offer:

*26 Q: And can you tell us what were your reasons for turning [the Eden Toys position] down?

A: I wanted to do sales and they offered me an administration position with the promise--well, not the promise--with some assurance that there was a possibility that I would get the opportunity to work in sales.

Q: And what were your reasons for turning [the Eden Toys position] down?

A: As I just stated, it was an administrative position.

Q: So you were very clear, by December of '94 that you wanted a sales position?

A: Yes.

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Goldweber Aff. at Ex. D, pp. 81-2.

Defendants argue that because the Eden Toys job was an administrative position in the same city offering a higher salary, it was comparable to her ILS position and that her reason for rejecting it—to move out of administrative work and into sales—was not reasonable. Plaintiff has not opposed Defendants' legal argument or its factual basis. Neither her Affidavit, nor her Rule 56.1 Statement disputes the salient facts surrounding the Eden Toys offer. Nowhere does Plaintiff provide any additional evidence to show that the position was not comparable or the rejection was not unreasonable. In light of Plaintiff's failure to offer any resistance to this ground of Defendants' summary judgment motion, there is no genuine issue of material fact to be tried with regard to whether she is entitled to back pay subsequent to December of 1994. Accordingly, I conclude that Defendants are entitled to summary judgment limiting any claim of back pay to the period between Plaintiff's discharge from ILS and her rejection of the Eden Toys offer in December of 1994.

3. Subtraction of Interim Earnings and Unemployment Insurance

Defendants also argue, without opposition, that Plaintiff's earnings from her temporary work and unemployment benefits received during the period from her dismissal to her rejection of the Eden Toys position should be subtracted from any back pay award.

It is well-settled that interim earnings from other employment are deducted from any award of back pay to a prevailing Title VII plaintiff. See *Clarke v. Frank*, 960 F.2d 1146, 1151 (2d Cir.1992) (earnings from work accepted by plaintiff after his discharge is subtracted from back pay award); *Evans v. State of Connecticut*, 967 F.Supp. 673 (D.Conn.1997) (actual interim earnings by a Title VII plaintiff are subtracted from back pay award). Accordingly, to the extent Plaintiff is awarded back pay, any earnings from her temporary work during the period before she rejected the Eden Toys offer will be subtracted from that award.

With respect to her unemployment benefits, however, the Second Circuit has refused to require the automatic deduction of such compensation from a back pay award. Instead, it has made clear that whether or not an award should be offset by such compensation is a discretionary determination to be made by the court. *Dailey v. Societe Generale*, 108 F.3d 451, 460-61 (2d Cir.1997) ("We now state explicitly what was implied in *Promisel v. First Am. Artificial Flowers*, 943 F.2d 251, 258 (2d Cir.1991)]: the decision whether or not to deduct unemployment benefits from a Title VII back pay award rests in the sound discretion of the court."). Since this case has not yet been tried and no award has been made, it would be premature for me to make a discretionary determination regarding whether or not the unemployment benefits Plaintiff earned should be deducted from any potential back pay award. Decision on the issue, if necessary, will be deferred until after the case has been tried.

CONCLUSION

*27 For the reasons explained above, I conclude that: (1) Plaintiff's claims of employment discrimination pursuant to Title VII and 42 U.S.C. § 1981 must be dismissed; (2) any award of back pay must be limited to the period between Plaintiff's dismissal from ILS and her rejection of an offer of employment in December of 1994; (3) the amount of interim earnings from temporary employment during that period will be subtracted from any back pay award; and (4) Plaintiff's claim for retaliatory discharge in violation of Title VII and 42 U.S.C. § 1981 and claim for punitive damages may go forward.

The Clerk of the Court is directed to dismiss Counts One and Two of the complaint with prejudice.

The parties are directed to attend a status conference in this case in Room 17C of the U.S. Courthouse, 500 Pearl Street, on Friday, April 9, 1999 at 2:00 p.m.

It is SO ORDERED.

FN1. Although the word "biased" appears

in Taylor's comments, Taylor did not express the view at the time that Grant was *racially* biased.

FN2. The reference to harassment by Monaco is puzzling since Plaintiff's Affidavit makes no specific claim that Monaco "harassed" or discriminated against Taylor.

FN3. Taylor argues that the inception of the criticism and her conflicts with others at ILS coincided with Grant's arrival, which should permit an inference of discriminatory intent on the part of Grant. I disagree. The record's absence of problems before the arrival of Grant does not necessarily suggest a link between Grant and Taylor's poor evaluations. Taylor had only been working at ILS for three months before Grant was hired; she received her first review three months after Grant arrived. Three months is hardly a period of time so remarkably long that the absence of poor evaluations or critical memoranda during that time would create a suspicious association between subsequent bad reviews and Grant's arrival. However, even if the complaints about her work performance did commence with Grant, that fact does not reasonably allow an inference that Grant was biased against her because of her *race*. The fact that Grant may not have gotten along with her or did not like her is not evidence of discrimination. At most, the timing suggests a personality conflict between Grant and Taylor without any hint that the discord was based on race; general personality conflicts are not actionable under Title VII.

FN4. Counsel for Defendants advises that Singleton was never deposed in this case. See Defendant's Memorandum of Law in Further Support of its Motion for Summary Judgment at p. 11.

FN5. Further, even assuming *arguendo* that the Kronfeld remark, the Cortes lawsuit and the circumstances of the co-workers' discharges were presented in a form of evidence admissible at trial, Plaintiff's efforts through these allegations to show a "hostile environment" at PolyGram Records are misguided. I do not regard Plaintiff's claims as alleging discrimination derived from a *hostile environment*. Such a claim would require her to prove that her "workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir.1996). Taylor advances no allegations of a "steady barrage of opprobrious racial comments" of the sort that could be regarded as engendering a hostile work environment. *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir.1994). Indeed, Plaintiff nowhere alleges that she heard or knew of the utterance of racial slurs while at ILS. Rather, she alleges that her supervisor insidiously worked against her and terminated her because of racial animus. None of the evidence she has provided suggests the pervasive permeation of discrimination sufficient to meet the "hostile environment" standard.

FN6. It is not disputed that the Defendants had contemporaneous knowledge of the filing of the EEOC charge and her retention of Mason. Both these actions constituted protected activity under Title VII. See *Khamba v. SSEU Local 372*, No. 97 Civ. 4461, 1999 WL 58924 (S.D.N.Y. Feb. 5, 1999) (instituting EEOC complaint of discrimination constituted protected activity under Title VII); cf. *Connell v. Bank of Boston*, 924 F.2d 1169, 1179 (1st Cir.1991) (retaining counsel to protect rights regarding termination constituted protected conduct under provision of ADEA identical to that of Title VII); *Tomka*, 66 F.3d at 1308 (internal

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complaint to company management about
discrimination constitutes protected
activity).

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H**Motions, Pleadings and Filings**

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Gianni VERSACE, S.p.A., Plaintiff,
v.
Alfredo VERSACE et al., Defendants.
No. 01Civ.9645(PKL)(THK).

Aug. 27, 2003.

Owner of incontestable trademarks using a surname as the "focal point" of the designation sought legal and equitable relief for alleged trademark infringement. Upon owner's motion for partial summary judgment, the District Court, Leisure, J., held that: (1) owner was entitled to injunctive relief on its trademark infringement claim under Lanham Act; (2) genuine issue of material fact existed as to whether there was actual consumer confusion or deception resulting from trademark infringement violation, precluding summary judgment in favor of owner on claim for damages; and (3) doctrines of res judicata and collateral estoppel did not preclude defendant from litigating owner's claims.

Motion denied in part and granted in part.

West Headnotes

[1] Federal Civil Procedure ¶2547.1
170Ak2547.1 Most Cited Cases

Facts contained in movant's statement accompanying its motion for summary judgment would be deemed admitted to extent they were supported by admissible evidence where defendants either did not file counter-statement or respond to summary judgment motion. Local Civil Rule

56.1(c).

[2] Federal Civil Procedure ¶2547.1
170Ak2547.1 Most Cited Cases

An affidavit was not sufficient to comply with requirement to file a memorandum of law in opposition to summary judgment motion. Local Rule 7.1.

