UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE: HURRICANE SANDY CASES **14 MC 41**

THIS DOCUMENT APPLIES TO:

DEBORAH RAIMEY AND LARRY RAISFELD
V.
WRIGHT FLOOD

Docket No.:
14-cv-00461-JFB-SIL

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MEMORANDUM OF LAW CONCERNING POTENTIAL ADDITIONAL SANCTIONS-RELATED STEPS TO BE TAKEN WITH RESPECT TO GERALD NIELSEN, ESQ., AND NIELSEN CARTER & TREAS, LLC, BASED UPON MISCONDUCT RELATING TO AN ALTERED ENGINEERING REPORT

A. INTRODUCTION.

On behalf of Pinczewski & Shpelfogel, LLC, the undersigned respectfully submits this Memorandum of Law addressing possible additional sanctions-related steps to be taken with respect to Gerald Nielsen, Esq. ("Nielsen"), and his law firm, Nielsen Carter & Treas, LLC ("NCT"), former co-counsel for defendant Wright National Flood Insurance Co. ("Wright Flood").[1] Magistrate Judge Gary R. Brown has already imposed monetary sanctions upon Nielsen in an Order dated November 7, 2014 because of "the reprehensible practices" in this case concerning the alteration by Wright Flood of an engineering report and counsel's failure to disclose those practices in a timely fashion.

[1]Nielsen appeared, *pro hac vice*, as defense counsel in this and other Hurricane Sandy Cases and was also appointed as Defendants' Liaison Counsel for the Hurricane Sandy Cases. However, as the Court noted in its December 29, 2014 Order (in the overall Hurricane Sandy Cases docket) granting Mr. Nielsen's motion to withdraw as Defendants' Liaison Counsel, Nielsen has withdrawn from all Hurricane Sandy cases in this District.

(Nov. 7, 2014 Memorandum & Order at 23[2]) And Judge Joseph F. Bianco affirmed Magistrate Judge Brown's sanctions Order because:

> "Having carefully reviewed the record, it is absolutely clear to this Court that the process that led to the modification of the initial engineering report (including the removal of observations that were inconsistent with the new conclusions) was flawed, and the concealment of that initial report and the process that led to the new report (including conduct at the evidentiary hearing) has prejudiced plaintiffs in terms of delay and costs in this litigation, such that the sanctions were warranted."

Raimey v. Wright Nat'l Flood Ins. Co., 2014 U.S. Dist. LEXIS 178910, at *3-4 (E.D.N.Y. Dec. 31, 2014).

As this Court is well aware, further discovery authorized by Magistrate Judge Brown and Judge Bianco uncovered evidence of *additional* misconduct and misrepresentations to the Court by Nielsen and Wright Flood. Magistrate Judge Brown, accordingly, found in his Order of January 12, 2015 that "additional sanctions may be warranted under statutory authority, the federal rules or under the Court's inherent authority." (Jan. 12, 2015 Memorandum & Order at 6) Magistrate Judge Brown subsequently noted, in an Order dated February 24, 2015, that "the plaintiffs [had] suggested that the Court should consider additional disciplinary sanctions, including, as appropriate, revocation of *pro hac vice* status and referral to disciplinary committees" and that the Court would determine whether additional sanctions against Nielsen and NCT were appropriate. (Feb. 24, 2015 Order at 4-5)

Based upon the Statement of Assumed Facts set forth below, it is my opinion to a reasonable degree of professional certainty that, under the norms governing attorney discipline in Federal and

[2]The November 7, 2014 Memorandum & Order is published at Raimey v. Wright Nat'l Flood Ins. Co., 303 F.R.D. 17 (E.D.N.Y. 2014).

New York state courts, additional sanctions-related steps with respect to Nielsen and NCT are warranted. The record in this case and the findings made by Magistrate Judge Brown and Judge Bianco demonstrate that Nielsen and NCT, together with Wright Flood, engaged in serious misconduct, including: concealing the fact that Wright Flood had improperly altered the engineering report relating to Plaintiffs' home in order to change – without any factual basis – its conclusion to a "finding" that the permanent damage to Plaintiffs' home was not attributable to Hurricane Sandy; making false statements to the Court about when Nielsen, NCT and Wright Flood first learned that the engineering report relating to Plaintiffs' home had been improperly altered; and attempting improperly to curtail the Court's inquiry into the fraudulent alteration of the engineering report relating to Plaintiffs' home.

Under these circumstances, the following additional sanctions-related steps with respect to Nielsen and NCT would be appropriate:

- Referring Nielsen to the Chief Judge of this Court for referral to the Attorney Disciplinary Committee of this Court for disciplinary action. An appropriate disciplinary sanction to be imposed by the Attorney Disciplinary Committee would be to permanently bar Nielsen from appearing in any case in this District.

- Referring Nielsen to disciplinary bodies in the State of Louisiana for disciplinary action.

- Referring Nielsen to the Clerk of the New Jersey District Court based upon his and his firm's conduct in Uddoh v. Selective Ins. Co. of Amer., Docket No. 2:13-cv-02719 (D.N.J.).

- Referring Nielsen and NCT to the Office of the United States Attorney for the Eastern District of New York for investigation and potential prosecution of possibly criminal conduct in connection with, among other things, fraudulent alteration of engineering reports and knowingly making false and misleading statements to the Court, to FEMA and to other litigants and their counsel.

B. MY QUALIFICATIONS.

I am a member of the Bar of the State of New York, and am admitted to practice before the Southern, Eastern and Northern Districts of New York, the United States Court of Appeals for the Second Circuit and the United States Supreme Court.

