September 22, 2022

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

Re: Notice of *Ex Parte* Communication, MB Docket Nos. 20-401 and 17-105; RM-11854

Dear Ms. Dortch:

On September 20, 2022, Patrick McFadden, Larry Walke, and the undersigned of the National Association of Broadcasters (NAB) had a telephone conference with Shiva Goel of Commissioner Starks's office to discuss the above-captioned proceeding regarding a proposed rule change that would enable GeoBroadcast Solutions, LLC (GBS) to license its proprietary booster technology to FM stations (ZoneCasting).[1] NAB reiterated that nearly every radio broadcaster with whom we have spoken opposes GBS's proposal and that GBS's claim of significant industry support is demonstrably false. Moreover, NAB raised serious concerns with the Commission relying on GBS's representations and that of its founder and Chief Executive Officer (CEO), Chris Devine. NAB believes that Mr. Devine's track record requires the Commission to examine the underlying information carefully and reject his petition.

Some have questioned why the radio industry remains adamantly opposed to greenlighting Mr. Devine's proprietary technology if its use would be voluntary. As NAB explained in the meeting, ZoneCasting would inevitably damage radio's technical integrity and reputation[2] and serve as a lever for advertisers to force radio broadcasters to artificially reduce rates.[3] NAB further submits that the proposal's merits necessarily

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[1] *Amendment of Section 74.1231(i) of the Commission's Rules on FM Broadcast Booster Stations*, Notice of Proposed Rulemaking, 35 FCC Rcd 14213 (2020); 47 C.F.R. § 74.1231(i).

[2] Comments of the National Association of Broadcasters, MB Docket Nos. 20-401 and 17-105, RM-11854 (Feb. 10, 2021), at 4.

[3] It is telling that ZoneCasting proponents included an advertising executive in a recent meeting with Commissioner Starks, as NAB has no doubt that ad agencies would relish the opportunity to leverage lower rates from radio stations. *See* Letter from James L. Winston to Marlene H. Dortch, MB Docket Nos. 20-401 and 17-105, RM-11854 (Sept. 8, 2022).

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must be evaluated in the context of the credible and public accusations concerning Mr. Devine's questionable business dealings. At a minimum, it would be prudent for the Commission to take a close and exacting look at the record and proceed with extreme caution.

During the conversation, NAB shared publicly available information detailing some of the instances where Mr. Devine has been credibly accused of fraudulent and deceitful conduct. For example, in 2009, Mr. Devine was sued by Robert Allen, III, who alleged that Mr. Devine had defrauded Mr. Allen of roughly $70 million.[4] According to Mr. Allen's family, Mr. Devine befriended Mr. Allen, who over time became elderly and infirm, and convinced Mr. Allen to invest tens of millions of dollars in Superior Broadcasting Company, Inc. (Superior), a company ostensibly created to buy and operate radio stations.[5] According to the lawsuit, unbeknownst to Mr. Allen and despite his $70 million investment in Superior, Mr. Devine did not purchase a single station for the company. Instead, over the course of years, Mr. Devine and his accomplices allegedly siphoned millions of dollars directly to themselves and to fund investments with no benefit to Mr. Allen. As part of this scheme, Mr. Devine allegedly falsified financial statements to deceive Mr. Allen.[6] In short, Mr. Devine was accused of a long-running and successful con to befriend and then defraud a mentally and physically infirm senior citizen out of tens of millions of dollars. Mr. Devine ultimately settled the case out of court.

Mr. Devine also formerly owned Devine Racing, a company specializing in marathon races. His operations were allegedly financed in part by his profits from years of defrauding Mr. Allen.[7] Again, Mr. Devine was accused of "downright immoral" business practices,[8] and leaving "a wide boulevard of broken promises everywhere [Devine Racing] operated."[9] During this period, Mr. Devine and his various companies were the

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[4] *Allen v. Devine*, 670 F. Supp. 2d 164 (E.D.N.Y. 2009), attached as Exhibit 1; *see also* Plaintiff's Memorandum of Law in Opposition to Devine Defendants' Motion for Partial Summary Judgment, The Estate of Robert Allen, III, by its Executrix, Grace M. Allen, against Christopher Devine et al., Docket No. 09-CV-0668 (ETB), United States District Court Eastern District of New York (May 10, 2013), attached as Exhibit 2.

[5] *Allen*, 670 F. Supp. 2d at 167.

[6] *Id*. at 167-68.

[7] Lya Wodraska and Pamela Manson, "Salt Lake marathon owner accused of fraud, 'downright immoral' business practices," *Salt Lake Tribune*, Apr. 11, 2009, *available at*: https://archive.sltrib.com/story.php?ref=/news/ci_12115972.

[8] *Id.*

[9] Hal Habib, "New Organizer of Palm Beaches Marathon has a tattered reputation," *Palm Beach Post*, Dec. 1, 2009, attached as Exhibit 3.

subject of numerous lawsuits, as well as multiple IRS liens worth over $1.1 million.[10] "Dozens of runners and vendors from Las Vegas to Los Angeles to Salt Lake City . . . complained of late payments and non-payments worth millions from Devine Racing."[11] According to one former employee, Devine Racing "borrowed from one, they stole from one to pay the other. Then they stole from those to go on to something else."[12] The winner of the 2008 Las Vegas marathon, Ethiopian runner Abebe Yimer, "didn't have the funds needed to cover his rent because the money he counted on from Devine never came."[13] A former Devine Racing employee ultimately paid Yimer the money he was owed because he did not believe the company would ever pay it.[14]

The Commission itself has asserted that Mr. Devine has been untruthful. In 1993, the Commission investigated Mr. Devine for allegedly engaging in a sham assignment of a radio station license to circumvent the Commission's ownership rules. The Mass Media Bureau considered the information provided by Mr. Devine regarding the transfer of a station in Spanish Fork, Utah to an employee (who quit soon thereafter) and concluded that, "Devine and [the employee] have provided false information to the Commission. This false information includes the representation that Devine divested control of the Spanish Fork, Utah station and the representation that [the employee] assumed control of the station when Devine and/or [his business partner] are actually in *de facto* control."[15] The full Commission agreed, finding that Mr. Devine's responses "to Commission inquiries concerning this assignment appear to have been false or deceptive, in violation of Sections 73.1015 and 1.17 of the Commission's Rules and raise substantial and material questions as to whether Devine and [the former

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[10] *Id.*

[11] *Id.*

[12] *Id.* Ultimately, the Town of Palm Beach had to reclaim control of the Palm Beaches Marathon. Hal Habib, "Chamber of Commerce reassumes control of Palm Beaches Marathon," *Palm Beach Post*, Dec. 3, 2013, attached as Exhibit 4.

[13] Wodraska and Manson, *supra*.

[14] *Id.*

[15] *Applications of C. Devine Media, Inc., For Renewal of License of Station KBER-FM, Ogden, Utah; Street Stryder, For Renewal of License of Station KQOL-FM, Spanish Fork, Utah*, Bill of Particulars, MM Docket No. 93-56, File Nos. BRH-900604Y and BRH-900601A3 (Apr. 26, 1993), at 4, *available at*: https://www.fcc.gov/ecfs/file/download/1145370001.pdf?file_name=1145370001.pdf. Note: The only available electronic copy of this document was apparently poorly scanned into ECFS; however, the cited text is legible and the Bureau's conclusion is clear.

employee] possess the requisite qualifications to warrant granting the applications for renewal of the licenses of KBER-FM and KQOL-FM."[16]

This documented pattern of dealings[17] is directly relevant to the proceeding at hand, as GBS is itself engaging in frequent misrepresentations, misdirections, and false claims. Perhaps most notably, GBS is now cynically attempting to claim that there is an intra-radio industry rift regarding the ZoneCasting proposal. Mr. Devine's company contends there is a "thinly veiled goal of the largest radio group owners reinforcing and seeking to maintain their dominant position in the market by denying smaller broadcasters an opportunity to use technology to level the playing field."[18] NAB, which vigorously represents broadcasters of all sizes, could not disagree more. To NAB's knowledge, nearly every broadcaster that has seriously considered the implications of the rule change at issue has vehemently opposed it.[19]

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[16] *Applications of C. Devine Media, Inc., For Renewal of License of Station KBER-FM, Ogden, Utah; Street Stryder, For Renewal of License of Station KQOL-FM, Spanish Fork, Utah*, Hearing Designation Order and Notice of Forfeiture, 8 FCC Rcd 2493 (1993). The matter was never tried before an Administrative Law Judge, however, as Mr. Devine availed himself of the Commission's minority distress sale policy, which at one time permitted a licensee to avoid a hearing if it was able to sell its station for a maximum of 75 percent of its fair market value before the trial commenced. *Applications of Chestnut Broadcasting Company For Renewal of License of Station KBER-FM, Ogden, Utah; Street Stryder For Renewal of License of Station KUJJ-FM Spanish Fork, Utah; Street Stryder Assignor and Bajamar Broadcasting, L.L.C. Assignee, For Consent to Assignment of Station KUJJ-FM Spanish Fork, Utah*, Memorandum Opinion and Order, 9 FCC Rcd 6141 (1994).

[17] The list of Mr. Devine's past dealings is far longer than could be detailed in a one-hour *ex parte* meeting. For example, Arbitron won an award from Mr. Devine after he failed to pay the company nearly $800,000 for services rendered. *Arbitron, Inc. v. Marathon Media, LLC, d/b/a/ KRKI-FM, and Lakeshore Media, LLC, d/b/a KRKI-FM/KXDC-FM*, 2008 WL 892366 (S.D.N.Y. 2008), attached as Exhibit 5.

[18] Letter from Gerard J. Waldron, Covington & Burling, Counsel to GBS, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 20-401 and 17-105, and RM-11854 (Jan. 19, 2022), at 3.

[19] *See, e.g.*, Reply Comments of Alaska Broadcasters Association, Colorado Broadcasters Association of Broadcasters, Oregon Association of Broadcasters, and Puerto Rico Broadcasters Association, MB Docket Nos. 20-401 and 17-105, and RM-11854, at 2 (Mar. 12, 2021) (listing numerous broadcasters opposed to GBS's proposal); Letter from Greg Davis Sr., Davis Broadcasting, and Kevin Perry, Perry Publishing & Broadcasting, to the Honorable Geoffrey Starks, Commissioner, FCC, MB Docket No. 20-401 (Aug. 9. 2022); Letter from (all fifty) State Broadcasters Associations

As primary support for its claim, GBS points to filings in the record that purport to be from smaller broadcasters backing the company's proposal. Because that alleged support runs counter to the feedback NAB has received from its members and the industry as a whole, NAB undertook a close examination of the filings to which GBS points. Predictably, given Mr. Devine's conduct, some curious patterns quickly emerge.

First, the vast majority of comments filed "in support" of the rule change are identical form letters. These forms are not signed by the broadcaster whose name appears on the form, and no contact person or telephone number for the broadcaster is listed. In fact, the forms contain no substantive indication that the comments were reviewed or endorsed by the named broadcaster. Notably, these form letters– *representing 93 of the 109 stations purportedly supporting GBS* (that NAB could identify) – were filed under the signature of attorney Aaron P. Shainis.[20]

The Commission's records reflect that Mr. Shainis is a longtime counsel to GBS and appears to have been (and perhaps still is) in business with Mr. Devine.[21] Indeed, Mr. Shainis authored GBS's original petition for rulemaking in 2012.[22] In 2017, Mr. Shainis filed comments on behalf of himself urging the Commission to renew interest in the 2012 petition as part of the Commission's media modernization effort.[23] Now, Mr. Shainis has apparently enlisted his station clients – many of whom do not appear to have ever participated in an FCC rulemaking before – to officially support Mr. Shainis's interest in Mr. Devine's latest endeavor, GBS. One of Mr. Shainis's group filings even goes so far to indicate that these station clients "retained the services of Kessler and Gehman Associates, Inc. to review [GBS's technical] reports and to submit a Technical

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to the Honorable Jessica Rosenworcel, Chairwoman, FCC, et al., MB Docket Nos. 20-401 and 17-105, and RM-11854 (July 21, 2021).