[3] Trade Regulation ¶620
382k620 Most Cited Cases

Owner of incontestable trademarks using a surname as the "focal point" of the designation was entitled to injunctive relief on its trademark infringement claim under Lanham Act since there was similarity between owner's marks and the alleged infringing mark, parties' products were in close proximity and there was no gap to bridge, and one defendant, who knew about owner's marks at the time of the conduct at issue, had acted in bad faith. Lanham Trade-Mark Act, § 33(a), as amended, 15 U.S.C.A. § 1115(a).

[4] Trade Regulation ¶722
382k722 Most Cited Cases

Genuine issue of material fact existed as to whether there was actual consumer confusion or deception resulting from trademark infringement violation, precluding summary judgment in favor of owner of incontestable trademarks on claim for damages under Lanham Act. Lanham Trade-Mark Act, § 33(a), as amended, 15 U.S.C.A. § 1115(a).

[5] Judgment ¶569
228k569 Most Cited Cases

[5] Judgment ¶653
228k653 Most Cited Cases

Even though defendant's pleadings in the related cases had been stricken, doctrines of res judicata and collateral estoppel did not preclude defendant from litigating plaintiffs claims since there had been no final judgment in those related actions.

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[6] Corporations ⇐508

101k508 Most Cited Cases

Corporation can only appear in federal court through a licensed attorney. 28 U.S.C.A. § 1654.

David E. Jacoby, Phillips, Nizer, Benjamin, Krim & Ballon LLP, New York, New York, for Plaintiff Gianni Versace, S.p.A.

Bryan J. Holzberg, Melville, New York, Joseph A. Carmen, Haddonfield, NJ, for Defendant Alfredo Versace.

OPINION AND ORDER

LEISURE, J.

*1 In this action, plaintiff seeks legal and equitable relief for alleged trademark infringement. No less than Judge Henry Friendly recognized that the "problem of determining how far a valid trademark shall be protected ... has long been vexing and does not become easier of solution with the years." *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir.1961); see also *Coach Leatherware Co., Inc. v. AnnTaylor, Inc.*, 933 F.2d 162, 171 (2d Cir.1991) (Kaufman, J.) ("Regretfully, the body of law relating to the Lanham Act has developed into a tangled morass. Courts struggling to move mountains often find they have only affected minuscule changes in trademark jurisprudence and occasionally have created their own likelihood of confusion." (internal citation omitted)). Plaintiff Gianni Versace, S.p.A. ("Gianni") now moves for an order granting (1) summary judgment against defendants Alfredo Versace ("Alfredo") and L'Abbigliamento Ltd. ("L'Abbigliamento") on its first, second, fourth and fifth claims in the complaint; and (2) partial summary judgment against Alfredo on liability for all plaintiff's claims. Gianni also asks the Court to grant it defendants' profits, treble damages, and attorneys' fees and costs in this action. For the following reasons, plaintiff's motion is granted in part and denied in part.

BACKGROUND

I. Procedural Problems

[1] Before reciting the facts of this case, the Court must address the primary source of these facts. Plaintiff accompanied its motion for summary judgment with a statement of undisputed facts as required by Local Civil Rule 56.1(a). Both defendants, however, failed to file a counter Rule 56.1 statement. [FN1] Local Civil Rule 56.1(b) requires a party opposing summary judgment to "include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Importantly, if such a counter statement is not filed, the facts in the moving parties Rule 56.1 statement are deemed admitted by the opposing party. Local Civil Rule 56.1(c); see *Gubitosi v. Kapica*, 154 F.3d 30, 31 n. 1 (2d Cir.1998) (stating that because of non-movant's failure to file a counter Rule 56.1 statement, material facts in movant's Rule 56.1 statement are deemed admitted); *Maresco v. Evans Chemetics Div.*, 964 F.2d 106, 111 (2d Cir.1992) ("Because [non-movant] did not respond to [movant's Rule 56.1 statement], [Rule 56.1] requires that they be deemed to be admitted for purposes of summary judgment." (footnote and internal quotations omitted)); *Dusanenko v. Maloney*, 726 F.2d 82, 84 (2d Cir.1984) (stating that district court properly considered statements admitted because of opposing party's failure to object); *Beckman v. United States Postal Service*, 79 F.Supp.2d 394, 396 n. 2 (S.D.N.Y.2000) (Leisure, J.) (accepting as admitted facts in movant's Rule 56.1 statement because non-movant did not file a counter statement); *Commercial Union Ins. Co. v. M.V. Bremen Express*, 16 F.Supp.2d 403, 409 (S.D.N.Y.1998) (Leisure, J.) (same). The Second Circuit, however, recently made it clear in *Giannullo v. City of New York*, 322 F.3d 139, 140-43 (2d Cir.2003), that a district court must ensure that there is support in the record for unopposed Rule 56.1 statements before accepting them as true. "[U]nsupported assertions must ... be disregarded and the record independently reviewed." *Id.* at 140. In light of these principles, Gianni's assertions of fact in its Rule 56.1 statement are deemed admitted to the extent they are supported by admissible evidence. With respect to assertions unsupported by the provided citations, the Court has independently reviewed the submitted

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record in order to determine if there is support therein for those statements. [FN2]

FN1. Actually, L'Abbigliamento filed no opposition. *See infra*.

FN2. In this regard, the Court notes that there are some problems with plaintiff's Rule 56.1 statement. Some of the statements of fact are supported with only citations to the unverified complaint. *See, e.g.*, Plaintiff's Rule 56.1 Statement ("Pl. 56.1 S.") ¶¶ 1-4. While a verified complaint may be treated as an affidavit for summary judgment purposes if it meets the requirements of Rule 56(e), *see Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 292 (2d Cir.2000); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995), an unverified complaint is not useful to the Court on such a motion. *Yearwood v. LoPiccolo*, No. 95 Civ. 2544, 1998 WL 474073, at *5 (S.D.N.Y. Aug. 10, 1998). Gianni cites to other inadmissible sources in its Rule 56.1 statement, such as the preliminary injunction. *See* Pl. 56.1 S. ¶ 16 (citing to the preliminary injunction to support assertion that there is a likelihood of confusion between marks). Furthermore, one statement is "[o]n information and belief," *id.* ¶ 2, one statement has no citation whatsoever, *see id.* ¶ 34, and at least one assertion of fact is not supported by the evidence that is cited. *See id.* ¶ 36. Many of these statements, however, are supported by the affidavits and other evidence submitted in connection with this motion.

Finally, several statements are supported by citation to an affidavit of David Jacoby, Esq., counsel for plaintiff. *See, e.g., id.* ¶ 6, 32. The Jacoby affidavit cites admissible evidence. The more prudent practice would have been for the Rule 56.1 statement to cite directly to the admissible evidence.

*2 With respect to L'Abbigliamento, there is a

further reason to accept plaintiff's Rule 56.1 statements as true, and that is L'Abbigliamento's failure to oppose the motion. Warren R. Hamilton, Esq., who maintains his office in Philadelphia, Pennsylvania, purportedly represents L'Abbigliamento. He is not a member of the Southern District bar. Despite the Court's repeated reminders to Mr. Hamilton that he needs to be admitted *pro hac vice* in order to represent L'Abbigliamento in this proceeding, *see, e.g.*, Order of the Court, Apr. 17, 2003, at 2 n. 3; *Gianni Versace S.p.A. v. Versace*, No. 01 Civ. 9645, 2003 WL 470340, at *3 (S.D.N.Y. Feb.25, 2003); Order of the Court, Mar. 24, 2003, at 2; Transcript of February 4, 2003 pre-trial conference at 2-4 ("Feb. 4 Tr."), he has steadfastly failed to do so. [FN3]

FN3. As the Court noted in a June 23, 2003 Order, Bryan Holzberg, Esq., attorney for Alfredo, bears some of the responsibility for this situation. That fact, however, does not excuse L'Abbigliamento and Mr. Hamilton from properly responding to plaintiff's summary judgment motion.