I am an Adjunct Professor at the Benjamin N. Cardozo School of Law (where I teach Fall and Spring courses in Litigation Ethics) and an Adjunct Associate Professor at Brooklyn Law School (where I teach Fall, Spring, and sometimes Summer courses in Professional Responsibility). In addition, in my more than three decades of teaching at Cardozo Law School, I have taught a variety of ethics, trial practice and judicial administration courses, and from 1984 through 2010, I served as the Executive Director/Team Leader of Cardozo's annual two-week Intensive Trial Advocacy Program. I have continued to serve on the Program's faculty; and, each year, I provide the mandatory two-hour introductory lecture to all of the Program's students in connection with evidentiary objections and evidentiary foundations.

I earned my *Juris Doctor* in 1974 from New York University School of Law and earned my Bachelor of Arts degree, *cum laude*, with Phi Beta Kappa honors, in 1971 from Rutgers University. After graduating law school, I served as a Kings County Assistant District Attorney and, thereafter, as an Assistant United States Attorney for the Southern District of New York's Criminal Division.

In addition to teaching ethics at two law schools, I maintain a private law practice, the Law Offices Of Michael S. Ross. Among my attorney ethics-related work, my firm regularly provides ongoing consultation and guidance to lawyers and law firms concerning appropriate courses of action when dealing with ethics-related issues which arise in the day-to-day practice of law. I regularly consult with lawyers and law firms to assess claims of legal malpractice and violations of the

Judiciary Law as they relate to disciplinary and fiduciary issues. I also represent trial and appellate judges before the New York State Commission on Judicial Conduct.

In addition to my ethics practice, I maintain a criminal defense practice in both New York State and Federal courts, which is focused on the representation of attorneys and other professionals.

I have lectured extensively on ethics-related matters, and have taught and lectured on attorney ethics issues at well over 200 Continuing Legal Education programs for both lawyers and judges, sponsored by: the New York State Judicial Institute; the Appellate Divisions, First and Second Departments; the Association of Professional Responsibility Lawyers (a national group of ethics lawyers); the New York State Bar Association; the Practicing Law Institute; the Association of the Bar of the City of New York; the New York County Lawyers' Association; the New York State Academy of Trial Lawyers; and the New York State Trial Lawyers' Association. In connection with the vast majority of the Continuing Legal Education programs at which I have lectured, I have also authored or co-authored monographs to accompany the programs.

Over the years, I have served as a member of the Association of the Bar of the City of New York's Committee on Professional Discipline; the New York County Lawyers' Association Committee on Professional Discipline; the New York State Bar Association's Committee on Professional Discipline; the New York State Bar Association's Special Committee on Procedures for Judicial Discipline; the New York State Bar Association Special Committee on Unlawful Practice of Law (which considers the activities of suspended and disbarred attorneys as well as individuals who are not admitted attorneys); and the New York State Bar Association's Special Committee on Mass Disaster (which has worked on the ethical provision of legal services during

public disasters). I have also served on the Board of Advisors of the New York County Lawyers' Association Institute of Legal Ethics.

With particular relevance to the issues addressed in this Memorandum of Law, I maintain a very extensive disciplinary practice in which I advise law firms and lawyers in connection with disciplinary issues based upon misconduct in litigation, and I regularly counsel lawyers with respect to issues dealing with admissions in other jurisdictions, including *pro hac vice* applications in State and Federal courts. As my Curriculum Vitae (available at http://www.rosslaw.org/rossbio.pdf) indicates, I have thought a wide variety of Continuing Legal Education Programs aimed specifically at litigation misconduct.

I render this opinion in my individual capacity and not in connection with any of the entities with which I am connected.[3]

[3]In developing my opinion in this case, I have used the same methodology that I have utilized during all of the years I have worked in the field of attorney ethics. The methodology is consistent with the methodology utilized by other attorney ethics and misconduct experts. In particular, I understand that a witness' credibility is a matter for consideration by the trier of fact and not a proper consideration for expert testimony. I understand that proper expert testimony must be objective and an expert must not be an advocate for any party involved in a lawsuit. However, an expert must assume a set of facts for purposes of analysis. In this case, I assumed the facts of the Plaintiffs and then analyzed those facts against a backdrop of ethical rules, court decisions, ethics opinions, criminal law practices, ethics treatises and my experience in the practice of law. If asked to consider a different set of facts, I will apply those facts and render my opinion to a reasonable degree of professional certainty. Although an opinion expressed by me may state a conclusion, which is also the ultimate issue before the court, the opinion, along with supporting statements about common practice and understanding in the legal profession and references to ethical rules, court decisions, ethics opinions and professional literature that are used to substantiate my opinion, are those that I believe will assist the trier of fact in understanding the evidence or in determining a fact at issue in the case under consideration.

C. STATEMENT OF ASSUMED FACTS.

In forming my opinion as set forth below, I have assumed the following facts which were provided to me by Plaintiffs' counsel, but of which I have no personal knowledge:

1. OVERVIEW OF ASSUMED FACTS.

It is my understanding that the record that has already been produced in this case contains persuasive evidence that Nielsen and NCT engaged in serious misconduct in this case including, but not limited to, making false representations to this Court and to adverse counsel and attempting to obstruct this Court's proceedings concerning the allegations that the engineering report concerning Plaintiffs' home had been fraudulently altered.

1) Nielsen made false statements when he represented to this Court that he and NCT had no knowledge of possible engineering fraud in this case, i.e., the fraudulent alteration of the engineering report, prior to Plaintiffs' notice to this Court.

2) Nielsen made false statements when he represented to this Court that there was no evidence of similar fraud, i.e., fraudulent alteration of engineering reports, committed by other engineering companies in connection with Hurricane Sandy or in connection with other mass wind and flooding disasters.