[20] This figure does not include broadcasters who have subsequently withdrawn their initial support. *See*, *e.g.*, Letter from John Zimmer, Zimmer Midwest Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 20-401 and 17-105, and RM-11854 (July 29, 2022) (withdrawing three stations' ZoneCasting support after purchasing them from a client of Mr. Shainis).

[21] *See, e.g.*, 3 Point Media – Coalville, LLC, FCC Form 323, Ownership Report for Commercial Broadcast Stations (filed July 20, 2004), Exhibit 3 - Other Media Interests, *available at*: https://publicfiles.fcc.gov/api/service/fm/application/1002600.html, and attached hereto as Exhibit 6.

[22] *See Consumer & Governmental Affairs Bureau Reference Information Center Petitions for Rulemaking Filed*, Public Notice, Report No. 2949 (April 23, 2012).

[23] Comments of Shainis & Peltzman, Chartered, MB Docket No. 17-105 (July 3, 2017).

Statement."[24] One wonders how many of these small broadcasters are aware that they retained such assistance, or for that matter, knowingly endorsed ZoneCasting.[25]

Moreover, NAB estimates that more than half of the Shainis filers have service areas that cover fewer than *50,000* people, and almost 30 percent have service areas that cover fewer than *25,000* people.[26] This population coverage means that these broadcasters already geotarget their content. Further slicing up such small markets, especially at the substantial price ZoneCasting requires, frankly makes no sense and is not financially sustainable. Further calling the credibility of these filings into question, NAB estimates that approximately 25 percent of the Shainis filers are *non-commercial* stations. As NAB explained, non-commercial stations cannot accept advertisements and can only seek underwriters. It strains credulity that any of these stations could possibly attract enough underwriters to fund a ZoneCasting play.[27]

NAB also pointed out that, in the 10 years since filing its original petition, GBS has curiously (and consistently) neglected to mention how expensive it would be for stations to employ its system. This glaring omission is not accidental. The only note the company offered is yet another "promise" that it would engage in something akin to profit-sharing to reduce the upfront costs.

Fortunately, Alpha Media, a mid-sized broadcaster that purchased a station on which ZoneCasting was tested in 2015, submitted the actual costs the station incurred working with GBS. According to Alpha, upfront infrastructure costs to implement ZoneCasting with four boosters at four different sites totaled $51,000, FM booster equipment for this implementation would cost at least $118,000, and annual recurring

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[24] Comments submitted by Aaron P. Shainis ("on behalf of the following . . . Licensees"), MB Docket Nos. 20-401 and 17-105, and RM-11854 (June 6, 2022), at 6.

[25] In addition to sufficiently informing his clients of the substantive issues regarding ZoneCasting, one hopes that Mr. Shainis, at the least, adhered to D.C. Bar rules and informed the station clients he solicited to support GBS of his involvement with the company (and the extent of that involvement, including any ownership share in GBS or other business interests of Mr. Devine, or success fee if GBS's petition is approved). *See* D.C. Rules of Prof'l Conduct 1.7(b)(4), (c).

[26] Station information taken from engineering data in the Commission's LMS or CDBS database. Coverage calculations were performed using the "General-Purpose FM" mode in the FCC's TVStudy software (version 2.2.5). Population coverage values are based upon the 2010 U.S. Census.

[27] Of note, National Public Radio also opposes GBS's proposal. Comments of National Public Radio, Inc. MB Docket Nos. 20-401 and 17-105, and RM-11854 (June 6, 2022).

costs would be $59,200.[28] Thus, Alpha would have to invest at least $169,000 upfront, with annual recurring costs of over $59,000 to implement ZoneCasting. Alpha notes that as of 2021, the average *gross* annual revenue for radio stations in markets 210 to 253, before deducting rent, salaries, utilities, insurance, and other expenses, was only $347,000.[29] Given these one-time and annual costs, Alpha concluded that even for itself, a mid-size broadcaster, "the costs of using GBS's technology would far exceed the benefits."[30]

With respect to the cost of implementing the ZoneCasting system, particularly given his track record, this expert agency simply cannot accept Mr. Devine's appeal to the Commission to "trust me." Moreover, the Commission should not entertain as credible the attempt by Mr. Devine (and his longtime associate) to manufacture a perception that there is an industry rift regarding his proposal (they may, in fact, be attempting to create an actual rift wholly based on misinformation).

Despite GBS's smoke and mirrors, nothing has changed since GBS filed its original petition in 2012. The company has not successfully convinced the radio industry that the likely downsides attendant to ZoneCasting are worth the limited potential benefits. Importantly, ZoneCasting still has the very same technical problems that existed 10 years ago. The *only* thing that has changed is the packaging of its proposal: for the first time ZoneCasting is pitched as assisting minority-owned broadcasters (it will not) and now, as of 2022, as helping small broadcasters (it cannot). Neither of these contentions were raised in the 2012 and 2017 submissions and are clearly new attempts to give window dressing to the same flawed proposal.

The Commission should not become the latest in a long line of those who regret having trusted Mr. Devine and his businesses' representations. It should not give Mr. Devine the green light to prey on the radio industry by adopting his GBS proposal. NAB encourages the Commission to stick to the facts and adhere to its rigorous standards

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[28] Letter from D. Robert Proffitt and Mike Everhart to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 20-401 and 17-105; RM-11854 (July 27, 2022), at 2-3.

[29] *Id.* at 4, citing *BIA Media Access Pro* (May 19, 2022).

[30] *Id*.

for testing. If the Commission proceeds in that fashion, it is quite clear that GBS's proposal should be rejected.

Respectfully Submitted,

Rick Kaplan
Chief Legal Officer and Executive Vice President
National Association of Broadcasters

cc: Shiva Goel

Exhibit 1

Allen v. Devine

United States District Court for the Eastern District of New York

November 19, 2009, Decided

09-cv-668 (ADS) (MLO)

Reporter
670 F. Supp. 2d 164 *; 2009 U.S. Dist. LEXIS 110768 **

C. ROBERT ALLEN, III, by LUKE ALLEN, as Guardian for the Property Management of C. Robert Allen III, Plaintiff, -against- CHRISTOPHER DEVINE, LAKESHORE MEDIA, LLC, MILCREEK BROADCASTING LLC, COLLEGE CREEK MEDIA LLC, MARATHON MEDIA GROUP, LLC, 3 POINT MEDIA -- SALT LAKE CITY, LLC, 3 POINT MEDIA DELTA, LLC, 3 POINT MEDIA -- UTAH, LLC, 3 POINT MEDIA -- FRANKLIN, LLC, 3 POINT MEDIA -- PRESCOTT VALLEY, LLC, 3 POINT MEDIA -- COALVILLE, LLC, 3 POINT MEDIA -- ARIZONA, LLC, 3 POINT MEDIA -- FLORIDA, LLC, 3 POINT MEDIA -- KANSAS, LLC, 3 POINT MEDIA -- OGDEN, LLC, 3 POINT MEDIA -- SANFRANCISCO, LLC, MIDVALLEY RADIO PARTNERS, LLC, D&B TOWERS LLC, SUPERIOR BROADCASTING OF DENVER, LLC, WACKENBURG ASSOCIATES, LLC, PORTLAND BROADCASTING LLC, DESERT SKY MEDIA LLC, SKY MEDIA LLC and John Does 1-50, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Motion granted by, Motion denied by, Claim dismissed by *Allen v. Devine, 726 F. Supp. 2d 240, 2010 U.S. Dist. LEXIS 74495 (E.D.N.Y., July 24, 2010)*

Related proceeding at *Excelsior Capital, LLC v. Devine, 2011 U.S. Dist. LEXIS 174961 (E.D.N.Y., Jan. 26, 2011)*

Related proceeding at *Davis v. Farrell Fritz, P.C., 2022 N.Y. App. Div. LEXIS 412 (N.Y. App. Div. 2d Dep't, Jan. 26, 2022)*

Prior History: *Excelsior Capital, LLC v. Superior Broadcasting Co., Inc., 2009 N.Y. Misc. LEXIS 5893 (N.Y. Sup. Ct., June 3, 2009)*

Core Terms

personal jurisdiction, alleges, joinder, joined, venue, motion to dismiss, feasible, parties, witnesses, resident, necessary party, present case, Defendants', factors, constructive trust, co-conspirator, considers, state law claim, due process, inconvenience, convenience, conspiracy, injunctive, non-party, tortious, reasons, funds, weigh, lack of personal jurisdiction, joint tort feasor

Counsel: **[**1]** For Plaintiffs: Lawrence T. Gresser, Esq., Alexandra Sarah Wald, Esq., Nathaniel P.T. Read, Esq., Alexis Gena Stone, Esq., and Harvey B. Silikovitz, Esq., Of Cousels, Cohen & Gresser LLP, New York, NY.

For all Defendants: Kevin Joseph O'Connor, Esq., Of Counsel, Peckar & Abramson, P.C., New York, NY.

For D&B Towers LLC, Defendant: Nicholas J. Fortuna, Esq., Of Counsel, Allyn & Fortuna, LLP, New York, NY.

For D&B Towers LLC, Defendant: Mark L Callister, Esq., Of Counsel, Callister Nebeker & McCullough, P.C., Salt Lake City, UT.

Judges: ARTHUR D. SPATT, United States District Judge.

Opinion by: ARTHUR D. SPATT

Opinion

[*166] MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

This case arise out of allegations by the plaintiff, C. Robert Allen, III ("Allen"), by his Guardian for Property Management, Luke Allen, that the defendants defrauded Allen out of tens of millions of dollars over several years. Presently before the Court are (1) a motion by defendants Christopher Devine, Lakeshore Media, LLC, College Creek Media LLC, Marathon Media Group, LLC, 3 Point Media -- Salt Lake City, LLC, 3 Point Media

Delta, LLC, 3 Point Media -- Prescott Valley, LLC, 3 Point Media -- Coalville, LLC, 3 Point Media -- Arizona, LLC, 3 Point **[**2]** Media -- Florida, LLC, 3 Point Media -- Kansas, LLC, 3 Point Media -- Ogdon, LLC, 3 Point Media -- San Francisco, LLC, Midvalley Radio Partners, LLC, Superior Broadcasting of Nevada, LLC, Superior Broadcasting of Denver, LLC, Wackenburg Associates, LLC, Portland Broadcasting LLC, Desert Sky Media LLC, and Sky Media LLC (collectively, the "Moving Defendants") to dismiss the complaint for failure to join an **[*167]** indispensable party, pursuant to *Fed. R. Civ. P. 19*, (2) a motion by the Moving Defendants in the alternative to transfer the action, (3) a motion by defendant D&B Towers, LLC ("D&B Towers") to dismiss the complaint against them for lack of personal jurisdiction, and (4) a motion by defendant D&B Towers to dismiss the complaint against them for failure to state a claim, pursuant to *Fed. R. Civ. P. 12(b)(6)* and *9(a)*. For the reasons which follow, the Court denies all the motions, and orders Bruce Buzil, Richard Davis, and Superior Broadcasting Company, Inc. to be joined as defendants as to the plaintiff's request for a constructive trust, and orders Bruce Buzil and Richard Davis to be joined as defendants as to the plaintiff's request for injunctive relief.

I. BACKGROUND

C. Robert Allen **[**3]** III is a 79-year old resident of Port Washington, New York. He is alleged to have lived in Port Washington since at least the 1980's. Through his family, Allen developed significant personal wealth, though Allen himself had earned little money in business. According to the complaint, Allen is today both physically and mentally infirm, and rarely leaves his home.

Allen alleges that he met defendants Christopher Devine and Bruce Buzil in the 1980's. Soon after Allen met Devine, it is alleged that Devine began telephoning Allen in his New York home on a daily basis. Devine also allegedly visited Allen at his home in Port Washington, New York on multiple occasions. According to Allen, Devine and Buzil saw him as a "mark", and ingratiated themselves to Allen for the purpose of defrauding him.