The briefing schedule for this motion was set at a February 4, 2003 status conference, *see* Feb. 4 Tr. at 32-35, and Mr. Hamilton was in attendance. [FN4] In accordance with that schedule, Gianni served its summary judgment motion on Mr. Hamilton, on behalf of L'Abbigliamento, on March 17, 2003. [FN5] On April 16, 2003, Mr. Hamilton attempted to file an opposition on L'Abbigliamento's behalf. That response, however, was rejected on April 21, 2003, due to Mr. Hamilton's failure to include his signature on the brief, in contravention of Local Civil Rule 11.1(b), and also because of Mr. Hamilton's lack of membership in the Southern District bar. The Court was concerned, however, that Mr. Hamilton's status would unduly prejudice his client's rights. Therefore, on April 23, 2003, the Court issued a Memorandum Order in which it stated that it would withhold consideration of the instant summary judgment motion until at least June 16, 2003, in order to give Mr. Hamilton even more time to attain *pro hac vice* status or for L'Abbigliamento to retain

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new counsel. See *Gianni Versace, S.p.A. v. Versace*, 01 Civ. 9645, 2003 WL 1937201 (S.D.N.Y. Apr.23, 2003). The Court ordered Mr. Hamilton to supply his client with a copy of the Memorandum Order "to ensure that L'Abbigliamento is aware of this deadline." *Id.* Despite this leeway from the Court, L'Abbigliamento has not filed an opposition to Gianni's motion, which was served well over four months ago.

FN4. Mr. Hamilton was granted *pro hac* status for the limited purpose of that conference. See Feb. 4 Tr. at 4.

FN5. Consistent with the Court's procedure, the motion was not filed with the Clerk of Court until April 21, 2003. Gianni filed a proof of service with his papers indicating that the motion was sent via Federal Express to Mr. Hamilton on March 17, 2003.

According to Rule 56, if a non-movant fails to respond to a summary judgment motion, "summary judgment, if appropriate, shall be entered against the adverse party." Fed.R.Civ.P. 56(e). In this Circuit, failure to oppose a summary judgment motion "does not ... mean that the motion is to be granted automatically." *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996). Therefore, in spite of L'Abbigliamento's failure to oppose the motion, the Court must consider the substantive merits of Gianni's motion to determine whether the movant has shown that there is no issue of material fact. See *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir.2001) (Sotomayor, J.) ("[I]t is clear that even when a nonmoving party chooses the perilous path of failing to submit a response to a summary judgment motion, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial."). L'Abbigliamento's dereliction does, however, have consequences. The failure to oppose the motion further supports the Court's decision to accept Gianni's statement of facts in its Rule 56.1 statement, to the extent that they are supported by the record. [FN6] Cf. *Gadsden v. Jones Lang*

Lasalle Americas, Inc., 210 F.Supp.2d 430, 438 (S.D.N.Y.2002) (accepting facts in movant's Rule 56.1 statement as admitted because non-movant's opposition was rejected as untimely); *Anderson v. Phoenix*, No. 95 Civ. 4605, 1997 WL 362255, at *2 (S.D.N.Y. June 27, 1997) (accepting movant's factual assertions as true because of the lack of opposition to the summary judgment motion); *Reaves v. Williams*, No. 95 Civ. 0281, 1997 WL 10132, at *3 (S.D.N.Y. Jan.10, 1997).

FN6. Courtesy copies of L'Abbigliamento's rejected filings were sent to Chambers. While the Court has not considered them in deciding this motion, it has read them and none of the arguments contained in those submissions would have changed the Court's determination of this motion.

II. Factual Background

*3 While the facts as recited here are largely taken from plaintiff's Rule 56.1 statement because of defendants' failure to file a counter statement, the Court must still construe these facts in the light most favorable to Alfredo and L'Abbigliamento. See *Gadsden v. Jones Lang LaSalle Americas, Inc.*, 210 F.Supp.2d 430, 442 (S.D.N.Y.2002).

Gianni is an Italian corporation and design house. It sells fashion apparel, accessories and other products. Alfredo is an Italian citizen and a resident of New York. L'Abbigliamento is a New York corporation based on Long Island. It is controlled by a man named Paolo Vista.

Plaintiff owns several trademarks that include the "Versace" surname. They include "Gianni Versace," [FN7] "V2 By Versace," [FN8] "Versus Gianni Versace," [FN9] "Versace Red Jeans," [FN10] "Versace Blue Jeans," [FN11] and "Versace." [FN12] Significantly, each of these trademark registrations has become incontestable. Sales of products bearing these marks and others have lead to income for plaintiff of hundreds of millions of dollars each year from the United States/Caribbean area. Gianni has spent millions of dollars in advertising and promotion each year to promote its

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products and trademarks in the United States. Without question, these trademarks are nationally renowned.

FN7. Reg. Nos. 1,123,748; 1,254,212; 1,460,108; 1,641,270 and 1,541,272.

FN8. Reg. No. 1,812,743.

FN9. Reg. No. 2,053,187.

FN10. Reg. No. 2,053,186.

FN11. Reg. No. 2,053,186.

FN12. Reg. No. 2,121,984.

Alfredo and L'Abbigliamento entered into a clothing venture in which L'Abbigliamento sold clothing under the mark "Designed by Alfredo Versace." This mark was not used in conjunction with any other mark. The clothing was sometimes, but not always, accompanied by a disclaimer noting that Alfredo is not affiliated with plaintiff. [FN13] The clothing offered for sale under the "Designed by Alfredo Versace" label included men's pants, men's suits, men's canvas suits, men's neckties, men's shirts, polo shirts, men's sport coats and men's cashmere jackets. These goods were not actually designed by Alfredo. [FN14] L'Abbigliamento advertised these goods with a sign on its offices and distributed solicitation letters.

FN13. As discussed *infra*, this disclaimer was and is required by a preliminary injunction.

FN14. Alfredo contests this fact in his affidavit, but only with conclusory statements. The clear import of Paolo Vista's deposition is that Alfredo had no role in the design of the clothing. See Deposition of Paolo Vista, dated Dec. 19, 2002, at 66, 131-32, & 169-70.

Alfredo never told L'Abbigliamento that it was subject to a preliminary injunction and never gave L'Abbigliamento a copy of the preliminary

injunction.

III. Procedural Background

The procedural background of this case and the related cases is a quagmire into which this decision will only wade to the extent necessary. Before this action, the parties filed separate lawsuits in December 1996 and January 1998, filed as No. 96 Civ. 9721 and No. 98 Civ. 0123, respectively. [FN15] In the first action, Gianni claimed that Alfredo had licensed infringing trademarks to A.V. by Versace, Inc., for shoes and other products, beginning in 1995 and 1996. In the second filed action, Gianni brought claims against Alfredo and Foldom International (U.S.A.), Ltd., for their alleged efforts, beginning in 1997, to license infringing trademarks worldwide. On December 1, 1998, the Court consolidated the two actions.

FN15. Throughout this decision, these cases are referred to as the related cases or actions.

On February 4, 1998, Judge Sidney H. Stein granted Gianni's request for a preliminary injunction against Alfredo in the related cases, issuing his decision from the bench. [FN16] The preliminary injunction enjoins Alfredo from using or licensing the use of "Alfredo Versace" as well as a list of other specifically enumerated "Infringing Marks" [FN17] previously used by Alfredo, and enjoins the use any other trademarks confusingly similar to those of Gianni. See Preliminary Injunction, 98 Civ. 0123, Feb. 10, 1998 ("PI"), ¶¶ 6-8. Although the injunction bars Alfredo from using his name as a trademark, the preliminary injunction, when first entered, allowed him to use his name to identify goods that he has designed by use of the phrase "Designed by Alfredo Versace," as long as the goods so identified prominently display the disclaimer: "not affiliated with or authorized by Gianni Versace S.p.A." *Id.* ¶¶ 6-10. The disclaimer must be printed in the same size as the words "Designed by Alfredo Versace." See *id.* ¶¶ 9-10.

FN16. The parties filed separate lawsuits

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in December 1996 and January 1998, respectively, the second of which was assigned to Judge Stein. This Court later consolidated the two actions. *See A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, No. 96 Civ. 9721, 1998 WL 832692, at *1-3 (S.D.N.Y. Dec.1, 1998).

FN17. The Infringing Marks are defined as "Alfredo Versace," "A.V. by Versace," "AV by Versace," "AV by A. Versace," "AV Versace," "Versace by A.V.," "AV Alfredo Versace," "A.V. Alfredo Versace," "A. Versace," "A.V. Versace," "Versace," and "A. Versace Jeans." PI ¶ 6.