3) Nielsen and NCT failed to reasonably investigate these allegations of fraud.

4) Nielsen and NCT wrongfully coerced WYO ("Write Your Own") policy holders whose engineering reports had fraudulently been altered into submitting to new engineering inspections by threatening to deny their claims if they failed to "cooperate" with such requests. The purpose of this conduct was to attempt to conceal the fact that engineering reports had been fraudulently altered.

5) NCT improperly attempted to curtail this Court's inquiry into the fraudulent conduct in this case by making deliberate misrepresentations to this Court in an attempt prematurely to

terminate a hearing concerning the allegations of fraudulent alteration of engineering reports.

6) Nielsen and NCT failed to abide by its discovery obligations in this case.

7) Nielsen and NCT have engaged in misconduct with respect to an apparently altered engineering report in another Hurricane Sandy case pending before a New Jersey Federal District Court.

2. FIRST ASSUMED FACT.

It is my understanding that Nielsen made false statements when he represented to this Court that he and NCT had no knowledge of possible engineering fraud in this case, i.e., the fraudulent alteration of the engineering report, prior to Plaintiffs' notice to this Court.

It is also my understanding that Nielsen repeatedly represented to this Court that neither he nor NCT had any knowledge in this case of the existence of a previous engineering report that had been fraudulently altered, prior to Plaintiffs' notice to the Court, following the unsuccessful mediation, concerning the possible improper alteration of the report. These representations were inaccurate because Nielsen and NCT were repeatedly put on notice of the fraud prior to the mediation. (See Table 1 below.)

TAB NO.	ISSUE	QUOTE	SOURCE
(A)	Nielsen represents no prior knowledge	"So Wright Flood didn't have [the initial Hernemar report], and it didn't come to my office in the claim file." "Your Honor, plaintiffs' counsel were the only ones who had all three reports. My client didn't. We have the two final reports."	December 16, 2014 TR at 14, 20.
(B)	Nielsen represents no prior knowledge	"Indeed, neither Wright nor Wright's counsel was aware of the process by which [U.S. Forensics] peer reviewed	ECF Docket Entry No. 95 at 1 n.5.

		its reports until… just days before the hearing."	
(C)	Nielsen represents no prior knowledge	"There is still no evidence before you that this thing ever made its way into the claims file, and made it to my associate, and then to local counsel."	December 16, 2014 TR at 76-77.
(D)	Nielsen represents no prior knowledge	"Plaintiffs never divulged what they had, to clue in their adversary."	Defendants' Memorandum in Opposition, ECF Docket Entry No. 59 at 7.
(E)	Nielsen represent no prior knowledge	"At the outset, defense counsel had absolutely no knowledge whatsoever of the existence of a different engineering report until it was presented as a surprise during the mediation conference on Thursday, September 25, 2014."	Defendants' Memorandum in Opposition, ECF Docket Entry No. 59 at 1.
(F)	Wright had knowledge	"I will call you in the morning. After reviewing, I remember these folks and may have an idea about the 'fraud' engineer report."	September 18, 2014 email from Jeff Moore, Wright's VP of Claims, to FEMA claims executive Russell Tinsley, one week *before* mediation.
(G)	NCT had knowledge	In August 2014, Plaintiff Liaison Counsel John Houghtaling requests meeting with NCT to discuss the concern of fraudulent engineering reports in Hurricane Sandy.	
(H)	NCT had knowledge	On August 11, 2014, Plaintiff Liaison Counsel John Houghtaling and Brian Houghtaling met with NCT partners John Carter and William Treat. John Houghtaling stated that expert reports upon which NCT was relying were produced by the same individuals	

		behind fraudulently changed engineering reports in Hurricane Katrina. John Houghtaling hands a list of cases involving suspected engineering issues, including the Raimey claim, to John Carter and William Treas. Carter and Treas respond that they had to review the allegations with Managing Partner Gerald Nielsen and their clients.	

3. SECOND ASSUMED FACT.

It is my understanding that Nielsen made false statements when he represented to this Court that there was no evidence of similar fraud, i.e., fraudulent alteration of engineering reports, committed by other engineering companies in connection with Hurricane Sandy or in connection with other mass wind and flooding disasters.

It is also my understanding that this Court ordered that *all* WYO defendants produce all draft engineering reports. Nielsen, appealing on behalf of the WYOs other than Wright Flood, stated: "Defendants note that there is no evidence that adjusting companies, adjusters, other engineering companies, engineers or other 'agents or contractors' use a similar process or even if so, that the process is tainted in any way." This representation is false, as well. Nielsen and NCT had personal knowledge that a flood claim under a policy issued by Hartford Fire Insurance Company, whom Nielsen and NCT represented, involved allegations that an engineer's original report was altered and forged by HiRise Engineering, P.C. and its employee who "reviewed" the report. (See Table 2 below.)