In 1999, Devine and Buzil allegedly began soliciting Allen to invest in a company called Superior Broadcasting Company, Inc. ("Superior"), for which Devine served as president and Buzil served as secretary. Devine and Buzil allegedly represented to Allen that Superior owned several radio stations and other related assets, when in fact Superior was a shell company with no significant assets or income. **[**4]** Allen alleges that, beginning in 2000, he began making significant loans to Superior based on Devine and Buzil's misrepresentations.

Once Allen began making loans to Superior, Devine and Buzil allegedly began using these loans for their own benefit. Allen alleges that Devine and Buzil improperly diverted some of the money he loaned to Superior directly to themselves, and used some of the money to pay an accomplice, one Richard Davis. However, A large portion of the money is alleged to have been used to fund a network of limited liability corporations that Devine and Buzil owned (the "Devine/Buzil LLCs"), without any benefit for Superior or Allen. One of these alleged Devine/Buzil LLCs is the defendant D&B Towers. Allen names as defendants an additional twenty-two Devine/Buzil LLCs, all of which Allen alleges were operated by Devine and Buzil from a single Chicago office.

Further, Allen alleges that Devine and Buzil were aided in their scheme by Allen's neighbor in Port Washington, Richard Davis. While Allen introduced Davis to Devine and Buzil, Allen alleges that Devine and Buzil ultimately included Davis as a co-conspirator in their scheme. Davis' role in the scheme is alleged as follows: **[**5]** First, Davis would loan money to Superior, Devine, Buzil, and the Devine/Buzil LLCs. Devine and Buzil would then use the money Allen invested in Superior to repay these loans to Davis, plus exorbitant interest. Allen alleges that approximately $ 23 million of Allen's money was eventually paid to Davis.

To keep Allen from discovering their alleged misappropriation of funds, Devine **[*168]** and Buzil allegedly prepared falsified financial statements for Superior. They then regularly sent these statements to Allen at his home in New York. Allen alleges that, by 2007, when family members discovered the fraud, he had lost some $ 70 million to Devine and Buzil's scheme.

On February 18, 2009, Allen filed the present law suit, naming as defendants Devine, Buzil, and twenty-three Devine/Buzil LLCs. Against Devine and Buzil, Allen alleges violations of the Racketeering Influenced Corrupt Organizations Act ("RICO"), fraud, and breach of fiduciary duty. Against all the defendants Allen alleges civil conspiracy, conversion, and unjust enrichment. On March 20, 2009, Allen voluntarily dismissed Buzil from the present case pursuant to *Fed.*

R. Civ. P. 41(a)(1)(A)(1), after a New York State Justice found, in sealed **[**6]** proceedings in a separate but related matter, that New York State long arm jurisdiction did not extend to Buzil. Allen states that he dismissed Buzil "rather than waste time on motion practice over jurisdictional issues incidental to Allen's principal rights to relief." (Opp. at 8.)

II. DISCUSSION

A. As to the Moving Defendants' Motion to Dismiss for Failure to Join an Indispensable Party

The Moving Defendants have moved to dismiss the present action without prejudice pursuant to Fed. R. Civ. P. 19(b) for failure to join an indispensable party. Specifically, the Moving Defendants argue that Buzil and Davis are necessary parties, but that Buzil's joinder is not feasible because the Court has no personal jurisdiction over him, and that Davis's joinder is not feasible because his joinder would destroy the Court's subject matter jurisdiction. The Moving Defendants argue this is fatal to the plaintiff's complaint. The Moving Defendants additionally argue that Superior is a necessary party, though the parties agree that Superior's joinder is feasible.

Under Rule 19, the Court conducts a three-part analysis concerning the joinder of a party. The Court considers (1) whether the party is necessary **[**7]** to the present case and therefore should be joined, (2) whether the party's joinder is feasible (that is, whether all jurisdictional requirements are met and whether any other extraordinary circumstance prevents joinder), and (3) whether, if the party is necessary but joinder is not feasible, the court may in equity and good conscience, allow the action to proceed with the existing parties. See, Viacom Intern., Inc., 212 F.3d at 724-25; Underpinning & Foundation Skanska, Inc. v. Berkley Regional Ins. Co., 07-cv-2758 (ADS)(ARL), 262 F.R.D. 196, 2009 U.S. Dist. LEXIS 99414, 2009 WL 3363700, *4 (E.D.N.Y. Oct. 20, 2009); Fed. R. Civ. P. 19.

Fed. R. Civ. P. 19 provides that a party is necessary to an action when:

> (A) in that person's absence, the court cannot accord complete relief among existing parties . . .

Fed. R. Civ. P. 19(a); see also, Viacom Intern., Inc., 212 F.3d at 724.

The Court therefore first considers whether Buzil, Davis, or Superior are necessary parties who must be joined in this action pursuant to Rule 19(a). In general, the party moving for compulsory joinder has the burden of showing that joinder is appropriate. *Joseph S. v. Hogan, 561 F.Supp.2d 280, 311 (E.D.N.Y. 2008)* (citing Bodner v. Banque Paribas, 114 F.Supp.2d 117, 137 (E.D.N.Y. 2000) **[**8]** and M.C. v. Voluntown Bd. of Educ., 178 F.R.D. 367, 369 (D.Conn.1998)). Generally, joint tortfeasors are not necessary parties under Rule 19(a). See Temple v. Synthes Corp., Ltd., ***[*169]*** 498 U.S. 5, 7, 111 S.Ct. 315, 112 L.Ed.2d 263 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit."); Bodner v. Banque Paribas, 114 F.Supp.2d 117, 136-37 (E.D.N.Y. 2000); Fed R. Civ. P. 19 advisory committee's note ("[Rule 19] is not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability.").

Here, the plaintiff is alleging that all of the named defendants, plus Buzil, Davis, and Superior, conspired to commit and did commit torts against the plaintiff. Buzil, Davis, and Superior are therefore alleged joint tortfeasors along with the named defendants. At least with respect to money damages, the Court finds that the Moving Defendants have made no showing sufficient to contravene the general rule that a plaintiff need not join all alleged joint tortfeasors. The two cases that the Moving Defendants cite **[**9]** in support of their argument, Fitzgerald v. Jandreau, 16 F.R.D. 578 (S.D.N.Y. 1954) and Serlin v. Samuels, 101 F.R.D. 64 (E.D.N.Y 1984), are both inapposite. Fitzgerald addressed the joinder of a non-party local union chapter when the plaintiff sought to enjoin it from disaffiliating from a national union, and Serlin held that potential claimants to a decedent's estate are necessary parties. Id. Neither appears analogous to the present case.

The Moving Defendants similarly argue that, because the torts alleged involve complicated transactions, all implicated persons must be made parties to this action. Again, this argument is unavailing. All persons relevant to the case may be called as witnesses, and, similarly, may seek to interplead into the case if they are concerned their interests will be harmed. Moreover, the Moving Defendants have provided no law, and the Court is aware of none, that supports the conclusion that the complexity of the alleged tort requires the joinder of alleged joint tortfeasors. The Court therefore denies the Moving Defendants' motion to dismiss for failure to join a necessary party with respect to the plaintiff's requests

which may involve joint and several **[**10]** money damages.

However, the analysis diverges with respect to the equitable relief the plaintiff seeks. The plaintiff requests:

> a constructive trust over the amounts invested in the Devine/Buzil LLCs and the John Does Defendants . . . [and]
> an injunction preventing the dissipation of any funds obtained from Allen and the sale or other transfer of any assets obtained in whole or in part with any funds obtained from Allen . . .

(Compl. at 40.)

The Court first finds that "complete relief" as requested with respect to the plaintiff's constructive trust request could not be accorded among the existing parties without the presence of Buzil, Davis, and Superior. The plaintiff alleges that (1) Buzil invested money in the Devine/Buzil LLCs, (2) Davis loaned money to the Devine/Buzil LLCs, and (3) Superior transferred money to the Devine/Buzil LLCs. Any constructive trust over "the amounts invested in the Devine/Buzil LLCs" would therefore necessarily implicate the rights of Buzil, Davis, and Superior with regard to their alleged investments in the Devine/Buzil LLCs. Without their presence in this case, their claims to the requested constructive trust would be unprotected. They are therefore necessary **[**11]** parties with respect to this request.

Buzil and Davis are also necessary parties with respect to the plaintiff's request for injunctive relief. The plaintiff plainly alleges that a large portion of the funds **[*170]** "obtained from Allen" were improperly diverted to Buzil and Davis, and presumably remain in their possession. Any injunction preventing "the dissipation of funds obtained from Allen" would necessarily provide the plaintiff with complete relief only if it also applied to funds in the possession of Buzil and Davis.

Finding these parties to be necessary, the Court must then consider whether the joinder of Buzil, Davis, and Superior is feasible. Although no party requests that Buzil, Davis, or Superior be in fact joined to the present action, each should be joined if it is feasible. See *MasterCard Intern. Inc. v. Visa Intern. Service Ass'n, Inc., 471 F.3d 377, 382-383 (2d Cir. 2006)* (holding that trial courts may consider joinder of necessary parties *sua sponte*, and citing *Manning v. Energy Conversion Devices, Inc., 13 F.3d 606, 609 (2d Cir.1994))*.

The parties do not dispute that the joinder of Superior is feasible, and for reasons substantially analogous to those discussed below at II(C), **[**12]** the Court agrees. However, the parties do not agree as to the feasibility of the joinder of Davis and the joinder of Buzil. In turn, therefore, the Court reviews these matters.

Davis is a New York resident, and is therefore subject to the personal jurisdiction of this Court. However, the plaintiff, also a New York resident, has alleged subject matter jurisdiction, in part, on diversity grounds. Davis's joinder would therefore destroy complete diversity between the parties, vitiating the Court's diversity jurisdiction over this case.

Nevertheless, the plaintiff also alleges that the Court has federal question subject matter jurisdiction over this case based on his RICO claims, pursuant to *28 U.S.C. § 1331*. While all of the plaintiff's other claims are state law claims, *28 U.S.C. § 1367* provides the Court with the power to exercise its supplemental jurisdiction over state law claims that "form part of the same case or controversy" as the federal claim. However, *Section 1367* provides that the Court's exercise of supplemental jurisdiction is discretionary when state law claims "substantially predominate[] over the claim or claims over which the district court has original jurisdiction." **[**13]** Here, the state law claims are more numerous than the plaintiff's federal claim. Nevertheless, it is not obvious that they predominate over the plaintiff's federal claim, as the federal claim relies on virtually all of the same factual predicates as the state law claims. Moreover, taking into account "the traditional 'values of judicial economy, convenience, fairness, and comity,'" *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)* (quoting *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988))*, the Court finds that its exercise of supplemental jurisdiction would be proper even if the state law claims were determined to predominate. Davis's joinder is therefore feasible.

As for Buzil, he is not a New York resident, and his joinder will therefore only be feasible if the Court can exercise personal jurisdiction over him. The Court's personal jurisdiction power is pursuant to New York's long-arm statute, which provides in pertinent part:

> Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, **[**14]** or his executor or administrator, who in person or through an agent: . . . 2. commits a tortious act within the state,

NY C.P.L.R. § 302(a).

Here, the plaintiff alleges that Buzil made tortious misrepresentations to Allen **[*171]** in New York by telephone and in writing. However, the plaintiff does not allege that Buzil took any actions giving rise to a tort while physically inside New York. The Second Circuit has held that the law in New York State with regard to personal jurisdiction under Section 302(a)(2) is clear: personal jurisdiction arises under this section *only* pursuant to actions taken while physically within New York State. Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27-29 (2d Cir. 1997) (holding that, while some lower New York State courts have disagreed, the New York State Court of Appeals has not overturned its clear indication that physical presence in the state is a prerequisite for personal jurisdiction under Section 302(a)(2)).