*4 The preliminary injunction also prohibits Alfredo from delegating or licensing his rights to a middleman. However, under the original injunction, manufacturers and distributors could use the name "Alfredo Versace" in accordance with the preliminary injunction, provided that those manufacturers and distributors first agree in writing to be bound by the preliminary injunction. *See* PI ¶ 13. Alfredo was required to withdraw any pending trademark registrations consisting of, in part or in whole, any of the Infringing Marks. *See id.* ¶ 12. In addition, the preliminary injunction required Alfredo Versace to provide a copy of the preliminary injunction to all past and present licensees and distributors. *See id.* ¶ 15. On January 4, 2001, the Court clarified that the preliminary injunction applies extraterritorially.

On March 6, 2000, the Court found Alfredo in civil contempt for violating the preliminary injunction. *See A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 87 F.Supp.2d 281, 294-95 (S.D.N.Y.2000). Specifically, the Court held that Alfredo violated the preliminary injunction by using offshore Internet sites to advertise and distribute his products in the United States. *See id.* at 295. As a result of this violation, the Court ordered Alfredo to pay Gianni the sum of one-third of its costs and attorneys' fees incurred in making the contempt motion. *See id.* at 296.

In an Opinion and Order and Report and

Recommendation dated January 9, 2002, United States Magistrate Judge Theodore H. Katz granted Gianni's motion for sanctions against Alfredo for his long-term refusal to obey three discovery orders issued by the Court. As a sanction for his misconduct under Rule 37 of the Federal Rules of Civil Procedure, Magistrate Judge Katz ordered Alfredo to pay Gianni's costs and attorneys' fees incurred in attempting to secure compliance with the discovery orders, and recommended that both Alfredo's Answer in No. 98 Civ. 0123, and his Answer and cross-claim in the related action, No. 96 Civ. 9721, be stricken. On March 21, 2002, this Court adopted Judge Katz's Opinion and Order and Report and Recommendation in its entirety, essentially causing a default for Alfredo in the consolidated action. [FN18]

FN18. All other parties in the related cases had either entered default judgments or settled with Gianni by the time this Court adopted Judge Katz's Opinion and Order and Report and Recommendation striking Alfredo's two Answers in this consolidated action. In the instant action, Gianni reached a settlement with Eslim Ve Sheva Holding Corp.

On September 3, 2002, the Court again found Alfredo in contempt for, *inter alia*, the manner in which his dealings with L'Abbigliamento have been conducted. *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, No. 96 Civ. 9721, 2002 WL 2012618 (S.D.N.Y. Sept.3, 2002). That conduct is the same conduct that lead to this lawsuit. The contempt finding and the remedy ordered by the Court has lead to a procedural and substantive morass that is still pending resolution. Also in the September 3, 2002 Opinion and Order, the Court indicated that, in light of Alfredo's repeated violations of the preliminary injunction, it would modify that injunction to bar Alfredo from using the "Versace" name in connection with the licensing, manufacture, offering for sale, sale, distribution or promotion of goods or services. *Id.* at *12-13. That modified injunction was signed by the Court on January 27, 2003.

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DISCUSSION

I. Alfredo's Failure to File a Memorandum of Law

*5 [2] Recognizing another procedural problem with Alfredo's opposition to this motion, Gianni urges the Court to grant the motion on default because of Alfredo's failure to comply with Local Civil Rule 7.1, which states that "[e]xcept as otherwise permitted by the court, all motions and all oppositions thereto shall be supported by a memorandum of law, setting forth the points and authorities relied upon in support of or in opposition to the motion." Local Civil Rule 7.1 (former Local Civil Rule 3(b)). The rule goes on to state that "[w]illful failure to comply with this rule may be deemed sufficient cause for denial of a motion or for the granting of a motion by default." *Id.*; see also *Wenzhou Wanli Food Co., Ltd. v. Hop Chong Trading Co., Inc.*, No. 98 Civ. 5045, 2000 WL 964944, at *3 (S.D.N.Y. July 11, 2000) (Keenan, J.); *East 65 Street Realty Corp. v. Rinzler*, No. 98 Civ. 6555, 2000 WL 303279, at *2 (S.D.N.Y. Mar.22, 2000); *Toner v. United Bhd. of Carpenters*, No. 96 Civ. 0023, 1999 WL 178784, at *1 (S.D.N.Y. Mar. 31, 1999); *Sadowski v. Technical Career Inst., Inc.*, No. 93 Civ. 0455, 1995 WL 236725, at *1 n. 1 (S.D.N.Y. Apr. 24, 1995) (Leisure, J.); *American Apparel Assoc., Inc. v. D'Mode Classix, Inc.*, No. 93 Civ. 7167, 1994 WL 176978, at *1 (S.D.N.Y. May 5, 1994) (Leisure, J.). The entirety of Alfredo's opposition to Gianni's motion is his own three-page affidavit, [FN19] which cites no case or statutory authorities. [FN20] An affidavit is not sufficient opposition under Local Rule 7.1. *Microsoft Corp. v. K & E Computer Inc.*, No. 00 Civ. 7550, 2001 WL 332962, at *1 (S.D.N.Y. Apr.4, 2001); *Wenzhou Wanli Food Co.*, 2000 WL 964944, at * 3; *East 65 Street Realty Corp.*, 2000 WL 303279, at *3; *Rotblut v. 300 East 74th Street Owners Corp.*, No. 96 Civ. 5762, 1997 WL 16063, at *1 (S.D.N.Y. Jan.16, 1997); *Washington Square Post # 1212 v. City of New York*, 808 F.Supp. 264, 269 (S.D.N.Y.1992) (Leisure, J.).

FN19. Actually, this affidavit was not filed with the Clerk of Court. A courtesy copy, however, was delivered to Chambers.

Counsel for Alfredo was made aware of this problem, but it has yet to be rectified. The original of the affidavit must be filed with the Clerk of Court. Mr. Holzberg has been reminded on numerous occasions that originals of all documents must be properly filed. Quite frankly, the Court is at a loss to explain why this simple procedure seems to be such a problem for him. If this practice continues, the Court will take appropriate steps, including the consideration of sanctioning Mr. Holzberg. The Court acknowledges that it may seem inconsistent for it to consider Alfredo's submission that was not filed while refusing to consider L'Abbigliamento's submissions that were not permitted to be filed. The difference is, of course, that Alfredo's opposition was not signed and submitted by an attorney who is not authorized to practice in this Court.

FN20. The overwhelming majority of this affidavit is self-serving, conclusory statements. It is axiomatic that "reliance upon conclusory statements or mere allegations is not sufficient to defeat a summary judgment motion." *Davis v. New York*, 316 F.3d 93, 100 (2d Cir.2002); *Gucci America, Inc. v. Action Activewear, Inc.*, 759 F.Supp. 1060, 1062 (S.D.N.Y.1991) (Leisure, J.) ("Conclusory allegations are not sufficient to create a genuine issue.").

Alfredo's insufficient opposition is emblematic of the slipshod and unprofessional manner in which this case (and the related cases) has been defended. [FN21] See, e.g., Order of the Court, June 23, 2003, at 2 (noting *pro hac vice* problems); Order of the Court, May 1, 2003, at 2 (noting Mr. Holzberg's failure to file affidavits with the Clerk of Court even though he represented that he had done so); Order of the Court, Mar. 24, 2003, at 2 (noting Mr. Holzberg's problems with filing documents with the Clerk of Court); *Gianni Versace, S.p.A. v. Versace*, No. 01 Civ. 9645, 2003 WL 470340, at *3 (S.D.N.Y. Feb.25, 2003) (noting *pro hac vice*

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problems); Feb. 4 Tr. at 2 (noting Mr. Carmen's failure to move for *pro hac vice* admission); *Id.* at 5 (noting defense counsels' "unfortunate sloppy way of handling this case"). The lacunae created by his deficiencies would require the Court to construct his defense to this motion and to do the research that should have been done in the first instance by Mr. Holzberg and Mr. Carmen. *V.W. Broad v. DKP Corp.*, No. 97 Civ.2029, 1998 WL 516113, at *3 (S.D.N.Y. Aug. 19, 1998) ("Plaintiffs failure to oppose [the motion at issue] would require [the Court] to construct plaintiff's legal arguments for him in order to reach the merits of defendant's motion. This is an unacceptable burden to place upon a court."); *Rotblut*, 1997 WL 16063, at *1 (stating that a party's failure to file a memorandum of law "effectively places on the court the burden of conducting the initial legal analysis that is properly the responsibility of defendant's counsel"). Nonetheless, the Court is reluctant to award summary judgment to plaintiff based solely on this procedural ground. Therefore, in the interests of justice and a full hearing of the merits, the Court will not grant Gianni's motion on the basis of Alfredo's failure to file a memorandum of law. *Cf. Kessenich v. Raynor*, 120 F.Supp.2d 242, 247 (S.D.N.Y. Nov.13, 2000); *Wenzhou Wanli Food Co.*, 2000 WL 964944, at *4; *Briarpatch Limited, L.P. v. Pate*, 81 F.Supp.2d 509, 511 n. 2 (S.D.N.Y.2000); *Washington Square*, 808 F.Supp. at 269. Alfredo, however, should not assume that the Court would excuse a future failure to include a memorandum of law or otherwise to comply with the Local Civil Rules. "The patience of the courts is enduring but not infinite." *Saylor v. Bastedo*, 78 F.R.D. 150, 153 (S.D.N.Y.1978).