TAB NO.	ISSUE	QUOTE	SOURCE
(A)	Nielsen represents no evidence of similar conduct elsewhere	"Defendants note that there is no evidence that adjusting companies, adjusters, other engineering companies,	ECF Docket Entry No. 92, pp. 3-4.

		engineers or other 'agents or contractors' use a similar process or even if so, that the process is tainted in any way."	
(B)	NCT client Hartford Fire Insurance Company ("Hartford") has knowledge of evidence	Counsel for Stephen and Sarise Dweck advise Hartford that its denial of the Dwecks' claim is based upon an altered, forged report by HiRise Engineering, P.C. ("HiRise").	July 2, 2013 letter from Counsel for Dweck to Hartford, Exhibit 6 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.)
(C)	Hartford has knowledge of evidence that "peer review process" is similarly tainted	HiRise employee Matt Pappalardo allegedly concedes that he had altered report and affixed the engineer's seal and signature to it, without showing report to the original engineer.	July 2, 2013 letter from Counsel for Dweck to Hartford, Exhibit 6 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.)
(D)	NCT had knowledge of Dweck issue	William Treas and NCT appear as Hartford's counsel in response to July 2, 2013 Dweck letter and demand additional inspection by new engineer.	August 27, 2013 NCT letter to Dweck, Exhibit 7 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.)
(E)	Nielsen and NCT had knowledge of general allegations of engineering fraud in Hurricane Sandy claims	Nielsen is present for and participated heavily in first status conference before the Sandy Docket magistrates, at which a plaintiff's attorney states: "I think that it's very important to have all the reports including drafts given over. We actually have several situations where we had recovered initial drafts where it's so different from the final draft that the causation of the damage changed from the first draft to the last draft."	February 5, 2014 Status Conference before Magistrate Judges Brown, Reyes and Pollak, TR pp. 55-56.

4. THIRD ASSUMED FACT.

It is my understanding that Nielsen and NCT consciously avoided the allegations of fraud and failed to investigate them. This Court found that Nielsen failed to investigate these allegations of fraud that were reported to him and NCT. (See Table 3 below.)

TAB NO.	ISSUE	QUOTE	SOURCE
(A)	Nielsen and NCT fail to investigate fraud	"After receiving evidence that the engineers report apparently had been altered, counsel for Wright initially did little to investigate the matter."	Magistrate Judge Brown's November 7, 2014 Memorandum & Order, p. 21.
(B)	Nielsen and NCT fail to investigate fraud	Nielsen and NCT respond to allegations of fraud in this case by demanding new inspection by new engineer, without reference to the purported fraud.	NCT letters dated August 27, 2013 and September 17, 2013, Exhibits 7 and 8 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.).
(C)	NCT and Treas fail to investigate fraud	Treas and NCT respond to allegations of fraud in Dweck claim by demanding new inspection by new engineer, without reference to the purported fraud.	NCT letters dated August 27, 2013 and September 17, 2013, Exhibits 7 and 8 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.).
(D)	NCT and Nielsen fail to investigate fraud that they are alerted to during the first status conference for the "Sandy Docket"	Nielsen is present for and participated heavily in first status conference before the Sandy Docket magistrates, at which a plaintiff's attorney states: "I think that it's very important to have all the reports including drafts given over. We actually have several situations where we had recovered initial drafts where it's so different from the final draft that	14-mc-41, February 5, 2014 Status Conference before Judges Brown, Reyes and Pollak, TR pp. 55-56.

		the causation of the damage changed from the first draft to the last draft."	

5. FOURTH ASSUMED FACT.

It is my understanding that Nielsen and NCT wrongfully coerced WYO policy holders whose engineering reports had fraudulently been altered into submitting to new engineering inspections by threatening to deny their claims if they failed to "cooperate" with such requests. The purpose of this conduct was to attempt to conceal the fact that engineering reports had been altered.

It is also my understanding that, after being informed of the alleged frauds, Nielsen and NCT pressured policy holders into submitting to unwarranted additional inspections by new engineers by threatening to deny their claims if they did not agree. (See Table 4 below.)

TAB NO.	ISSUE	QUOTE	SOURCE
(A)	Nielsen and NCT threaten Raimey with improper denial	"… if Plaintiffs elect to refuse to cooperate in this regard, the Defendant will have no choice at that point, to issue a written claim denial based upon a failure to cooperate in the evaluation of the claim."	Defendants' Memorandum In Opposition to 1) Plaintiffs' Motion to Set Discover Schedule and Set for Trial, and 2) Renewed Request for CMO Compliance, ECF Docket Entry No. 59, p. 13.
(B)	Treas and NCT threaten Dwecks with improper denial	"… please consider this an express written demand for the Dwecks' cooperation in scheduling an onsite evaluation with a new engineer… If the Dwecks choose to refuse to cooperate in this demand, their refusal to cooperate will be considered in determining whether any further benefits are owed under the SFIP."	NCT letter dated August 27, 2013, Exhibit 7 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.).

(C)	Treas and NCT threaten Dwecks with improper denial	"Your clients have decided… to refuse to cooperate in Hartford's request to have a new engineer look at the property… At this juncture, we have no choice but to recommend to the Hartford that your clients' claim be denied due to [their] failure to cooperate. The claim denial letter should go out within the next few days."	NCT letter dated September 17, 2013, Exhibit 8 to Docket Entry No. 7 in Dweck v. Hartford, 1:14-cv-06920-ERK-LB (E.D.N.Y.).

6. FIFTH ASSUMED FACT.

It is my understanding that NCT improperly attempted to curtail this Court's inquiry into the misconduct in this case by making misrepresentations to this Court in an attempt prematurely to terminate a hearing concerning the allegations of alteration of engineering reports. It is also my understanding that, at an October 16, 2014 hearing, the Court heard the testimony of George Hernemar, the engineer who inspected Plaintiffs' home. Hernemar testified that he authored both reports and that he changed his opinion in the second report after having had an "open discussion" with a U.S. Forensic engineer, who "pointed out that 'the draft was based on assumptions.'" The Court then sought the testimony of Michael Garove, the engineer who had performed the "peer review" of Hernemar's initial report and with whom Hernemar said he had an "open discussion" with. The NCT attorney then tried to curtail the inquiry by representing to the Court that he knew that Garove's testimony regarding the peer review process would state that the two engineers consulted about Garove's "suggestions and that Mr. Hernemar could adopt or deny every single suggestion made."