However, the plaintiff does allege that Devine took tortious actions while physically in New York State, and personal jurisdiction under Section 302(a)(2) may also be predicated on acts taken by a co-conspirator within New York when the co-conspirator **[**15]** acts as "agent" for the absent party. To determine whether this personal jurisdiction exists, the Court considers whether: "(1) the out-of-state co-conspirator had an awareness of the effects of the activity in New York, (2) the New York co-conspirators' activity was for the benefit of the out-of-state conspirators, and (3) that the co-conspirators in New York acted at the behest of or on behalf of, or under the control of the out-of-state conspirators." Cleft of the Rock Foundation v. Wilson, 992 F.Supp. 574, 583 (E.D.N.Y. 1998) (Spatt, J., quoting Heinfling v. Colapinto, 946 F.Supp. 260, 265 (S.D.N.Y.1996)). Here, the plaintiff alleges that Buzil was a full-fledged participant in virtually every one of Devine's alleged misdeeds. He is alleged to have been aware of Devine's acts; to have benefited from them; and to have supported them. Under the co-conspirator theory, Devine's allegedly tortious acts in New York are therefore imputed to Buzil, and the Court may exercise personal jurisdiction over Buzil under Section 302(a)(2).

However, before exercising personal jurisdiction over Buzil, the Court must also examine whether his joinder is consistent with the requirements of federal due **[**16]** process. For reasons analogous to those more fully set forth below at II(C)(2), the Court finds that the exercise of personal jurisdiction over Buzil is consistent with due process. Buzil's joinder is therefore also feasible.

Because Superior, Davis, and Buzil are necessary parties under Rule 19 and their joinder is feasible, the Court orders them joined as defendants in the present action with respect to the requests for relief for which they are necessary. Thus, (1) Superior, Davis, and Buzil are ordered joined as defendants with respect to the plaintiff's request for the establishment of a constructive trust, and (2) Davis and Buzil are ordered joined as defendants with respect to the plaintiff's request for injunctive relief.

B. As to the Moving Defendants' Motion to Transfer

In the alternative, the Moving Defendants move to transfer this case to the Northern District of Illinois. The Moving Defendants argue that there are two bases for this: (1) venue is improperly laid in the Eastern District of New York pursuant to the applicable statutory venue provisions, and (2) even if venue is proper in the Eastern District of New York, transfer is warranted for equitable reasons. Although **[**17]** the Moving Defendants do not clearly separate these issues, the Court considers them in turn.

The Moving Defendants contend that venue is not proper pursuant to the RICO venue statute, which states:

> **[*172]** Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. § 1965(a). The plaintiff responds that, even if venue does not properly lie pursuant to Section 1965(a), it is proper under 28 U.S.C. § 1391, which states in pertinent part:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The plaintiff argues **[**18]** that Section 1965(a) is intended to supplement, not to replace, Section 1391.

The Court agrees that Section 1965(a) is intended to supplement, and not replace, Section 1391. See Pardy v. Gray, No. 06-CV-6801 (JBW), 2007 U.S. Dist. LEXIS 45428, 2007 WL 1825200, *3 (E.D.N.Y. 2007) (holding Section 1965(a) need not be satisfied when Section 1391 is satisfied); City of New York v. Cyco. Net, Inc., 383 F.Supp.2d 526, 543-44 (S.D.N.Y. 2005) (same). Thus, the plaintiff need not satisfy Section 1965(a) here. Further, the Moving Defendants do not contest the plaintiff's assertion that venue is proper pursuant to Section 1391. While the Moving Defendants make passing reference to venue not being "proper" in their reply memorandum of law (See Defs.' Reply at 8-9), the Court finds that the Moving Defendants did not raise this argument in their motion for transfer. The Court therefore declines to transfer the case because of improper venue.

The Moving Defendants additionally argue that, even if venue is proper, transfer to the United States District Court for the Northern District of Illinois is appropriate on equitable grounds pursuant to 28 U.S.C. § 1404(a), which provides:

> (a) For the convenience of parties and witnesses, **[**19]** in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The movant in a motion to transfer pursuant to Section 1404(a) bears the burden of establishing the propriety of transfer by clear and convincing evidence. Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir.1950); Neil Bros. Ltd. v. World Wide Lines, Inc., 425 F.Supp.2d 325, 327 (E.D.N.Y. 2006) (Spatt, J.); Excelsior Designs, Inc. v. Sheres, 291 F.Supp.2d 181, 185 (E.D.N.Y.2003); Hernandez v. Blackbird Holdings, Inc., No. 01 Civ. 4561, 2002 U.S. Dist. LEXIS 2999, 2002 WL 265130, at *1 (S.D.N.Y. Feb.25, 2002). The criteria that courts utilize to determine whether to transfer an action under Section 1404 include: (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative means of the parties; (4) the locus of operative facts and relative ease of access to sources of proof; (5) the availability of process to compel the attendance of witnesses; (6) the weight accorded the plaintiff's choice of forum; (7) calendar congestion; (8) the desirability of having the case tried by the forum familiar with the substantive law to be applied; and (9) trial **[**20]** efficiency and how best to serve the interests of justice, based on an assessment of the totality of material circumstances. See D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106-07 (2d Cir. 2006); Laumann Mfg. Corp. v. Castings **[*173]** USA, Inc., 913 F. Supp. 712, 720 (E.D.N.Y. 1996). Ultimately, "[t]he Court has broad discretion in balancing these factors." Neil Bros. Ltd., 425 F.Supp.2d at 328 (citing In re Cuyahoga Equip. Corp., 980 F.2d 110, 117 (2d Cir.1992)).

The Moving Defendants argue that four primary factors militate in favor of transfer: (1) the businesses in question are all alleged to have been operated by Devine and Buzil in Chicago, not New York, (2) four of the Moving Defendants are involved in Chapter 11 bankruptcy proceedings in the Northern District of Illinois, (3) the pertinent business records required for discovery are voluminous and located in the Northern District of Illinois, (4) there are numerous party and non-party witnesses located in Illinois, and (5) Illinois law applies in this case. The Court finds that these factors do not merit transfer.

As an initial matter, the Court must accord significant deference to a plaintiff's choice of forum. See Iragorri v. United Technologies Corp., 274 F.3d 65, 71 (2d Cir. 2001). **[**21]** The Moving Defendants argue that the present case is an exception to this general rule because there is no connection between the underlying facts and the venue. See, e.g., Kai Wu Lu v. Tong Zheng Lu, No. 04-cv-1097 (CBA), 2007 U.S. Dist. LEXIS 67545, 2007 WL 2693845, *6 (E.D.N.Y. Sept. 12, 2007) (according lesser deference to the plaintiff's choice of forum when there was not a strong connection to the locus of operative facts). This argument is inapplicable. The plaintiff alleges that at all times relevant to his claims, he was present in the Eastern District of New York, and that he felt the effects of the alleged fraud solely in New York. The plaintiff alleges he received visits, innumerable telephone calls, and written communications in New York that effected the alleged fraud. He also alleges that he initiated the wire transfers allegedly involved in the fraud from New York. These are obvious connections with the present forum, and the Court therefore gives deference to the plaintiff's choice of forum.

As for their affirmative arguments in favor of transfer, the Moving Defendants first assert that the location of Devine and the defendant corporations in Chicago militates for transfer, as it will be burdensome **[**22]** for "23 separate defendants" to come to New York to litigate the present action. (Defs. Mem. L. at 18.) All of the Moving Defendants save Devine, however, are corporate persons, many or most of which are allegedly controlled by Devine and Buzil. Indeed, the same law firm represents all of the Moving Defendants, including

Devine. Only defendant D&B Towers has retained separate additional counsel. Moreover, the Moving Defendants offer no authority that the numerosity of out of state defendants favors transfer. The Court therefore finds that this argument does not weigh heavily in favor of transfer.

Similarly, the Moving Defendants offer no authority in support of their second argument that transfer is warranted in light of the pending bankruptcy proceedings of four of the Moving Defendants in the Northern District of Illinois. While judicial economy favors the transfer of closely related cases to a single district, see *Ferens v. John Deere Co., 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990)*, the Moving Defendants have made no showing that the four defendants' bankruptcies are closely related to the present case. Moreover, those bankruptcies are presumably pending before bankruptcy **[**23]** judges, not the district judge to whom this case would be transferred in the Northern District of Illinois. This factor also does not strongly support transfer.

The Moving Defendants also argue that the presence of discovery material in Illinois supports transfer. However, as the **[*174]** plaintiff points out, courts in this circuit have generally held that contemporary technology has significantly reduced the importance of this factor. See *Charter Oak Fire Ins. Co. v. Broan-Nutone, L.L.C., 294 F.Supp.2d 218, 221-22 (D.Conn. 2003)* (citing *Ford Motor Co. v. Ryan, 182 F.2d 329, 331 (2d Cir.1950)*). In addition, it is unclear what discovery benefit the Moving Defendants would obtain by litigating the present case in Illinois. Presumably, all of the relevant documents will be scanned and copied for production regardless of venue. Even if the documents were ultimately produced on-site, the Moving Defendants would be obliged to open their office or offices for inspection of documents. The Court does not see how the venue of the action would affect the burden caused by this in any way. This factor therefore also does not weigh heavily in favor of transfer.

Also, the Moving Defendants additionally argue **[**24]** that the presence of party and non-party witnesses in Illinois favors transfer. As a general matter, inconvenience to witnesses, and non-party witnesses in particular, is an important factor in deciding a motion to transfer. See *Herbert Ltd. Partnership v. Electronic Arts Inc., 325 F.Supp.2d 282, 286 (S.D.N.Y. 2004)*. To show inconvenience of witnesses, the movant must provide a detailed list of the witnesses who will be inconvenienced, and the testimony that each witness will provide. See, e.g., *Neil Bros. Ltd. v. World Wide Lines, Inc., 425 F.Supp.2d 325, 329 (E.D.N.Y. 2006)*.

Here, the Moving Defendants identify just one witness, Devine, who is a party to the case and who will be inconvenienced. However, as a party to the action, Devine's inconvenience does not weigh heavily in favor of transfer. The Moving Defendants also identify Buzil as a non-party witness who will be inconvenienced by trial in New York. Buzil is an Illinois resident, but he is also now being made a party to the action. Moreover, any inconvenience Buzil would suffer due to a trial in New York would be mirrored by the inconvenience suffered by Davis, a New York resident who is also now being made a party, if the **[**25]** case were tried in Illinois. Finally, the Moving Defendants identify Larry Levy, the bookkeeper for Superior, as an inconvenienced non-party witness. Levy is also an Illinois resident, but his employer, Superior, is now also a party to the case. Further, the Moving Defendants' description of Levy's testimony suggests he will largely authenticate records. Thus, Levy's testimony is likely to be short, and his inconvenience minimal. The burden on witnesses therefore also does not weigh heavily in favor of transfer.

The Moving Defendants also argue that the application of Illinois law favors transfer. However, the Moving Defendants have not shown that Illinois law applies to the present case. The Moving Defendants cite to only one case to support their argument that Illinois law applies here, *Kanbar v. U.S. Healthcare, Inc., 715 F.Supp. 602 (S.D.N.Y. 1989)*. The Court finds Kanbar to be inapplicable, as it analyzes choice of law in a case where the alleged tort had virtually no connection with the forum state. In the present case, the plaintiffs allege that significant acts related to the alleged torts took place in the forum state, New York, and that the torts had their primary effects **[**26]** in New York. To be sure, the Court does not find that New York law necessarily applies in the present case. However, the Moving Defendants have the burden of showing that transfer is proper, and they therefore also have the burden of substantiating their choice of law argument if that is to serve as a basis for transfer. The Moving Defendants have not done this, and the Court therefore accords this factor no weight.

[*175] In addition, the Court considers the plaintiff's health as a factor that weighs against transfer. The plaintiff is 78 years old, and has submitted an affidavit from his doctor of twelve years, Roger Emert, M.D., in which Dr. Emert states that the plaintiff's frailty would

preclude his travel to Chicago. The Court acknowledges that the Moving Defendants have not had the opportunity to cross-examine Dr. Emert, or to have the plaintiff examined by their own physician concerning the plaintiff's ability to travel. While these limitations lead the Court to accord less weight to Dr. Emert's affidavit, the Court nonetheless finds that this factor weighs in favor of maintaining the current venue.