FN21. Alfredo himself may well be as responsible as his attorneys for this sorry state of affairs, given the history of the related cases. *See, e.g., A.V. by Versace, Inc. v. Gianni Versace S.p.A.*, No. 96 Civ. 9721, 2002 WL 54610, at *2 & n. 3, *3, *6, *8 & n. 8 (S.D.N.Y. Jan.15, 2002) (noting Alfredo's failures to cooperate with his previous attorney); *id.* at *6 (stating that "Alfredo has been evasive and untrustworthy; he has attempted to avoid

responsibility for his derelictions by proffering disingenuous claims of misunderstanding and supposed reliance upon his attorneys' advice").

II. The Merits of the Motion

A. Summary Judgment Standard

*6 A moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Holt v. KMI-Continental Inc.*, 95 F.3d 123, 128 (2d Cir.1996). The substantive law underlying a claim determines if a fact is material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When considering the motion, the Court's responsibility is not "to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986).

In determining whether genuine issues of material fact exist, the Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255; *Holt*, 95 F.3d at 129. The moving party bears the burden of demonstrating that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Gallo v. Prudential Residential Serv. L.P.*, 22 F.3d 1219, 1223-24 (2d Cir.1994). "[T]he movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995). Once the moving party discharges his burden of demonstrating that no genuine issue of material fact exists, the burden

shifts to the nonmoving party to offer specific evidence showing that a genuine issue for trial exists. See *Celotex*, 477 U.S. at 324. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "A 'genuine' dispute over a material fact only arises if the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *Dister v. Cont'l Group*, 859 F.2d 1108, 1114 (2d Cir.1988) (citing *Anderson*, 477 U.S. at 248).

In trademark infringement cases, "disposition by summary judgment is often appropriate where the protection of a registered trademark is at issue." *Couch Leatherware*, 933 F.2d at 170. Summary judgment should be granted in such situations "where the undisputed evidence would lead only to one conclusion as to whether confusion is likely." *Cadbury Beverages, Inc. v. Cott Corp.*, 73 F.3d 474, 478 (2d Cir.1996); *Consolidated Cigar Corp. v. Monte Cristi De Tabacos*, 58 F.Supp.2d 188, 195 (S.D.N.Y.1999) ("Summary judgment is appropriate in a trademark case where the facts upon which an infringement or dilution analysis will rest are clearly beyond dispute."). However, that the basic facts in a case are undisputed "does not necessarily mean that these facts alone compel certain findings as to" each of the likelihood of confusion factors. *Cadbury Beverages*, 73 F.3d at 478. The application of uncontested facts to the likelihood of confusion analysis "is a legal issue which [is] appropriate for the district court to resolve on summary judgment." *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 876 (2d Cir.1986). "If a factual inference must be drawn to arrive at a particular finding on a [likelihood of confusion] factor, and if a reasonable trier of fact could reach a different conclusion, the district court may not properly resolve that issue on summary judgment." *Cadbury Beverages*, 73 F.3d at 478.

B. Lanham Act Trademark Infringement Claim

*7 [3] Gianni first seeks summary judgment against

both defendants on its trademark infringement claim under § 32 of Lanham Act, which is claim one in the complaint. In order to prevail on this claim, plaintiff must show (1) that its valid marks are entitled to protection, and (2) that there is a likelihood of confusion between its product and Alfredo's products. *The Sports Auth., Inc. v. Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d Cir.1996); *Paddington Corp. v. Attiki Importers & Distributors, Inc.*, 996 F.2d 577, 582 (2d Cir.1993); *Gruner + Jahr USA Publishing v. Meredith Corp.*, 991 F.2d 1072, 1075 (2d Cir.1993); *Gucci America*, 759 F.Supp. at 1063. Both prongs of this test will be addressed in turn.

1. Plaintiff's Marks Are Entitled to Protection

The Court need not tarry long on this prong. Under the Lanham Act, the fact that a mark is registered by its owner is "*prima facie* evidence of the registrant's exclusive right to use the mark in commerce on the product, without precluding an opposing party from proving any defense that might have been asserted had the mark not been registered." *Gruner + Jahr*, 991 F.2d at 1076; *Lois Sportswear*, 799 F.2d at 871 (stating that "registered trademarks are presumed to be distinctive and should be afforded the utmost protection"); *Playboy Enters., Inc. v. Chuckleberry Publishing, Inc.*, 687 F.2d 563, 567 (2d Cir.1982) (Lumbard, J.); *Abraham Zion Corp. v. Lebow*, 593 F.Supp. 551, 566 (S.D.N.Y.1984), *aff'd*, 761 F.2d 93 (2d Cir.1985); see 15 U.S.C. § 1115(a). If a mark is registered for five consecutive years and has been in continuous use, that mark becomes incontestable. 15 U.S.C. § 1065; *Gruner + Jahr*, 991 F.2d at 1076. By statute, if a mark is incontestable, its registration "shall be conclusive evidence ... of the registrant's exclusive right to use the registered mark in commerce." [FN22] 15 U.S.C. § 1115(b); *Gruner + Jahr*, 991 F.2d at 1076.

FN22. Incontestable marks are subject to several statutory defenses. See 15 U.S.C. § 1115(b)(1)-(9). The only one of these defenses that is even arguably relevant here is § 1115(b)(4), which allows as a defense that an alleged infringing mark "is a use, otherwise than as a mark, of the

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party's individual name in his own business." It is indisputable in the action at bar, however, that Alfredo Versace used his name as a mark and therefore cannot avail himself of this defense.

Plaintiff owns numerous trademarks that include the name "Versace," including "Gianni Versace," "V2 by Versace," "Versus Gianni Versace," "Versace Red Jeans," "Versace Blue Jeans," and "Versace." Each of the foregoing marks has become incontestable. Therefore, it is indisputable that plaintiff's marks are entitled to protection. See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985); *Gruner + Jahr*, 991 F.2d at 1077.

2. There Is a Likelihood of Confusion

When assessing the likelihood of confusion, the Court must balance the eight factors set forth by Judge Friendly in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir.1961). They are:

the strength of [the senior user's] mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.

*8 *Id.* at 495; see also *Cadbury Beverages*, 73 F.3d at 478; *Arrow Fastener Co., Inc. v. Stanley Works*, 59 F.3d 384, at 391 (2d Cir.1995). These factors are "not exclusive and the analysis of the factors is 'not a mechanical process.'" *Merriam-Webster, Inc. v. Random House, Inc.*, 35 F.3d 65, 70 (2d Cir.1994) (quoting *Paddington Corp.*, 996 F.2d at 584). In other words, the party with the most factors in its favor does not automatically carry the day. *Paddington Corp.*, 996 F.2d at 584; *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1044 (2d Cir.1992) (noting that the *Polaroid* factors "are merely tools designed to help grapple with the 'vexing' problem of resolving the likelihood of confusion, and that the ultimate conclusion as to whether a likelihood of confusion exists is not to be determined in accordance with some rigid formula"

(internal quotations omitted)). "Rather, a court should focus on the ultimate question of whether consumers are likely to be confused." *Id.* Furthermore, the Court should "weigh each factor in the context of the others." *W.W.W. Pharmaceutical Co., Inc. v. Gillette Co.*, 984 F.2d 567, 572 (2d Cir.1993).

a. The Strength of Gianni's Marks

The first *Polaroid* factor is the strength of the senior user's marks. Strong marks are entitled to broad protection. *Nikon Inc. v. Ikon Corp.*, 987 F.2d 91, 94 (2d Cir.1993); *Tri-Star Pictures, Inc. v. Unger*, 14 F.Supp.2d 339, 355 (S.D.N.Y.1998). In this case, plaintiff uses several marks that in some way include the surname "Versace," and those marks are strong as a matter of law.