The Court ultimately allowed Garove's testimony. Garove then testified that, as opposed to an "'open discussion' described by Hernemar, [the] process by which the report authored by the

inspecting engineer was *rewritten* by an engineer who had not inspected the property and whose identity remained concealed from the homeowner, the insurer and, ultimately, the Court."

The Court found that the NCT attorney had improperly attempted to curtail the Court's inquiry. The Court also noted that during the December 17, 2014 oral argument regarding the appeal of Judge Brown's November 7, 2014 order, "counsel for defendant averred that he had spoken neither to Hernemar nor to Garove about their testimony before the October evidentiary hearing, other than to discuss Hernemar's compensation for his appearance." The Court further noted that NCT's proffer of Garove's anticipated testimony was based was made without clarifying that it was not based upon his own interview of the witness. (See Table 5 below.)

TAB NO.	ISSUE	QUOTE	SOURCE
(A)	NCT's co-counsel's attempt to curtail hearing	Counsel stated that Garove's (the peer reviewing engineer) testimony would state that he consulted with Hernemar (the original engineer) regarding Garove's "suggestions and that Mr. Hernemar could adopt or deny every single suggestion made."	Transcript dated October 16, 2014, pp. 123-24.
(B)	NCT attorney does not disclose that representation re: Garove's anticipated testimony was not based upon conversation with the witness	"Counsel for defendant averred that he had spoken neither to Hernemar nor to Garove about their testimony before the October evidentiary hearing, other than to discuss Hernemar's compensation for his appearance."	Judge Bianco's December 31, 2014 Memorandum and Order, p. 9 n.8.
(C)	Garove testimony is inconsistent with NCT's representation	Garove testified that he did not have an "open discussion" with Hernemar. "[The] process by which the report authored by the inspecting engineer was *rewritten* by an engineer who had not inspected the property and whose identity remained concealed from the	Magistrate Judge Brown's November 7, 2014 Memorandum & Order, p. 9 (emphasis in original).

		homeowner, the insurer and, ultimately, the Court."	

7. SIXTH ASSUMED FACT.

It is my understanding that Nielsen and NCT failed to abide by their discovery obligations in this case. (See Table 6 below.)

TAB NO.	ISSUE	QUOTE	SOURCE
(A)	Nielsen and NCT's disclosure failures	Nielsen and NCT's failures to disclose these [reprehensible] practices was to unnecessarily complicate and delay the Raimey action.	Magistrate Judge Brown's Memorandum & Order dated November 7, 2014, p. 23.
(B)	Nielsen and NCT's discovery failures	The Court finds that Nielsen and NCT did not abide by their discovery obligations.	Magistrate Judge Brown's November 7, 2014 Memorandum & Order, pp. 24-25.

8. SEVENTH ASSUMED FACT.

It is my understanding that Nielsen and NCT have engaged in misconduct similar to that described above (in connection with improperly presenting altered reports) in New Jersey federal court action captioned Uddoh v. Selective Ins. Co. of Amer., Docket No. 2:13-cv-02719 (D.N.J.), pending before United States District Court Judge Stanley R. Chesler.

It is my understanding[4] that, in the course of a New Jersey litigation arising out of the Hurricane Sandy disaster, Humphrey Uddoh, Esq., a client of the Pinczewski & Shpelfogel firm, discovered that his insurance adjuster's report was improperly altered. The original adjuster, Daniel

[4]My understanding is based upon documents available on PACER and information provided to me by the Pinczewski & Shpelfogel firm.

Jules, told Mr. Uddoh that the damage was adjusted to approximately $80,000.00 and had requested an advance payment of $20,000.00 on Mr. Uddoh's behalf. Thereafter, another estimate was issued which totaled *only* $334.00. (See NJ ECF Docket Entry 92 [letter from Mr. Uddoh to the New Jersey Court seeking a stay based upon the defendants' misconduct].) I have been advised by the Pinczewski & Shpelfogel firm that Nielsen and NCT ignored the allegations of fraud and maintained that the $334.00 report was the only report and no other draft reports existed.

It is also my understanding that, when Mr. Uddoh attempted to subpoena documents from the original adjuster (see NJ ECF NJ Docket Entry 46) – an outside contractor who was not an employee of the adjusting firm – an attorney with NCT intervened in that subpoena attempt. Specifically, Kristie L. Mouney, Esq., sent a letter to the original adjuster, Mr. Jules, "instructing that you not provide any response to" Mr. Uddoh's subpoena. (See generally NJ ECF Docket Entry 92.) Ultimately, Mr. Uddoh obtained a copy of the adjustment report, which showed an estimate of $16,170.00; however, the Pinczewski & Shpelfogel firm believes that this report was also altered, and based on the plaintiff's request, Magistrate Judge Cathy L. Waldor ordered an evidentiary hearing on the issue of these altered reports which is scheduled for May 18, 2015 (NJ ECF Docket Entry 95). Under the circumstances, the discrepancies in the insurance adjusters' reports are a troubling fact.

D. THE MISCONDUCT OF NIELSEN AND NCT WARRANTS THE IMPOSITION OF ADDITIONAL SANCTIONS.

Based upon my many years of experience in handling attorney disciplinary matters in both Federal and New York state courts, I respectfully submit that I have an educated understanding of the parameters by which courts impose attorney discipline. Based upon my experience, I submit that

there are three sanctions which this Court or the Attorney Disciplinary Committee, based upon a referral by this Court, should take, as set forth below.