In light of these factors, and according due deference to the plaintiff's choice of forum, **[**27]** the Court finds that transfer is not warranted, and therefore denies the Moving Defendants' motion to transfer.

C. As to D&B Towers' Motion to Dismiss for Lack of Personal Jurisdiction

D&B Towers separately moves to dismiss the complaint against it for lack of personal jurisdiction, pursuant to *Fed. R. Civ. P. 12(b)(2)*. As a general matter, the plaintiff has the burden of showing that personal jurisdiction over each defendant is proper. *Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 196 (2d Cir. 1990)*. The plaintiff may meet this burden by alleging facts that state a prima facie case for personal jurisdiction. *Id. at 197*. A defendant may challenge personal jurisdiction on the merits at a specially requested jurisdictional hearing, at summary judgment, or at trial. Id. However, for purposes of a pre-discovery *Rule 12(b)(2)* motion to dismiss, such as the present motion, the court takes the plaintiff's jurisdictional allegations as true and in the best light for the plaintiff. Id.; *National Union Fire Ins. Co. of Pittsburgh, PA. v. BP Amoco P.L.C., 319 F.Supp.2d 352, 357 (S.D.N.Y. 2004)*. The Court may also consider factual submissions when determining a pre-discovery *Rule 12(b)(2)* **[**28]** motion, though these are also taken in the best light for the plaintiff. *PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1109 (2d Cir. 1997)* (stating that, in deciding a pre-discovery *Rule 12(b)(2)* motion, the court "construe[s] the pleadings and affidavits in plaintiff's favor").

The Court analyzes its personal jurisdiction over a party pursuant to a two-step process. First, the Court considers whether personal jurisdiction lies pursuant to any of the provisions of New York's long-arm statute, *C.P.L.R. §§ 301* and *302*. See *National Union Fire Ins. Co. of Pittsburgh, PA. v. BP Amoco P.L.C., 319 F.Supp.2d 352, 357 (S.D.N.Y. 2004)* (citing *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 105, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987)*). Second, the Court analyzes whether personal jurisdiction comports with the basic requirements of due process. Id.

1. Long Arm Jurisdiction

Here, the plaintiff argues that the Court has personal jurisdiction over D&B Towers pursuant to *C.P.L.R. § 302(a)*. The relevant text of *Section 302(a)* is set forth above at II(B), and provides for personal jurisdiction over a defendant who, in person or through an agent, commits tortious acts in New York State. The plaintiff **[**29]** contends that Devine, acting as agent for D&B Towers, committed tortious acts in New York, thus subjecting D&B Towers to personal jurisdiction in New York. D&B Towers argues that the plaintiff has failed to properly allege these facts.

As a general matter, an "agent" for purposes of *C.P.L.R. § 302(a)* is a person who has "[1] acted in the state [2] 'for the benefit of, and [3] with the knowledge and consent of' the non-resident principal." **[*176]** *CutCo Industries, Inc. v. Naughton, 806 F.2d 361, 366 (2d Cir. 1986)*; see also *National Union Fire Ins. Co. of Pittsburgh, PA. v. BP Amoco P.L.C., 319 F.Supp.2d 352, 361 (S.D.N.Y. 2004)*. The Court thus considers these factors.

First, the Court finds that the plaintiff has alleged that Devine took actions "in the state" of New York and "for the benefit of" D&B Towers. Devine is alleged to have visited the plaintiff in New York "on multiple occasions" to induce the plaintiff to lend money that Devine then used to benefit the Devine/Buzil LLCs. One of the Devine/Buzil LLCs is D&B Towers. Taking the pleadings in the best light for the plaintiff, these allegations, though general, satisfy the first two factors.

However, whether these actions were taken with **[**30]** the "knowledge and consent" of D&B Towers is a closer question. According to a sworn and uncontested affidavit by Bret J. Leifson, the current manager of D&B Towers, D&B Towers did not exist until March 1, 2004. Thus, Devine could not have acted with the "knowledge and consent" of D&B Towers prior to this time. Liefson's affidavit also states, however, that from March 1, 2004 until March 31, 2005, Devine and Buzil were the sole owners and managers of D&B Towers. In addition, from March 31, 2005 until approximately June 2006, Devine and Buzil maintined day-to-day control over D&B Towers. The Court therefore finds that, at least during the period when Devine and Buzil were the sole owners of D&B Towers, and possibly during the period that they

continued to manage D&B Towers, it had knowledge of and consented to Devine's actions.

The operative question for the Court is therefore whether the plaintiff has established a prima facie case that Devine met with the plaintiff in New York during the period when D&B Towers knew of and consented to Devine's actions. The Court views this issue as a close one, as the plaintiff has not alleged with specificity when Devine met with the plaintiff in **[**31]** New York in furtherance of the torts alleged. However, the Court notes that, at this juncture, it is obliged to take the pleadings and the affidavits in the best light for the plaintiff, and therefore finds that the plaintiff's allegation that Devine met with Allen in New York on "multiple occasions" may be viewed as alleging that Devine met with the plaintiff in New York during the time period that he and Buzil owned and controlled D&B Towers. Thus, the Court finds that the plaintiff has established a prima facie case that *C.P.L.R. 302(a)* confers personal jurisdiction over D&B Towers.

2. Due Process

The Court must also address whether exercising personal jurisdiction over D&B Towers meets the "minimum contacts" and "reasonableness" requirements of federal due process. See *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002)*.

Here, the plaintiff has alleged specific personal jurisdiction over D&B Towers. Thus, to determine whether the minimum contacts requirements are met in this context, the Court must analyze whether there D&B Towers has "'purposefully availed' itself of the privilege of doing business in the forum and could foresee being 'haled into **[**32]** court' there." *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 152 (2d Cir.2001)*.

The Court finds that the plaintiff has sufficiently stated a prima facie case that D&B Towers has met this standard. The plaintiff alleges that D&B Towers, through Devine, not only came into New York to meet with the plaintiff, but also consistently telephoned and sent documents **[*177]** into New York for the purpose of wrongfully obtaining the plaintiff's money. Thus, D&B Towers, through Devine, is alleged to have purposefully interacted in New York in furtherance of its business. Taking the plaintiff's allegations as true, D&B Towers should have anticipated being "haled into" a New York court. D&B Towers has therefore met the minimum contacts requirements for due process.

In addition, the Court must analyze whether the exercise of personal jurisdiction is reasonable. The Court must consider five factors in determining reasonableness:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest **[**33]** in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Bank Brussels Lambert, 305 F.3d at 129 (internal quotations omitted, citing *Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-14, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)*). Balancing these factors, the Court finds that the exercise of personal jurisdiction over D&B Towers is reasonable. While D&B Towers is currently managed in Utah, the plaintiff has a significant interest in obtaining convenient relief in New York, and New York has a significant interest in adjudicating a tort that allegedly arose out of conduct in New York. See, e.g., *Cleft of the Rock Foundation, 992 F.Supp. at 584*. Further, the claims against D&B Towers are also asserted against Devine and the other defendants, and the interstate judicial system has an efficiency interest in adjudicating the claims against D&B Towers at the same time that it adjudicates the same claims against the other defendants.

For these reasons, the Court finds that the plaintiff has established a prima facie case for personal jurisdiction over D&B Towers. The Court therefore denies D&B Towers' **[**34]** motion to dismiss for lack of personal jurisdiction.

D. As to D&B Towers' Motion to Dismiss for Failure to State a Claim

D&B Towers also moves to dismiss the plaintiff's claim of civil conspiracy against it for failure to plead the claim with sufficient specificity, as required by *Fed. R. Civ. P. 9(b)*. *Fed. R. Civ. P. 9(b)* states:

> (b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other

> conditions of a person's mind may be alleged generally.

D&B Towers argues that this rule applies to a claim for civil conspiracy to commit fraud, and that the plaintiff has not alleged with sufficient specificity the acts taken by D&B Towers in furtherance of the conspiracy. The plaintiff responds that *Fed. R. Civ. P. 9(b)* does not apply to a claim for conspiracy to commit fraud. The Court agrees with the plaintiff.

While there is some apparent debate among the district courts in this circuit as to the proper pleading standard for a conspiracy to commit fraud, the Second Circuit has stated:

> On its face, *Rule 9(b)* applies only to fraud or mistake, not to conspiracy. [A] **[**35]** pleading of a conspiracy, apart from the underlying acts of fraud, is properly measured under the more liberal pleading requirements of *Rule 8(a)*.

Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 26 n. 4 (2d Cir. 1990); accord *Maersk, Inc. v. Neewra, Inc., 554 F.Supp.2d 424, 459-60. **[*178]** (S.D.N.Y. 2008)*. Here, D&B Towers does not allege that the plaintiff has failed to allege the underlying fraud pursuant to *Rule 9(a)*, or that the plaintiff has failed to allege the civil conspiracy pursuant to *Rule 8*. Rather, the plaintiff alleges only that the plaintiff has failed to meet the heightened pleading requirements of *Rule 9(a)* in alleging D&B's role in the alleged civil conspiracy. Because *Rule 9(a)* does not apply to an allegation of conspiracy to commit fraud, the Court denies D&B Towers' motion to dismiss.

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Moving Defendants' motion to dismiss for failure to join an indispensable party pursuant to *Rule 19* is DENIED,

ORDERED that the Moving Defendants' motion to transfer is DENIED,

ORDERED that defendant D&B Towers' motion to dismiss for lack of personal jurisdiction is DENIED,

ORDERED that defendant D&B Towers' motion to **[**36]** dismiss for failure to state a claim pursuant to *Rule 12(b)(6)* and *Rule 9(a)* is DENIED,

ORDERED that Bruce Buzil, Richard Davis, and Superior Broadcasting Company, Inc. be joined as defendants as to the plaintiff's request for a constructive trust, and

ORDERED that Bruce Buzil and Richard Davis be joined as defendants as to the plaintiff's request for injunctive relief.

SO ORDERED.

Dated: Central Islip, New York

November 19, 2009

/s/ Arthur D. Spatt

ARTHUR D. SPATT

United States District Judge

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Exhibit 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

THE ESTATE OF C. ROBERT ALLEN, III, by its Executrix, GRACE M. ALLEN,

Plaintiff,

- against -

CHRISTOPHER DEVINE, LAKESHORE MEDIA, LLC, MILCREEK BROADCASTING LLC, COLLEGE CREEK MEDIA LLC, MARATHON MEDIA GROUP, LLC, 3 POINT MEDIA – SALT LAKE CITY, LLC, 3 POINT MEDIA DELTA, LLC, 3 POINT MEDIA – UTAH, LLC, 3 POINT MEDIA – FRANKLIN, LLC, 3 POINT MEDIA – PRESCOTT VALLEY, LLC, 3 POINT MEDIA – COALVILLE, LLC, 3 POINT MEDIA – ARIZONA, LLC, 3 POINT MEDIA – FLORIDA, LLC, 3 POINT MEDIA – KANSAS, LLC, 3 POINT MEDIA – OGDEN LLC, 3 POINT MEDIA – SAN FRANCISCO, LLC, MIDVALLEY RADIO PARTNERS, LLC, D&B TOWERS LLC, SUPERIOR BROADCASTING OF NEVADA, LLC, SUPERIOR BROADCASTING OF DENVER, LLC, WACKENBERG ASSOCIATES, LLC, PORTLAND BROADCASTING LLC, DESERT SKY MEDIA LLC, SKY MEDIA LLC, DEVINE RACING MANAGEMENT, LLC, ACB CONSULTING CO., and John Does 1 – 50,

Defendants.