The strength of a mark is its "tendency to identify the goods sold under the mark as emanating from a particular, although possibly anonymous, source." *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1131 (2d Cir.1979); see also *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 830 F.2d 1217, 1225 (2d Cir.1987); *Lois Sportswear*, 799 F.2d at 873. In considering this factor, the Court should also consider the commercial context of the mark. *Bristol*, 973 F.2d at 1044. "If the mark ... is such that it seems to the consumer uniquely intended to indicate a product's source, it will be strong whether or not the consumer is familiar with the mark or knows the source." *Paddington Corp.*, 996 F.2d at 585.

Often, the analysis of the strength of a mark "parallels the inquiry concerning the mark's validity, inasmuch as the 'strength or distinctiveness of a mark determines both the ease with which it may be established as a valid trademark and the degree of protection it will be accorded.'" *Arrow Fastener*, 59 F.3d at 391 (quoting *McGregor-Doniger*, 599 F.2d at 1131). Ultimately, however, "the strength of a mark depends ... on its distinctiveness, or its 'origin-indicating' quality, in the eyes of the purchasing public." [FN23] *McGregor-Doniger*, 599 F.2d at 1131.

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FN23. To be sure, the finding that Gianni's marks are entitled to protection because of their incontestability is properly considered when assessing the strength of the mark in the likelihood of confusion analysis. See *Gruner + Jahr*, 991 F.2d at 1078; see also *Cadbury Beverages*, 73 F.3d at 479 (noting that the mark at issue was incontestable in the strength of the mark analysis). However, an incontestable mark can be found not to be strong. *Gruner + Jahr*, 991 F.2d at 1078-79; see, e.g., *W.W.W. Pharmaceutical*, 984 F.2d 567; see also *Oreck Corp. v. U.S. Floor Systems, Inc.*, 803 F.2d 166, 171 (5th Cir.1986) ("Incontestable status does not make a weak mark strong.").

*9 In considering this factor, courts look to "(1) the degree to which it is inherently distinctive; and (2) the degree to which it is distinctive in the marketplace." *W.W.W. Pharmaceutical*, 984 F.2d at 572; see also *McGregor-Doniger*, 599 F.2d at 1131-33. In order to assess inherent distinctiveness, the Second Circuit has looked to the mark's classification, of which there are five. A trademark can be generic, descriptive, suggestive, arbitrary or fanciful. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir.1976) (Friendly, J.); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992). Because "Versace" is a surname, it is a descriptive mark. See *Lane Capital Mgmt., Inc. v. Lane Capital, Inc.*, 192 F.3d 337, 345 (2d Cir.1999); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 104 (2d Cir.1985) (Kearse, J.). As such, if the analysis stopped there, the mark would not be entitled to much protection because descriptive marks are not inherently distinctive. See *Arrow Fastener*, 59 F.3d at 391; *McGregor-Doniger*, 599 F.2d at 1131-32.

The analysis, however, does not stop there. Plaintiff has submitted ample evidence that Gianni's marks have become distinctive in the marketplace. Gianni's proffer includes evidence of sales associated with the marks in hundreds of millions of dollars, and millions of dollars spent on advertising and promotion. Plaintiff also submitted numerous

articles in which the press covered Gianni Versace (the actual person) and the company. See Affidavit of Matteo Mascazzini, sworn to on Dec. 17, 1997, ex. D; see also *Consolidated Cigar Corp.*, 58 F.Supp.2d at 198 (stating that plaintiff's "commercial success, as shown by widespread media exposure and advertising expenditures, reinforces the strength of the mark"); *Tri-Star Pictures*, 14 F.Supp.2d at 355; *Kraft Gen. Foods, Inc. v. Allied Old English, Inc.*, 831 F.Supp. 123, 129-30 (S.D.N.Y.1993) (Leisure, J.); *Gucci America*, 759 F.Supp. at 1064; cf. *Playboy Enters.*, 68 F.2d at 566 ("'Playboy' is a mark of great value, due in large part to the long standing success of PLAYBOY magazine."). Neither Alfredo nor L'Abbigliamento has countered this evidence. All of the evidence in the record points to one conclusion—that plaintiff's marks are commercially distinctive, have acquired secondary meaning, and are strong. Therefore, those marks deserve broad protection. Cf. *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 352 (Fed.Cir.1992) ("Famous or strong marks enjoy a wide latitude of legal protection."). This *Polaroid* factor favors plaintiff.

b. The Degree of Similarity Between the Marks

In judging the degree of similarity between marks, the Court must "look at the general impression created by the marks, keeping in mind all factors which the buying public will likely perceive and remember." *W.W.W. Pharmaceutical*, 984 F.2d at 573; see also *Kraft Gen. Foods*, 831 F.Supp. at 130. Included in that is the "context in which the respective marks are generally presented." *McGregor-Doniger*, 599 F.2d at 1133; see also *Arrow Fastener*, 59 F.3d at 394. "[D]issection of the mark into its various components is not appropriate, as 'it is the impression which the mark as a whole creates on the average reasonably prudent buyer and not the parts thereof which is important.'" *Kraft Gen. Foods*, 831 F.Supp. at 130 (quoting *Dreyfus Fund, Inc. v. Royal Bank of Canada*, 525 F.Supp. 1108, 1117 (S.D.N.Y.1981)); see also *Arrow Fastener*, 59 F.3d at 395 ("While individual features may be dissimilar, the total effect may be one of similarity. Or the total effect

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may appear dissimilar despite similarities in individual features." (quoting Restatement of Torts § 729 cmt. B (1938)); *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 382 (2d Cir.1976) ("[A] side-by-side comparison of the marks is not the proper test. The test is the consumers' state of mind when faced with the marks individually."). Furthermore, it is important to remember that "(t)he test is not whether the consumer will know the difference if (s)he sees the competing products on the same shelf. It is whether (s)he will know the difference if (defendant's product) is singly presented and (s)he has heard of (plaintiff's product)." *Spring Mills, Inc. v. Ultracashmere House, Ltd.*, 689 F.2d 1127, 1133 (2d Cir.1982) (quoting *American Home Prods. v. Johnson Chem. Co.*, 589 F.2d 103, 107 (2d Cir.1978)) (alterations in original).

*10 There is no question that there is similarity between Gianni's marks and the alleged infringing mark. Both marks have the surname "Versace" as the "focal point" of the designation. *Lang v. Retirement Living Publ'g Co., Inc.*, 949 F.2d 576, 581 (2d Cir.1991); *Union Carbide*, 531 F.2d at 382; cf. *Gucci v. Gucci Shops, Inc.*, 688 F.Supp. 916, 926 (S.D.N.Y.1988) ("Plaintiff's 'Paolo Gucci' mark incorporates the entirety of Gucci Shops' famous 'Gucci' trademark."). While Alfredo's mark includes the phrase "Designed by Alfredo" before the word "Versace," the dominant part of the mark is the surname. Because of the presence of the Versace name in Alfredo's mark, "consumers would be 'reasonably justified in believing both products come from the same [source]." *Nabisco Brands, Inc. v. Arnold Kaye and Arnie's Deli, Ltd.*, 760 F.Supp. 25, 27 (D.Conn.1991) (quoting *Harlequin Enters. v. Gulf & Western Corp.*, 644 F.2d 946, 949 (2d Cir.1981)) (alteration in original). This is especially true in the fashion industry, an industry in which it is common for designers to be referred to by only their surnames. See *Polo Fashions, Inc. v. La Loren, Inc.*, 224 U.S.P.Q. 509, 512 (T.T.A.B.1984); *Nina Ricci S.A.R.L. v. Haymaker Sports Inc.*, 134 U.S.P.Q. 26, 28 (T.T.A.B.1962). The close proximity of the products, see *infra*, exacerbates this similarity. Furthermore, the Patent and Trademark Office has also noted the similarities

between Gianni's marks and the mark "Alfredo Versace." Affidavit of David Jacoby, Esq., sworn to on Mar. 14, 2003, ex. C & D.