First, this Court should refer Nielsen to the Chief Judge of this Court for referral to the Attorney Disciplinary Committee of this Court for disciplinary action.[5] Pursuant to such a referral, the Attorney Disciplinary Committee of this Court would be in a position to appropriately preclude Nielsen from again appearing in this District, pursuant to Local Rule 1.5(c)(2). Local Rule 1.5(c)(2) provides that this Court's Attorney Disciplinary Committee can, in certain circumstances, enter "an order precluding [an attorney who has been admitted *pro hac vice*] from again appearing at the bar of this Court."

Pursuant to Local Rule 1.5(b)(5), the sanction of a permanent bar from appearing before this court is authorized when, "[i]n connection with activities in this Court, any attorney is found to have engaged in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York." See also MacDraw, supra, 138 F.3d at 37 (attorneys who are found, by clear and convincing evidence, to have violated ethics rules can be permanently barred from appearing before the Court).

Based upon my assumed facts, Nielsen's and NCT's conduct appears to violate numerous provisions of the New York Rules of Professional Conduct (the "Rules") and appears to provide a basis for precluding Nielsen from again appearing before the bar of this Court. Nielsen's and NCT's misrepresentations and their co-counsel's attempts to improperly impede this Court's inquiry into

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[5]Under Local Rules 1.5(c) and (f), the Attorney Disciplinary Committee has the exclusive authority to impose certain types of discipline or sanctions, including barring future *pro hac vice* admission. See MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 138 F.3d 33, 37 n.2 (2d Cir. 1998) (noting that the predecessor to Local Rule 1.5 had permitted the District Court Judge presiding over a case to impose certain sanctions, but that Local Rule 1.5 eliminated that authority).

the allegations of fraudulent alterations of engineering reports appear to violate, among other Rules: Rule 3.1 (engaging in frivolous litigation conduct); Rule 3.3(a)(1) (making a false statement of fact to the Court); Rule 3.3(b) (failing to take reasonable remedial measures when a lawyer knows that a person is engaging in criminal or fraudulent conduct relating to a proceeding); Rule 3.4(c) (disregarding a standing rule or ruling of a tribunal); Rule 4.1 (making false statements of fact to third persons); Rule 8.4(b) (engaging in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice); and Rule 8.4(h) (engaging in any other conduct that adversely reflects on a lawyer's fitness as a lawyer).

State and Federal courts have recognized that pervasive misconduct warrants serious disciplinary action. See In re Peters, 941 F. Supp. 2d 359, 360 (S.D.N.Y. 2013) (pattern of litigation misconduct warranted seven-year suspension); In re Sobolevsky, 430 Fed. Appx. 9, 22 (2d Cir. 2011) (unpublished opinion) (litigation misconduct, which included a pattern of willful neglect, warranted two-year suspension with reinstatement conditioned upon a showing of fitness); Gadda v. Ashcroft, 377 F.3d 934, 943 (9th Cir. 2004) (disbarring attorney for litigation misconduct in immigration cases, and observing that suspension and disbarment are generally appropriate for conduct aberrant to an attorney's practice and/or which affects the court's ability to function in the public interest); In re Riggs, 240 F.3d 668, 671 (7th Cir. 2001) (disbarring attorney who ignored court orders and neglected his clients' cases); United States v. Ford, 806 F.2d 769, 770 (7th Cir. 1986) (indefinitely suspending attorney from practice in the Seventh Circuit based upon that attorney's neglect of client matters, and noting that indefinite suspension was the appropriate sanction because the attorney was

not a member of the bar of the Seventh Circuit); Matter of Freedman, 196 A.D.2d 280 (1st Dept. 1994) (pattern of misconduct warrants disbarment).[6] See also American Bar Association Standards For Imposing Lawyer Sanctions (Revised Feb. 2012), Standard 6.2 ("Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding").

Recently, the United States District Court of the Southern District of New York suspended an attorney for a period of one year based upon misconduct committed in a single employment discrimination action in which the attorney's firm represented the plaintiff. In re Gilly, 976 F. Supp. 2d 471 (S.D.N.Y. 2013). The District Court Judge in the underlying Southern District employment discrimination action imposed monetary sanctions on Gilly's law firm and its client, the plaintiff, based on the plaintiff's false testimony at a deposition and the efforts by Gilly and another associate at his firm to conceal the plaintiff's new employment and to use a false expert report on damages to extract a favorable settlement from the defendants. 976 F. Supp. 2d at 472. Gilly was subsequently

[6]See also, e.g., In re Truong, 22 A.D.3d 62, 63 (1st Dept. 2005) (disbarring an attorney who forged a lease and gave false testimony in support thereof in a landlord-tenant action, thereby engaging in frivolous conduct); In re Abrahams, 5 A.D.3d 21, 22-23 (2d Dept. 2003) (suspending an attorney for five years who, among other things, engaged in frivolous conduct by refusing to comply with a judge's explicit order requiring the attorney to comply with specific discovery demands); In re Hayes, 1 A.D.3d 789, 790-91 (3d Dept. 2003) (disbarring an attorney who, during the course of applying to refinance a mortgage, submitted two false and fraudulent satisfactions of judgment which he had prepared to make it appear that he had paid a default judgment taken against him by a creditor); In re Sassower, 125 A.D.2d 52, 53-54 (2d Dept. 1987) (disbarring an attorney who had engaged in frivolous and vexatious litigation against certain judges, referees, attorneys, public officials, and other parties who participated in certain litigation that the attorney had been involved in on behalf of a client, and finding that said litigation was for the purpose of harassing, threatening, coercing and maliciously injuring those made subject to it).

referred to the Southern District's Committee on Grievances to consider the imposition of discipline. Id.