----------X

Docket No.
09-CV-0668 (ETB)

Justice Assigned:
E. Thomas Boyle

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEVINE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Devine Dep., Exhibit 2, 41:18-24, 42:1-15. As set forth below, the evidence supports all of Plaintiff's claims. Now, without even addressing the merits of the claims, the Devine Defendants move for summary judgment based upon a wholly unrelated state court case in which none of the issues in this action were raised, let alone determined. The Defendants cite to the state court case because it is the only defense they can muster in light of the overwhelming evidence against them in this action.

As set forth by the Second Circuit, "[s]ummary judgment is appropriate only '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'"

Donnelly v. Greenburg Cent. School District No. 7, 691 F.3d 134, 141 (2d Cir. 2012), quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp,*. 475 U.S. 574, 587 (1986). Here, Defendants have not presented any evidence that could lead a rational trier of fact to even know what this case is about, let alone reach a decision. As such, Defendants' motion for summary judgment must be denied.

ARGUMENT

COUNTS I-VII OF PLAINTIFF'S AMENDED COMPLAINT

Facts

Allen was introduced to Christopher Devine by a radio station broker in the mid 1980s, when the two began what Devine described as a business relationship with the initial goal of identifying radio properties to invest in and manage together. Devine Dep., Exhibit 2, 7:2-25, 8:1-24, 9:1-4.

In these early years, as is typical in a scheme, Devine ensured that these deals went well for Allen in an effort to groom him for a much bigger payment down the road. Allen was repaid the relatively small amounts he put into his first two transactions with Devine—for stations in Wethersfield, New York and Spanish Fork, Utah—plus a profit, as the stations were sold for considerably higher than the amounts Allen had put in. Devine Dep., Exhibit 2, 11:7-9, 14:4-7, 15:13-18. Additional deals followed in Missouri, New Mexico, and Chicago.

As those deals progressed, so too did the relationship between Allen and Devine. One of Devine's tactics was to prey upon Allen's declining health. Diagnosed with osteoporosis and scoliosis, which "limited him incredibly to do things," Allen became dependent on the telephone. Grace Allen Dep., Defendants' Exhibit X, 13:15-16. Knowing that Allen was becoming

increasingly frail and lonely, Devine continued to pursue Allen to put money into several radio station deals. Grace Allen Dep., Defendants' Exhibit X, 43:19-25; 44:2-5. A master con man, Devine strategically developed a long-term trusting relationship with Allen through these calls and personal visits. This was confirmed by Allen's wife, Grace, who recalled "a lot of phone calls, daily phone calls" between the two. Grace Allen Dep., Defendants' Exhibit X, 11:10-13. All of Devine's efforts were designed to induce Allen to give him, ultimately, $67,955,000. See Plaintiff's Expert Report, Exhibit 3, and Letter Supplementing Plaintiff's Expert Report, Exhibit 4.

Having laid the groundwork, [redacted] Devine Dep., Exhibit 2, 35:20-24, 36:1-9; Neiman Dep., Exhibit 5, 33:3-16. Devine testified that Superior had

> adopted a strategy in the context of that company that deployed certain technologies that would enhance or improve the stations' signals and acquire stations that would ultimately—some would be kept, some would be sold. And the long-term business plan was to have a major market—major, meaning top 50 market operating enterprise—that would ultimately own those stations that we kept. Devine Dep., Exhibit 2, 34:3-11.

Superior's application for a federal employer identification number echoes the notion that Superior was to own and operate radio stations, describing the company's business purpose in two places, fittingly, as to "own and operate radio stations." See Exhibit 6. Devine further testified that "the way Superior was set up, was that it was supposed to eventually be a holding company for the stations that were continued to be acquired." Devine Dep., Exhibit 2, 42:12-15. However, Devine made sure that would never happen.

Allen funded Superior at Devine's direction, wiring funds from his personal accounts in New York to Superior's account in Chicago. Devine confirmed Allen's initial contribution of around one million dollars, and these wires increased over time, to tens of millions dollars per year, allegedly based on "a projection that we would present to him from time to time." Devine Dep., Exhibit 2, 39:3-4, 65:8-13. Devine personally procured those funds by conveying these "projections" to Allen at Allen's Long Island home or by phone from Devine's Chicago office. Devine Dep., Exhibit 2, 65:3-13. The two spoke by telephone "readily and often," according to Devine. Devine Dep., Exhibit 2, 66:19. Nearly every week, Devine faxed Allen fraudulent statements that falsely portrayed Superior as an active profitable business. Devine Dep., Exhibit 2, 67:15-24, 68:1-9; see also Exhibit 7. These statements painted a picture of an active business with ongoing financial needs and, as was agreed, Allen expected that his financial contributions to Superior would be repaid and that he would have ownership of radio stations. Devine Dep., Exhibit 2, 78:7-24.

one of Devine's co-conspirators, Bruce Buzil ("Buzil"), may have as well. Devine Dep., Exhibit 2, 75:18-20, 70:13-24; 71:1.

Devine Dep., Exhibit 2, 129:7-16. Allen, however, was not an officer of Superior and was not an authorized signatory to its bank account. Devine Dep., Exhibit 2, 71:2-6.

Devine Dep., Exhibit 2, 36:10-19.

Devine Dep., Exhibit 2, 91:11-13; see also Plaintiff's Expert Report, Exhibit 3.

Instead, Devine operated Superior as his personal piggybank, and Allen's funds never stayed in Superior's bank account for long. Devine Dep., Exhibit 2, 44:8-15; see also Exhibit K of Plaintiff's Expert Report (Exhibit 3). Devine Dep., Exhibit 2, 60:21-24, 61:1-3. , as well as Buzil and various entities associated with Robert Neiman ("Neiman"), a Chicago lawyer who represented numerous of Devine's entities involved in the enterprise. Hedge fund lenders also invested in Lakeshore. Devine Dep., Exhibit 2, 48:17-24, 49:13-18, 50:6-22.

Devine claimed that Lakeshore used the money "principally to support the overhead," such as engineering staff. Devine Dep., Exhibit 2, 156:8-15. In reality, Allen's money was disbursed to Lakeshore and then, at Devine's direction, to the following:

1)

2) ;

3) ; and

4) See Plaintiff's Expert Report (Exhibit 3) and Letter Supplementing Report (Exhibit 4).

Not all of Allen's money was laundered through Lakeshore; Devine pocketed some of it directly. See Plaintiff's Expert Report, Exhibit 3, and Letter Supplementing Report, Exhibit 4. See Exhibit H of Plaintiff's Expert Report (Exhibit 3). marathon businesses, and they had nothing to do with the radio business. See Exhibit H of Plaintiff's Expert Report (Exhibit 3). Devine also paid his personal expenses with Superior's money, classified in Superior's general ledgers as receivables from the various entities.

. See Exhibit I of Plaintiff's Expert Report (Exhibit 3). The co-conspirators testified that they used the private jet charter service for "[p]ersonal travel and often with family members" (Devine Dep., Exhibit 2, 107:18-24, 108:1); Buzil acknowledged using the aircraft for business and personal use (Buzil Dep., Exhibit 8, 104:1-4); Rick Bonick, an executive with numerous of Devine's businesses in Chicago, testified that the aircraft was used for non-business purposes (Bonick Dep., Exhibit 9, 8/28/12, 56:17-18); and Neiman testified that he had used a plane rented by

Superior for personal non-business purposes, and that he had not paid for the use of it (Neiman Dep., Exhibit 5, 40:3-16).

Devine did not steal Allen's money just so he could mix business with pleasure; he also used it to mix business with business. The Devine enterprise became so extensive that long-time Devine employee Cindy Ribbens could not even keep track of all of Devine's entities, testifying: "I have worked for various companies at Mr. Devine's office, but I wouldn't be able to tell you specifically as there have been, you know, different companies that I worked for." Ribbens Dep., Exhibit 10, 7:3-9. While employed as the payroll manager and benefits coordinator for Lakeshore, Ribbens performed human resources duties for companies she did not work for. Ribbens Dep., Exhibit 10, 17:16-24; 20:2-8; 23:7-19. Similarly, former Devine employee Larry Levy recalled that Devine may have operated five or more businesses, including radio and marathon entities, out of the same office, and that one receptionist serviced them all. Levy Dep., Exhibit 11, 18:1-24, 19:1-4; 21:4-11. Buzil testified that at various points in time, he performed work for all of the entities. Buzil Dep., Exhibit 8, 24:2-11. All of this was done on Allen's dime without his knowledge. Most tellingly, if one entity was short on funds, money would be transferred from one of the LLCs to another to cover shortfalls, or as Devine described, to "[b]orrow, essentially. Short-term borrowing." Devine Dep., Exhibit 2, 234:14-19.

Incredibly, the Defendants' motion ignores all of these issues and undisputed facts, and instead tries to rely on an esoteric point of law that is wholly misplaced.

POINT ONE

DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

Although the Devine Defendants have moved for summary judgment, they have not presented any evidence relating to this case or showing that there is no genuine issue as to any material fact. In this opposition, however, Plaintiff has cited ample admissible evidence, much of which is undisputed, which could lead a reasonable jury to find in its favor on each of the claims. The Devine Defendants cannot dispute the veracity of this evidence as much of it is their own testimony. Thus, they did what one does when the facts are against them: they ignored the facts altogether.

Summary judgment is proper only "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." *B&A Demolition and Removal, Inc., v. Markel Insurance Company*, 2013 WL 1686635 at *3 (E.D.N.Y. Apr. 18, 2013), citing Fed. R. Civ. P. 56. A fact is "material" "when its resolution 'might affect the outcome of the suit under the governing law.'" *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, "[a]n issue is 'genuine' when 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* Here, the Devine Defendants have not presented any facts at all.

The Devine Defendants' Rule 56.1 Statement of "Facts" is grossly deficient in that it recites only (1) unverified allegations in pleadings, (2) opening and closing statements made by counsel in a separate, unrelated state court action, (3) responses by Executrix Grace M. Allen to a Notice to Admit in yet another separate, unrelated matter (pending in Nassau County Surrogate's Court), and (4) memoranda of law in the Surrogate's Court action. None of these

statements—which focus on other issues in other cases, in other courts with other parties—have any bearing whatsoever on the issues in this litigation. The Devine Defendants can hardly have proved that there are no issues of material fact to be tried in this case if they have not actually referenced any facts pertinent to this case.

The Devine Defendants also failed to support their "statements" with any admissible evidence. A memorandum of law is not admissible evidence. *See, e.g. Giannullo v. City of New York*, 322 F.3d 139 (2d Cir. 2003) and *Maurizio v. Goldsmith*, 84 F.Supp.2d 455 (S.D.N.Y., Jan. 26, 2000) (holding that arguments made in a state court brief were not admissions of fact). Thus, the Devine Defendants' reliance on arguments made in a memorandum of law in connection with an unrelated state court action is misplaced, as this is not admissible evidence upon which to base a summary judgment motion. Similarly, statements made by counsel are not evidence. *See Weyant v. Okst*, 182 F.3d 902 (2d. Cir. 1999). Moreover, statements made by counsel during opening and closing arguments in a prior trial are not party admissions unless the statement is an assertion of fact inconsistent with similar assertions in the trial at issue. *See, e.g. U.S. v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994). Essentially, a reading of Defendants' 56.1 Statement leaves the reader with no idea as to what this case is about; the Defendants have submitted absolutely nothing regarding the relationship between Allen and Devine or the fraud alleged by Plaintiff.

Despite what they may submit in reply, based on the evidence discussed above, the Devine Defendants are unable to "show that 'little or no evidence may be found in support of the nonmoving party's case.'" *B&A Demolition and Removal, Inc. v. Markel Insurance Company, supra*, citing *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1223-24 (2d Cir. 1994). As such, their motion for summary judgment must be denied.

POINT TWO

DEFENDANTS' ARGUMENT REGARDING COLLATERAL ESTOPPEL AND PROOF ISSUES IS WITHOUT MERIT

Rather than cite facts related to this case upon which there is no material dispute, the Devine Defendants moved for summary judgment on two grounds: (1) that Plaintiff's claims are barred by the doctrine of collateral estoppel based upon the jury's verdict in a prior state court action involving different parties, different documents, and wholly separate issues, and (2) that Plaintiff purportedly admitted that it cannot prove its claims. Both of these arguments are based on false facts and misapplied law.