The presence of the disclaimer required by the preliminary injunction might have lessened the degree of similarity. [FN24] See *Bristol-Myers Squibb*, 973 F.2d at 1046. However, products were offered for sale and in fact sold that did not contain the required disclaimer. See Pl. 56.1 S ¶¶ 24-26. Indeed, Alfredo himself seems to acknowledge this fact. See Affidavit of Alfredo Versace, sworn to on Apr. 7, 2003, at ¶ 4 ("As to the sale of 'samples' to a private investigator hired by the plaintiff, I submit that the proper disclaimer should have been added by defendant [L'Abbigliamento] if and when such sale would have taken place."). Therefore, this *Polaroid* factor favors plaintiff.

FN24. The Second Circuit, however, has recently stated that a "growing body of academic literature has concluded that disclaimers, especially those ... which employ brief negator words such as 'no' or 'not,' are generally ineffective." *Charles of the Ritz Group, Ltd. v. Quality King Distribs., Inc.*, 832 F.2d 1317, 1324 (2d Cir.1987); see also *Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315 (2d Cir.1987) (collecting sources). Such disclaimers might be effective to cure a minimal or moderate amount of confusion, but a case involving more substantial confusion might require more than the simple "not affiliated" language....

ProFitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C., 314 F.2d 62, 70 (2d Cir.2002).

c. Proximity of the Products and Likelihood of Bridging the Gap

Plaintiff sells apparel throughout the United States (and the world). Defendants also sell apparel in the United States. Therefore, the products are in close proximity and there is no gap to bridge. See

Paddington Corp., 996 F.2d at 586; *Consolidated Cigar Corp.*, 58 F.Supp.2d at 198. As such, these factors favor Gianni. See *Paddington Corp.*, 996 F.2d at 586; *Tri-Star Pictures*, 14 F.Supp.2d at 355 ("Where the two products compete, there is a greater likelihood that the use of similar marks will cause consumer confusion.").

d. Actual Confusion

*11 [4] Before discussing the alleged incidents of actual confusion, it is important to note there are two different standards for actual confusion. If a plaintiff is seeking only injunctive relief, then there does not need to be evidence of actual confusion. However, if money damages are requested, a plaintiff is required to prove "actual consumer confusion or deception resulting from the violation." *Getty Petroleum Corp. v. Island Transp. Corp.*, 878 F.2d 650, 655 (2d Cir.1989); see also *W.W.W. Pharmaceutical*, 984 F.2d at 576 n. 6 (stating that "in this circuit proof of real and precise actual consumer confusion is required to recover damages"); *Coach Leatherware*, 933 F.2d at 171 ("To warrant injunctive relief, plaintiffs were not required to establish unquestioned confusion but a mere likelihood of it; proof of real and precise confusion is necessary only for the recovery of monetary damages."). In this case, plaintiff seeks both an injunction and damages. Therefore, to obtain all of the relief requested, Gianni must show actual confusion.

Gianni argues that several discrete events show actual consumer confusion. Some of them, however, are plainly not instances of actual confusion. For example, Gianni argues that the Patent and Trademark Office's refusal to register "Alfredo Versace" as a trademark is evidence of actual confusion. See Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment at 14. While such refusals are relevant to consideration of a likelihood of confusion, they do not show actual confusion. Similarly, plaintiff's statement that "L'Abbigliamento's side-by-side offering of the goods heightened the probability of confusion," *id.*, also only goes to likelihood of confusion. Furthermore, Gianni's arguments

regarding Paolo Vista's confusion when confronted with L'Abbigliamento's sales records is certainly not the type of consumer confusion that the *Polaroid* factors contemplate.

That leaves only one more arrow in Gianni's quiver of confusion. That is comments allegedly made by retailers and exhibitors at a large trade show in Las Vegas on August 28, 2000. According to the affidavit of Onoufrios Danny Argiros, who appears to be an employee of plaintiff, he was staffing plaintiff's booth at the show. Affidavit of Onoufrios Danny Argiros, sworn to on Jan. 25, 2001, ¶ 2. "Designed by Alfredo Versace" goods were also on display at the show at a booth registered to L'Abbigliamento. *Id.* ¶¶ 5, 6. According to Argiros,

a number of retailers and exhibitors who came to the Versace Neckwear booth asked us if the Versace firm had split in two and was now using two different names, Alfredo Versace and Versace. They also expressed skepticism about whether the items we were offering for sale at the Versace Neckwear booth were authentic.

Id. ¶ 7. This, Gianni argues, is evidence of actual confusion. In the future, at a trial, it may well be sufficient evidence of actual confusion. [FN25] At this juncture, given the posture that must be assumed on a summary judgment motion, the Court cannot find that this somewhat speculative and sparsely documented evidence sufficiently establishes actual confusion.

FN25. The Court expresses no opinion whether this is sufficient evidence of actual confusion to sustain an award of money damages.

*12 This determination is fatal to Gianni's summary judgment motion in so much as it seeks monetary damages. As for injunctive relief, this factor favors defendants. As stated *supra*, however, actual confusion is not required for injunctive relief under the Lanham Act.

e. Good Faith

The next factor for the Court to consider is the

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good faith of defendants. This factor focuses on "whether the defendant adopted its mark with the intention of capitalizing on plaintiff's reputation and goodwill and any confusion between his and the senior user's product." *Lang*, 949 F.2d at 583. Bad faith on the part of a defendant "raises the presumption of a likelihood of confusion." *Tri-Star Pictures*, 14 F.Supp.2d at 357 (citing *Paddington Corp.*, 996 F.2d at 586). One way in which bad faith can be demonstrated is through "a showing of actual or constructive knowledge of the prior user's mark." *Tri-Star Pictures*, 14 F.Supp.2d at 357; see also *Paddington Corp.*, 996 F.2d at 587; *Centaur Communications*, 830 F.2d at 1228; *Gucci America*, 759 F.Supp. at 1065. *But see Cadbury Beverages*, 73 F.3d at 483 ("Full knowledge of a prior use of a protected mark is not necessarily inconsistent with a finding of good faith, particularly where the alleged infringer is unsure as to the scope of the protection.").

One could say that the history of this case and the related cases are a virtual monument to Alfredo's bad faith. There can be no question that he knew about plaintiff's marks at the time of the conduct at issue in light of the fact that the related actions were already pending at that time. In fact, Alfredo has been held in contempt of Court for violations of the preliminary injunction, and part of the conduct that lead to the contempt finding is the same conduct at issue in this lawsuit. The Court has already found that Alfredo "has shown no interest in establishing an enterprise in which his own skill can be made known to the public, and his use of his surname has been less than 'honest and straightforward.'" *A.V. by Versace, Inc.*, 2002 WL 2012618, at *12. Certainly the standard for a contempt finding differs from the standard for summary judgment and the Court must avoid making findings of fact in a summary judgment motion. Regardless, it is undisputed that Alfredo has participated in a clothing venture with L'Abbigliamento that used "Designed by Alfredo Versace" as a trademark, failed to use consistently the required disclaimer, and did not actually design the clothing, all clear violations of the preliminary injunction. Under these circumstances, it is inescapable that Alfredo has acted in bad faith as a matter of law, given his

actions and the history of these litigations. With respect to Alfredo, this factor favors Gianni.

With respect to L'Abbigliamento, the record is more mixed. As such, the oft-stated maxim that "[s]ubjective issues such as good faith are singularly inappropriate for determination on summary judgment," *Cadbury Beverages*, 73 F.3d at 483 (quoting *American Int'l Group, Inc. v. London Am. Int'l Corp.*, 664 F.2d 348, 353 (2d Cir.1981)) (alteration in original), controls here. Therefore, this factor favors L'Abbigliamento.

f. The Quality of Defendants' Products

*13 None of the parties addressed this factor. Furthermore, there is no information regarding the quality of the products sold by defendants. Therefore, the Court will not consider this factor in its analysis.

g. Sophistication of the Buyers

While there were arguments regarding this factor, they were just that-arguments. There is no actual evidence in the record concerning this factor. Therefore, the Court will not consider this factor in its analysis.

h. Balancing These Factors

To review the foregoing, the strength of Gianni's marks, the degree of similarity between the marks, the proximity of the products, and the fact that there is no gap to bridge favors plaintiff with respect to both defendants. Additionally, Alfredo's bad faith favors Gianni. Actual confusion favors both defendants, and the good faith factor favors L'Abbigliamento. Also included in this mix is the fact that the Patent and Trademark Office has found that there is a likelihood of confusion between plaintiff and defendants' marks, a determination that "while not conclusive, is entitled to great weight." *Syntax Labs., Inc. v. Norwich Pharmacal Co.*, 437 F.2d 566, 569 (2d Cir.1971); *Gucci*, 688 F.Supp. at 927. As stated *supra*, the party who has the most factors in its favor does not automatically win. However, it is certainly worth noting that the

overwhelming number of factors favor plaintiff. Even if the Court assumes that the last two factors, for which there was no evidence in the record, favor defendants, the balancing clearly favors Gianni with respect to both defendants. There is undoubtedly and as a matter of law a strong likelihood of confusion between plaintiff's products and those of the defendants. As such, summary judgment for defendant on claim one in the complaint for trademark infringement under § 32 of the Lanham Act is granted to the extent it seeks injunctive relief. Because plaintiff has not shown actual confusion as a matter of law, plaintiff's motion on claim one for damages is denied. [FN26]

FN26. Because the Court is denying the motion with respect to money damages, there is no need to address plaintiff's arguments with respect to joint and several liability, damages, defendants' profits, trebling of damages or attorneys' fees and costs. They are now left for another day.