The Southern District's Committee on Grievances found that Gilly had instructed a lawyer under his supervision to serve defendants with a false and misleading expert report on damages (which report was based on the assumption that the plaintiff would remain unemployed through the end of 2010, when Gilly knew that the plaintiff had accepted a job offer in September of 2010 [id. at 473]) and to utilize that report in settlement negotiations to support the reasonableness of the plaintiff's settlement demand. Id. at 477-78. In addition, the lawyer under Gilly's supervision had failed to timely produce to the defendants documents that would have revealed the plaintiff's job offers and Gilly had ratified this misconduct by the junior lawyer. Id. at 478-79. Subsequently, during oral argument on the defendants' motion for dismissal of the employment discrimination action and for sanctions, Gilly made two factual misstatements to the District Court Judge regarding when he had reviewed the expert report and when he had become aware that the plaintiff's job offer had not been disclosed to defense counsel; but, after reviewing the transcript of the oral argument, Gilly wrote to the District Court Judge to correct his misstatements. Id. at 476.

In determining that a one-year suspension was the appropriate discipline to impose, the Southern District's Committee on Grievances took into consideration as mitigating factors: Gilly's 20 years of service to the Bar; his self-reporting of his misconduct to the District Court Judge and also to the Departmental Disciplinary Committee for the Appellate Division, First Judicial Department; his expressions of remorse; and the serious impact of his misconduct on his legal career (Gilly had voluntarily withdrawn from the law firm in which he was a partner following the

imposition of monetary sanctions in the underlying employment discrimination action [id. at 476]). Id. at 479-80.

The Gilly case presented less egregious circumstances than those present in this case. The attorney in Gilly *self-reported* his misconduct and, furthermore, voluntarily left his practice. Nielsen, however, has not acknowledged any misconduct, despite the fact that at least three court decisions which have found that he had engaged in misconduct. Although the attorney in Gilly used an inaccurate expert report to further an employment discrimination case in *one instance*, here, Nielsen and NCT have apparently engaged in the *pattern and practice* of using altered reports to injure many, many desperate homeowners. Such conduct strikes at the very heart of the administration of justice.

Magistrate Judge Brown's finding that Nielsen, NCT and their client, Wright Flood, had engaged in "flawed," "unprincipled," "reprehensible," and "highly improper" conduct, standing by itself, would be sufficient to conclude that Nielsen had violated numerous ethics rules and that the seriousness of his misconduct, at a minimum, raises substantial questions as to his fitness to practice law. These findings, taken together with the misconduct described in the Statement of Assumed Facts set forth above, further support the conclusion that Nielsen should be permanently barred from appearing before this Court.[7]

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[7] Another theoretical sanction against Nielsen and NCT would be *revocation* of their *pro hac vice* admission in this case and, perhaps, in other Hurricane Sandy Cases pending in the Eastern District of New York. See, e.g., Hatfill v. Foster, 415 F. Supp. 2d 353, 369-70 (S.D.N.Y. 2006) (in ordering counsel to show cause why their *pro hac vice* admission should not be revoked because of deceptive conduct, the court noted that "[t]his court is not required to permit, and will not permit, lawyers who engage in shady practice to appear before it as guests"); Ryan v. Astra Tech, Inc., 772 F.3d 50, 56-58 (1st Cir. 2014) (affirming revocation of *pro hac vice* admission of attorney who had made flagrant misrepresentations to the court). As noted above, however, Nielsen and NCT have previously withdrawn from all Hurricane Sandy Cases pending in the Eastern District of New York, the question of *revoking* Nielsen's *pro hac vice* admission in this case and in other Eastern District (continued...)

A disciplinary finding by this Court would be significant not only with respect to Nielsen's ability to practice before this Court in the future, but it would likely also have a *powerful impact* on his ability to practice in his home state (and any other state in which he is admitted permanently or on a *pro hac vice* basis). I take that position because Louisiana, the home state in which Nielsen is permitted to practice, has adopted – as has New York and other states – the policy of imposing "reciprocal discipline" upon a lawyer who is sanctioned in a "foreign jurisdiction" (i.e., another state). In other words, if a lawyer from Louisiana is the subject of discipline by a New York State or Federal court, that same discipline (with very few exceptions) will be imposed upon the lawyer by the Louisiana Supreme Court, which governs attorney discipline in that state. See, e.g., Louisiana Supreme Court Rule XIX, Section 21(D); In re Walters, 98 So. 3d 266 (S.Ct. Lou. 2012) (unless the discipline imposed in the foreign jurisdiction was the result of a deprivation of due process or otherwise suffered from an infirmity of proof or the imposition of identical discipline would result in grave injustice, then the disbarment imposed by the North Carolina court would be imposed by the Louisiana Supreme Court); In re Bos, 56 So. 3d 237 (S.Ct. Lou. 2011) (only under "extraordinary circumstances" will the Louisiana Supreme Court not impose reciprocal discipline).[8]

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[7](...continued)
of New York Hurricane Sandy Cases is obviously moot.

[8]Suffice it to say that the New York State Appellate Divisions generally follow this same reciprocal discipline practice. See, e.g., Matter of Gilly, supra, 110 A.D.3d 164 (1st Dept. 2013) (attorney who was suspended for one year by the Southern District of New York receives reciprocal discipline by the First Department [and citing various cases supporting the court's historic position on this issue]).

Here, should this Eastern District Federal Court impose a disciplinary sanction upon Nielsen – i.e., a bar on subsequent *pro hac vice* admission in this District – presumably Louisiana would disbar or equivalently sanction Nielsen.