The Doctrine of Collateral Estoppel is Inapplicable

By their own motion papers, the Devine Defendants demonstrate that the doctrine of collateral estoppel is inapplicable here. By arguing that Plaintiff cannot use Allen's prior deposition and trial testimony because the Devine Defendants, as non-parties in that case, did not have the opportunity to cross examine him, the Devine Defendants make clear that there are unresolved material issues in this case. See p. 8 of Defendants' memorandum of law.

Without citing a single authority, the Devine Defendants argue that based on the doctrine of collateral estoppel, the jury's verdict in *Excelsior Capital, LLC v. Superior Broadcasting Company, Inc.*, Index No. 08289/07 (Supreme Court, Nassau County) ("Excelsior"), bars Plaintiff from asserting its claims in this action. Not only do the Defendants disregard the law of the doctrine of collateral estoppel which renders the doctrine inapplicable here, but also completely misstate the issues before and findings of the Excelsior jury.

It is well settled that "collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was 'actually litigated and actually decided,'

(3) there was 'a full and fair opportunity for litigation in the prior proceeding,' and (4) the issues previously litigated were 'necessary to support a valid and final judgment on the merits.'" *Schinazi v. Tamman*, 2009 WL 5088767, at *3 (S.D.N.Y. Dec. 9, 2009) quoting *Ali v. Mukasey*, 529 F.3d 478, 489 (2d Cir. 2008); *Angstrohm Precision, Inc. v. Vishay Intertechnology, Inc.*, 567 F.Supp. 537 (E.D.N.Y. Sept. 22, 1982). Where, as here, a defendant argues that a plaintiff is collaterally estopped from litigating a claim because of a prior jury verdict where "the jury's verdict leaves unclear the grounds upon which its determination is based, the precision as to identity of issues which collateral estoppel demands is absent." *Angstrohm Precision, Inc. v. Vishay Intertechnology, Inc.* 567 F.Supp. at 541; *Peterec-Tolino v. Commercial Electrical Contractors, Inc.* 2009 WL 2591527 (S.D.N.Y. Aug. 19, 2009), citing *Interoceanica Corp. v. Sound Pilots, Inc.* 107 F.3d 86 (2d Cir. 1997).

Contrary to the Devine Defendants' suggestion, sharing some key players does not render two cases identical. As discussed above, Plaintiff's claims in this action against Devine and his LLCs relate to and involve the business relationship between Allen, Devine, and other individuals and entities who were not parties to the Excelsior action. This case also centers on Devine's actions and fraudulent representations to Allen regarding Superior, the purchase of radio stations, and the use of funds. See Amended Complaint, Defendants' Exhibit A. These issues have nothing to do with the Excelsior action, which was commenced by nonparties Excelsior and its principal, Richard Davis, to address issues surrounding Allen's alleged personal guarantees of certain notes between Superior and Excelsior. See Excelsior Amended Complaint, Defendants' Exhibit F. Devine was not a party in the Excelsior action. The notes and questions at issue in the Excelsior action are not part of this case. As such, the connection between the claims in these two cases is tenuous at best, and collateral estoppel is inapplicable.

Moreover, the Excelsior jury did not decide a single one of the four "findings" upon which the Devine Defendants hinge their collateral estoppel argument. First, the Excelsior jury did not find that Allen lacked diminished capacity. That issue was not litigated in either the 2009 or 2011 Excelsior trials and in fact, the Estate, over its objections, was precluded from introducing certain issues pertaining to Allen's capacity during the second trial. Indeed, when the Excelsior jury raised questions concerning Allen's capacity—specifically whether Allen suffered from Alzheimer's disease and/or whether Allen's son had become involved because of any impairment his father may have had—the trial court refused to answer those questions. The trial court told the jury only "for our purposes in this case, there is no claim here that Mr. Allen's physical or mental abilities are related to any defense that is being raised by the defendants to the claims made by the plaintiffs." See September 2, 2011 Excelsior trial transcript, Exhibit 12, 1133:24-25, 1134:1-2. Essentially, the trial court told the jury that it was not to determine whether Allen lacked the capacity to execute the guarantees.

Second, the Excelsior jury made no finding that Superior was a viable company. See September 9, 2011 Excelsior trial transcript, Exhibit 13, 1777-1783. The jury could not have made such a finding, because Superior's viability was never an issue in the Excelsior case. The trial court expressly instructed the jury that it was not deciding whether or not Superior's notes were valid; rather, the issue was whether the notes were modified and whether Allen was obligated to pay Excelsior based on his guarantees of the notes. See September 8, 2011 Excelsior trial transcript, Exhibit 14, 1710:18-25, 1711:1-7.

Similarly, the Excelsior jury made no determination as to whether fraud had occurred, because no claim for fraud was ever litigated or presented to the jury. In fact, during the first Excelsior trial, Justice Warshawsky specifically reminded the parties during summations that

"there is no fraud theory in the complaint or any of the defenses at this point in time." See June 22, 2009 Excelsior trial transcript, Exhibit 15, 1849:11-12.

Finally, the jury did not decide the issue of undue influence and whether Allen was susceptible to it. As with the other issues that the Devine Defendants speciously assert were decided in Excelsior, this issue was not addressed at all in that case. Conversely, the Excelsior jury's verdict was limited to the following determinations:

1) The Estate proved that the April 2004 note was modified.
2) Excelsior did not prove that Allen consented to the modifications of the April note in writing.
3) Excelsior proved that Allen otherwise consented to the modifications of the April note.
4) The Estate proved that the June 2004 note was modified.
5) Excelsior did not prove that Allen consented in writing to the modifications of the June note.
6) Excelsior proved that Allen otherwise consented to the modifications of the June note.
7) The Estate did not prove that the July note was modified.

See September 9, 2011 Excelsior trial transcript, Exhibit 13, 1777-1783.

These determinations have nothing at all to do with Allen's capacity, Devine's actions and fraudulent representations, or the relationship between the two men, all of which underlie each of Plaintiff's claims in this action and all of which are supported by the evidence discussed above. Not only are the issues decided in Excelsior wholly unrelated to the instant action, but as the jury did not provide any basis for its general determinations, the "identity of issues" required for collateral estoppel to apply has not been satisfied, defeating the Devine Defendants' argument. Further, even if, *arguendo*, the Excelsior jury had in fact decided the issues Devine

claims it did, such determinations would not preclude any of Plaintiff's claims in this action, in which the relationship between Allen and Devine and Devine's representations to Allen play a central role. As such, Defendants' collateral estoppel argument is meritless.

Defendants' Argument Regarding Lack of Knowledge and Proof is Baseless

The Devine Defendants can cite all they wish to the deposition testimony of Grace Allen and Luke Allen (Allen's son), but neither establishes that Plaintiff cannot prove its case. Grace's responses to Requests for Admission served by Excelsior and Richard Davis—non-parties in this action—in a totally unrelated state court action have no bearing on Plaintiff's ability to prove its claims in this action. As the Devine Defendants know full well, Grace did not draft or supply any facts for the Amended Complaint in this action. Further, in her responses to the Requests for Admission, Grace did not deny a single allegation alleged in the Amended Complaint; rather, she properly objected to the notices. It is also blatantly false for the Devine Defendants to claim that Grace and Luke testified to having no knowledge of the facts underlying the Amended Complaint. More importantly, however, even if, *arguendo*, Grace and Luke indeed testified that they had no personal knowledge whatsoever of the allegations in the Amended Complaint, such testimony does not extinguish all the evidence, discussed above, upon which Plaintiff will rely to support its claims.

Pointing to random sections of deposition testimony does not extinguish Defendants' obligation, in seeking summary judgment, to satisfy its burden of proving that there are no material issues of fact in dispute. The fact remains that the Devine Defendants have not presented any facts or evidence whatsoever establishing their entitlement to summary judgment

or discounting the evidence Plaintiff has set forth to support its claims. As such, Defendants' motion for summary judgment on the claims in Plaintiff's Amended Complaint must be denied.

COUNT I OF DEVINE'S COUNTERCLAIM

POINT THREE

SIGNIFICANT ISSUES OF MATERIAL FACT REGARDING DEVINE'S COUNTERCLAIM PRECLUDE SUMMARY JUDGMENT ON THE COUNTERCLAIM

In addition to seeking summary judgment on Plaintiff's claims, Devine also seeks summary judgment against Plaintiff as to liability on Count I of Devine's Counterclaim. The counterclaim seeks damages for Plaintiff's purported breach of contract based on a disputed letter allegedly signed by Allen whereby Allen purportedly agreed to indemnify and hold Devine harmless if Devine was sued based on a challenge to the business relationship between Allen and Devine. The Devine Defendants argue that this alleged agreement was memorialized in a letter dated January 9, 2006 which they claim was signed by Allen (the "January 2006 Letter"). See Defendants' Exhibits BB and FF. As more fully explained below, several material issues exist surrounding the January 2006 Letter, including (i) the circumstances giving rise to the letter; (ii) whether the letter was procured by fraud; and (iii) whether the enumerated condition precedent was satisfied triggering any indemnification obligation. As such, Devine's motion seeking summary judgment on Count I of his Counterclaim must be denied.

Here, it is clear that Devine has not proven the absence of a genuine issue of material fact concerning the January 2006 Letter. Contrary to Devine's bold assertion that there can "be no dispute that Bob Allen signed the contract" (see Defendants' memorandum of law, p. 13), a review of Allen's testimony reveals that Devine grossly mischaracterized Allen's statements in a desperate attempt to demonstrate the absence of questionable circumstances surrounding the

letter. In fact, Allen never said that the signature on the January 2006 Letter was his; rather Allen testified that it "looks like" his signature. See Defendants' Exhibit K, 844:15-16; 854:24-25 and 855:10-11. Moreover, when questioned about the January 2006 Letter, Allen testified:

> Q. Do you recognize the rest of this document?
> A. No. I recognize – well, one thing at a time. I don't recognize that paragraph where I indemnified everybody. It just doesn't make sense. This is my signature. It looks like my signature here.
> Q. Do you recognize the rest of the document?
> A. I recognize no part of the document that I gave any indemnification to anybody. It doesn't make sense.
> (See Defendant's Exhibit K, 855:7-14)

Significantly, the original executed version of the January 2006 Letter has never been produced. Robert Wessely testified that he has no personal knowledge that Allen ever signed the January 2006 Letter. Wessely Dep., Exhibit CC of Defendants' motion, 68:6-10. In fact, Wessely was not even aware that it was claimed that Allen had allegedly signed the January 2006 Letter until roughly a year later. Wessely Dep., Exhibit CC of Defendants' motion, 56:20-57:23. In an email dated January 19, 2006 from Wessely to Neiman, the drafter of the January 2006 Letter, Wessely stated that "Bob Allen does not want to sign" the letter. See email attached as Exhibit 16. Thus, Devine's suggestion that there can be no dispute that Allen was represented by Wessely during the alleged negotiation of the January 2006 Letter is a mischaracterization.

Neiman was similarly vague about the circumstances surrounding the January 2006 Letter. Neiman testified that he has only seen a copy of the signed January 2006 Letter. Neiman Dep., Exhibit 5, 53:14-22. Notably, Neiman never spoke directly with Allen about the letter. Neiman Dep., Exhibit 5, 53:23-54:1. In fact, Neiman was first informed by Wessely that Allen had not signed the January 2006 Letter (Neiman Dep., Exhibit 5, 54:22-24) and he only became aware that Allen purportedly signed the letter months later, after being informed by Wessely. Neiman Dep., Exhibit 5, 54:6-14. The confusion about the circumstances surrounding the

January 2006 Letter is further demonstrated in email correspondence from Neiman to Wessely dated December 29, 2006, wherein Neiman states "I am now told that the indemnification may not have been signed." See email attached as Exhibit 17.