C. Lanham Act Unfair Competition Claim, Infringement of Common Law Trademark Rights Claim and Common Law Unfair Competition Claim

Plaintiff also requests summary judgment on its claim for unfair competition under § 43(a) of the Lanham Act, infringement of common law trademark rights and common law unfair competition. The focus under these causes of action is likelihood of confusion, a consideration that the Court has already discussed with respect to the Lanham Act trademark infringement claim. That analysis need not be repeated here. However, like the § 32 claim, these causes of action require a showing of actual confusion to recover monetary damages. See *W.W.W. Pharmaceutical*, 984 F.2d at 576; *Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76, 79 (2d Cir.1981); *Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc.*, 618 F.2d 950, 955 (2d Cir.1980) (Kearse, J.). Therefore, based on the same analysis discussed above, to the extent that plaintiff requests money damages, the motion is denied and to the extent that plaintiff requests injunctive relief, the request is granted.

D. Gianni's Arguments Based on Preclusion

*14 [5] Gianni argues that there is another reason to grant summary judgment on liability against Alfredo on all of plaintiff's claims: that the striking of his pleadings in the related cases has a preclusionary effect on this case. More specifically, Gianni relies on the doctrines of res judicata and collateral estoppel. This argument is intriguing, but it ultimately fails.

According to the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d Cir.2000) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)) (alteration in original). Collateral estoppel bars the relitigation of issues litigated in a previous action "if (a) the issues in both proceedings were identical, (b) the issue in the prior proceeding was actually litigated and actually decided, (c) there was a full and fair opportunity to litigate in the prior proceedings and (d) the issue previously litigated was necessary to support a valid and final judgment on the merits." *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 362 (2d Cir.2003). As such, both doctrines require that there be a final judgment in the prior proceeding on which the proponent of the doctrines relies.

What is fatal to plaintiff's preclusion argument in this case is the present status of the related actions. Even though Alfredo's pleadings have been stricken, which in effect is a default judgment, there has been no final judgment in those actions. Indeed, damages have not yet been determined and a permanent injunction has not been issued. The parties have allowed the related actions to lay fallow while litigating the instant action. Because there is as of yet no final judgment, plaintiff's preclusion analysis fails. Summary judgment on this ground is denied.

III. The Status of L'Abbigliamento's Representation

[6] There is one more issue that the Court must

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address. L'Abbigliamento is a corporation. It is settled law that under 28 U.S.C. § 1654, a corporation can only appear in Federal Court through a licensed attorney. See *Eagle Assocs. v. Bank of Montreal*, 926 F.2d 1305, 1308 (2d Cir.1991). In this action, as discussed above, no attorney has entered an appearance on behalf of L'Abbigliamento. The Court has exercised a great deal of patience in this regard only because Mr. Hamilton has been assuring the Court that he will enter an appearance as soon as his *pro hac vice* status is resolved. However, this has gone on far too long. Therefore, the Court orders L'Abbigliamento to direct an attorney to enter an appearance on its behalf within thirty days of this Opinion and Order or a default judgment will be entered against it. [FN27] See *id.* In plain English so that there is no confusion, [FN28] if L'Abbigliamento does not have an attorney (who is qualified to practice in this District) file a notice of appearance in this case within thirty days, L'Abbigliamento will lose the case and will quite likely have to pay damages to plaintiff. [FN29]

FN27. It should go without saying that the lawyer who enters an appearance on behalf of L'Abbigliamento must be either a member of the Southern District bar or be admitted *pro hac vice*. In other words, if it is Mr. Hamilton, he must fulfill all of the requirements of Local Civil Rule 1.3(c) to obtain admission *pro hac vice*.

FN28. A copy of this Opinion and Order is being sent directly to L'Abbigliamento.

FN29. If there is no entry of appearance within thirty days, the Court directs plaintiff to prepare a default judgment against L'Abbigliamento and present it to the Court.

CONCLUSION

*15 Based on the foregoing, plaintiff's motion for partial summary judgment is denied in part and granted in part. Specifically, plaintiff is granted summary judgment with respect to its Lanham Act trademark infringement claim, its Lanham Act

unfair competition claim, its infringement of common law trademark claim, and its common law unfair competition claim, in so far as it is seeking injunctive relief, but denied summary judgment for monetary damages. Plaintiff's motion for partial summary judgment with respect to Alfredo on liability for all claims based on preclusion doctrines is denied. Furthermore, L'Abbigliamento must be represented in this action by a qualified attorney within thirty days or a default judgment will be entered against it. The parties are hereby ordered to appear for a pre-trial conference on September 18, 2003, at 10:00 a.m., at which time they should be prepared to discuss how this case and the two related cases should move forward.

SO ORDERED.

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(Nov. 01, 2001)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DAN BROWN and RANDOM HOUSE, INC.,

Plaintiffs,

against

LEWIS PERDUE,

Defendant.

Civil Action No.
Index No. 04 CV. 7417 (GBD)

-----X
LEWIS PERDUE,

Counterclaim-Plaintiff,

against

DAN BROWN, RANDOM HOUSE, INC., COLUMBIA
PICTURES INDUSTRIES, INC., SONY PICTURES
ENTERTAINMENT INC., SONY PICTURES
RELEASING CORPORATION, and IMAGINE FILMS
ENTERTAINMENT, LLC,

Counterclaim-
Defendants.

-----X
CERTIFICATE OF SERVICE

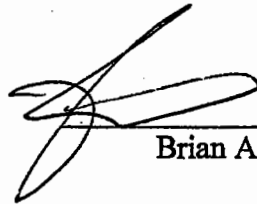
I hereby certify that I caused copies of:

1. Defendant and Counterclaim Plaintiff Lewis Perdue's ("Perdue") Memorandum of Law in Opposition to Plaintiff/Counterclaim Defendants' Motion For Judgment On the Pleadings, or, In the Alternative, Summary Judgment on Plaintiff's Declaratory Judgment Claim and in Support of Plaintiffs' and Counterclaim Defendants' Motion to Dismiss the Counterclaims, or, in the alternative for Summary Judgment on the Counterclaims ("Motion");
2. Perdue's Response to the Rule 56.1 Statement of Material Facts of Plaintiffs and Counterclaim Defendants and Counter-Statement of Undisputed Facts;
3. Declaration of Donald N. David dated April 7, 2005 in Opposition to Plaintiff/Counterclaim Defendants' Motion;

4. Declaration of Lewis Perdue dated April 5, 2005 in Opposition to Plaintiff/Counterclaim Defendants' Motion;
5. Declaration of John Gabriel Olsson dated April 1, 2005 in Opposition to Plaintiff/Counterclaim Defendants' Motion; and
6. Declaration of Gary Goshgarian dated April 4, 2005 in Opposition to Plaintiff/Counterclaim Defendants' Motion

to be served by Hand Delivery, this 8th day of April, 2004 upon Plaintiff/Counterclaim Defendants' attorneys listed below:

DAVIS WRIGHT TREMAINE LLP
Elizabeth A. McNamara, Esq.
1633 Broadway
New York NY 10019

A handwritten signature in black ink, appearing to be 'Brian A. Bloom', written over a horizontal line.

Brian A. Bloom