Separately, this Court should refer Nielsen's conduct to the Clerk of the New Jersey District Court, based upon the facts (as set forth above) that: 1) Nielsen had engaged in misconduct in connection with altering an engineering report in the Eastern District of New York's Sandy Hurricane Sandy litigation; and 2) there is evidence that Nielsen is currently engaging in similar misconduct before the New Jersey District Court in Uddoh v. Selective Insurance Company (D.N.J. Docket No. 2:13-cv-02719), which is also a case arising out of the Hurricane Sandy disaster.

Second, this Court should refer Nielsen to the Louisiana disciplinary authorities for possible disciplinary action in Louisiana. Nielsen's principal law office is located in Louisiana and Nielsen is admitted to practice in Louisiana. Because of the scope and seriousness of Nielsen's misconduct and the serious questions that misconduct raises about his fitness to practice law, it would be appropriate for Louisiana disciplinary authorities to investigate this matter and conduct of Nielsen.

Third, this Court should refer the conduct of Nielsen and NCT to the United States Attorney's Office for the Eastern District of New York. Based upon the facts I have assumed, and I say this with a deep sense of regret, it appears that Nielsen and NCT has engaged in conduct which might be viewed as criminal. For example, their misrepresentations to this Court may have violated 18 U.S.C. § 1001, the false statement statute. Their collaboration with Wright Flood in attempting to conceal the fraudulent alterations of engineering reports and engaging in a pattern of such fraudulent conduct could violate the Federal conspiracy statute, 18 U.S.C. § 371, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq.

Based upon my assumed facts, it would be appropriate for this Court to refer Nielsen's and NCT's potentially criminal conduct to the Office of the United States Attorney for the Eastern District of New York. See, e.g., Pfrmf Inv. Holdings v. Interpublic Group of Cos., 2012 U.S. Dist. LEXIS 96981, at *16 (S.D.N.Y. Jul. 10, 2012) (referring a party's "potentially fraudulent behavior" in connection with a lawsuit to the United States Attorney). Furthermore, if Nielsen has engaged in criminal misconduct, then under the principles of entity liability, the NCT firm likely has vicariously liability as well.[9] Obviously, this is a matter best addressed by the United States Attorney's Office for the Eastern District of New York.

I conclude by noting that Magistrate Judge Brown has already imposed monetary sanctions upon Nielsen and NCT because of their "reprehensible" conduct in connection with the alteration of the engineering report concerning Plaintiffs' home, their misrepresentations about their alleged lack of prior knowledge of the improper alteration of the report and their attempt to impede this Court's inquiry into the allegations of fraud. As Magistrate Judge Brown noted in his February 24, 2015 Order, Wright Flood has agreed to be entirely responsible for paying the attorneys' fees and expenses, even though the Court had imposed the monetary sanction upon Nielsen and NCT as well as upon Wright Flood. (Feb. 24, 2015 Order at 3-4.) Because Plaintiffs have already been provided with full compensation for "the excess costs, expenses and attorneys' fees reasonably incurred" on account of Nielsen and NCT's misconduct, which is the available monetary sanction against lawyers and law firms pursuant to 28 U.S.C. § 1927, further monetary sanctions cannot be imposed upon Nielsen and NCT in connection with their misconduct in this case.

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[9] See People v. Highgate LTC Management, LLC, 69 A.D.3d 185, 188 (3d Dept. 2009) (a corporate entity is liable for the criminal acts of its agents or employees if those acts are committed within the scope of their employment or authority).

E. CONCLUSION.

It is my opinion to a reasonable degree of professional certainty that, under the norms governing attorney discipline in Federal and New York state courts, the following additional sanctions-related steps with respect to Nielsen and NCT would be appropriate:

- Referring Nielsen to the Chief Judge of this Court for referral to the Attorney Disciplinary Committee of this Court for disciplinary action. An appropriate disciplinary sanction to be imposed by the Attorney Disciplinary Committee would be to permanently bar Nielsen from appearing in any case in this District.

- Referring Nielsen to disciplinary bodies in the State of Louisiana for disciplinary action.

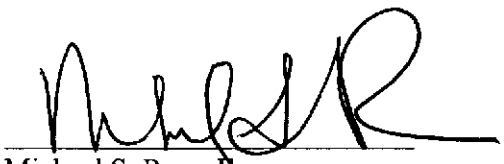
- Referring Nielsen to the Clerk of the New Jersey District Court based upon his and his firm's conduct in Uddoh v. Selective Ins. Co. of Amer., Docket No. 2:13-cv-02719 (D.N.J.).

- Referring Nielsen and NCT to the Office of the United States Attorney for the Eastern District of New York and/or the United States Department of Justice for investigation and potential prosecution of possibly criminal conduct in connection with, among other things, fraudulent alteration of engineering reports and knowingly making false and misleading statements to the Court, to FEMA and to other litigants and their counsel.[10]

[10]Separate and apart from the additional sanctions-related steps available to this Court, I would note that the misconduct which I have assumed for purposes of this Memorandum triggered the crime-fraud exception to the attorney-client privilege. See, e.g., In re Chevron, 650 F.3d 276 (3d Cir. May 25, 2011) (defendants made a prima facie showing of the application of the crime-fraud exception where the court found an indication of fraud in the fact that an expert who worked for an engineer who had been appointed by the Ecuadorian court to conduct an assessment of damages was also employed by a company which had been hired by the plaintiffs' environmental consulting firm); Amusement Industry, Inc. v. Stern, 293 F.R.D. 420 (S.D.N.Y. 2013) (communications between defendants and their lawyers were subject to the crime-fraud exception where there was evidence that defendants had engaged in fraudulent acts, such as repeated creation and use of fraudulent documents with forged signatures of non-existent alleged employees of financial and real estate companies).

Dated: New York, New York
April 17, 2015

Respectfully submitted,



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