Further, there are numerous drafts of the January 2006 Letter that have been produced in this action, with several of the drafts dated after January 9, 2006. See various versions of letter attached as Exhibit 18. Issues of fact exist concerning what negotiations continued to be made to the January 2006 Letter after the date Allen allegedly signed it. It is curious, to say the least, that neither of the two attorneys who participated in the drafting and negotiation of the January 2006 Letter witnessed Allen actually sign it, have never seen the original, and were not aware until months—possibly a year—later that a "signed" copy of the letter even existed. Thus, it is obvious that genuine issues of material fact exist concerning the circumstances surrounding the January 2006 Letter.

Further, there are questions as to whether, if Allen did actually sign the letter, such signature was procured by fraud. The January 2006 Letter itself includes numerous false statements, including that Superior "has an indirect interest" in "radio broadcasting stations" and that "Devine is the registered holder of interests in numerous radio broadcast Stations [*sic*] for the benefit of Superior." See Defendants' Exhibit BB. In direct contradiction of these statements, Devine testified at his deposition that Superior never had an interest in any radio stations. Devine Dep., Exhibit 2, 216:16-21. Accordingly, due to the false statements contained in the January 2006 Letter itself, it is clear that genuine issues of material fact exist as to the enforceability of any such agreement contained therein.

Additionally, the January 2006 Letter plainly contemplates that any indemnity was to be entered into, if at all, in connection with a contemplated transaction between Superior and Major

Music (the "Major Transaction"), in exchange for which the C.R. Allen '65 Trust was to receive $14 million. However, the Major Transaction never occurred. Thus, a genuine issue of material fact exists as to whether Devine's alleged right to indemnity ever arose. In fact, Devine, the person with signatory rights on Superior's bank accounts (Devine Dep., Exhibit 2, 70:13-21) testified that he does not recall if Superior even had the $14 million to consummate the Major Transaction. Devine Dep., Exhibit 2, 215:10-13).

Further, the January 2006 Letter provides that Devine was to execute "limited recourse notes as well as acknowledgments of Superior's rights to proceeds" of radio stations for which "Devine is the registered holder." See Defendants' Exhibit BB. The purpose of those notes and acknowledgements was to "document what has previously been the oral understanding between [Allen] and Devine as to the Superior (Devine) loans and investments." The January 2006 Letter goes on to state that the Documents "shall be completed by January 31, 2006." However, those "Documents" were never completed and therefore a genuine issue of material fact exists as to whether such condition precedent was ever satisfied triggering Allen's purported obligation to indemnify Devine.

In addition, the January 2006 Letter's indemnification provision became effective only when "any third party or persons allegedly acting in [Allen's] name or on [Allen's] behalf" initiates an action against Devine and/or the "Protected Parties" (as defined in the January 2006 Letter). See Defendants' Exhibit BB, p. 2. This action against Devine was brought by Allen, through his financial guardian, and seeks to recover directly on his behalf. Thus, a genuine issue of material fact exists concerning whether the indemnification and hold harmless language in the January 2006 Letter ever became effective.

Lastly, Devine's demand for indemnification would essentially require Allen to indemnify Devine for Devine's intentional wrongdoing, specifically Devine's defrauding of Allen over the course of many years. It is well settled law in New York that any attempt to obtain indemnification for a party's own intentional wrongdoing is rendered void *ab initio* as a matter of public policy. *Kalisch-Jarcho, Inc. v. City of N.Y.,* 58 N.Y.2d 377, 384-385, 461 N.Y.S. 2d 746 (1983). Therefore, even assuming Devine can prove that Allen actually signed the January 2006 Letter, the date of the signature, and that the conditions were met, genuine issues of material fact exist concerning the enforceability of the indemnification based upon the fraud alleged in this action.

Based on the foregoing, it is apparent that several genuine issues of material fact exist concerning the circumstances surrounding the January 2006 Letter. Questions also remain regarding the legality of enforcing the indemnification agreement contained therein based upon Devine's alleged fraudulent inducement of Allen to allegedly sign the January 2006 Letter as well as Devine's failure to satisfy necessary conditions precedent. Accordingly, Devine's motion for summary judgment on Count I of his Counterclaim must be denied.

CONCLUSION

Plaintiff has established that it can prove each of the claims in the Amended Complaint. Defendants have not presented any evidence to the contrary, instead wrongly arguing that a jury verdict in a prior state court action involving different issues and parties bars Plaintiff's claims. Further, Plaintiff has demonstrated that significant issues of material fact remain regarding the purported "indemnification letter" upon which the Devine Defendants' first counterclaim is

based. These material issues of fact necessarily preclude summary judgment. Defendants' motion for summary judgment must be denied in all respects.

Dated: Bohemia, New York
May 10, 2013

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Exhibit 3

The Palm Beach Post

SPORTS

New organizer of Palm Beaches Marathon has a tattered reputation

Hal Habib hhabib@pbpost.com

Published 11:01 p.m. ET Dec. 1, 2009 | **Updated 7:35 a.m. ET March 31, 2012**

On a mid-February day this year, the Marathon of the Palm Beaches took a sudden turn.

Having outgrown its founder, the Chamber of Commerce of the Palm Beaches, The deal was important to Chris Devine, but it wasn't all that was on his mind.

said Kelly, who says Devine hasn't reimbursed him $10,000 for race expenses. "While I'm sure the good folks at the Marathon of the Palm Beaches mean well, I'd hate to see them end up as roadkill in Devine's rearview mirror."

This year's race, renamed Palm Beaches Marathon on Flagler Drive, begins at 6:30 a.m. Sunday. Devine Racing hopes for a smoother sprint to the finish line.

Last year, when Dodgers owner

Frank McCourt purchased the L.A. Marathon from Devine, he absorbed $537,391 of debt from Devine's company, according to the Los Angeles Times.

Several agents of elite marathoners say they'll no longer send athletes to Devine's events.

He estimated his businesses are $3 million in debt but said rather than enter bankruptcy, he's attempting to rebound. He just needs time, he said.

"I'm sorry some people are disappointed at the pace we are keeping," said Devine, who purchased the Palm Beach race for an undisclosed amount, although public documents place the value at $540,000. "Businesses go through stuff. It doesn't not mean we're bad people."

Although he maintains "the buck stops" with him, Devine attributes many of Devine Racing's problems to the management team he inherited when he purchased the Los Angeles and Las Vegas marathons.

He says the only way to divest himself of those employees was to sell those events, which is why he's in Palm Beach. He knows his reputation in the marathoning community requires work.

"A lot of work," Devine said. "It'll either be an advantage or disadvantage, and my sense is it will be a great advantage for the races that we currently own, for them to be proving grounds because we are so focused on perfection and so focused on being good citizens at this point."

Former members of his management team acknowledge some issues, but overall are infuriated that Devine blames them for his problems. They say if they were as incompetent as he says, he was free to fire them.

Marathon founders put trust in him

Dennis Grady is banking on Devine to make a fresh start. Grady is the president of the Chamber of Commerce and husband of Iva Grady, who first suggested a marathon in Palm Beach County.

The race weekend, renamed Palm Beaches Marathon Festival, has a budget of $458,000, according to public records, and requires cooperation of 31 sponsors and scores of vendors supplying everything from portable toilets to cleanup crews and equipment.

Devine Racing is running the show, but Grady said he'll be there to support everyone involved in the event.

"I'll be here on behalf of the chamber — which will have an ongoing, obvious interest in a race that we started — and would be willing to assist anybody who felt that they had been less-than-satisfied with their working relationship with our race," Grady said.

Grady's group turned down a purchase bid from one of the marathon community's hottest companies — the Competitor Group, which operates the Rock 'n' Roll Marathon series, boasting 300,000 participants in 13 races nationally.

Grady said the "deal-breaker" was the Competitor Group's insistence on moving the race to February or March, when hotels are already full. But Elizabeth Cox, director of business development for the Competitor Group and Grady's guest during race weekend in 2008, said a late winter date was merely a suggestion and December was no problem.

Regardless, Grady saw how the Vegas marathon grew under Devine and envisioned a repeat here, citing the Vegas event's jump from 2,700 to 17,000 participants.

But Devine, who organized the Vegas marathon from 2005-2008, has said he took over a race already 6,000 strong and Active.com, a participant sports Web site, lists only 12,481 total finishers at the race's peak.

Marathons typically have a no-show rate of about 10 percent. "They never came close to 17,000," said Kelly, the former Vegas race assistant director.

Early registration for this year's Palm Beaches Marathon Festival is about 7.4 percent ahead of 2008, putting it on pace for 7,600 entries, including the half-marathon and kids' races. Devine said 10 percent growth this year is "an achievable goal."

As for the road not taken, the Competitor Group surpassed 20,000 entries for the Las Vegas Rock 'n' Roll Marathon and needed two years to grow the San Antonio Marathon from a size comparable to Palm Beach to 25,834 total finishers last month.

"No one else has done what they've done," said Larry Barthlow, who coordinates elite fields for marathons and said Devine owes him about $11,000 for consulting.

Not long after making the deal with Devine Racing, Grady talked about at least part of the vetting process.

"We've gone online and read the articles in the newspapers, asked them specific questions with regards to that," Grady said. "And I think to our satisfaction felt that Devine answered those questions very honestly and forthright."

Grady said he did not ask Devine for proof of payment of his debts.

Praise for his charity work

But Devine has a stellar reputation at the Huntsman Cancer Foundation in Salt Lake City. Lori Kun, the director of development, said the foundation has received about $50,000 from Devine via that city's marathon every year since 2004.

"He has been a visionary here," Kun said. "I think he is a savvy business person."

In his online bio, Devine says he has run the Boston and New York City marathons and in 1981 ran across the United States. Those who know him describe him as ruggedly handsome. Persuasive. Charming, even critics admit.

But in yet another suit, the family of a New York billionaire claims Devine used his charisma and the plaintiff's desire for friendship and a stake in the radio business to scam $70 million from C. suit alleges Devine used some of the money to fund his marathon business. Devine blames the situation on Allen's adopted son, "who has taken over his estate."

The suit placed a rather unexpected heavyweight in Devine's corner: New York lawyer Ed Hayes, the inspiration for the character of Tommy Killian in The Bonfire of the Vanities, written by Hayes' friend, Tom Wolfe.

Hayes won a related multimillion suit against Allen in July. Hayes said Allen's actions are "typical example of a guy who cheated everybody and claims everybody cheated him."

Hayes isn't representing Devine professionally but nonetheless defends him personally.

"The poor guy gets the worst press and he doesn't deserve it," said Hayes, who met Devine via the Allen cases. Hayes calls Devine "a good salesman" whose fault might simply be that he "oversells things sometimes. He wouldn't get into so much trouble if he would shut up."

Devine said he didn't compile the ambassador list.

The Palm Beaches Marathon offers a modest purse of $6,700, but it remains to be seen whether it is again distributed within two weeks of the race. Scott Poteet, an Air Force major who flew with the Thunderbirds, earned $2,500 by placing fourth at the 2008 Vegas Marathon. After nearly a year of constant calls to Devine Racing by Poteet's pregnant wife, Kristin, only $950 had been paid.

But one week after The Post asked Devine when he intended to pay the balance, the Poteets had their check.

Tom Ratcliffe, an elite runners' agent, endured similar delays in collecting on behalf of top-three finishers at three of Devine's marathons. The money eventually arrived with unexpected interest, but Ratcliffe was perplexed by what wasn't sent.

"No note of apology," Ratcliffe said. "It was nice to get the check, but I thought, 'If you're a good business person, then you really kind of address those things if you want people to put faith in you in the future.' '

"We always laughed," Debbie Biorn said of herself and other ex-Devine employees at the Vegas marathon. "If the goons in Vegas couldn't get their money out of Devine, how are we going to?"

Before Devine sold his rights to the Vegas race, Clark County Commissioner Rory Reid, son of Sen. Harry Reid, planned to force Devine to post a $3 million bond to assure everyone from vendors to runners were paid after the next event.

"We're happy that the Competitor Group has taken over, how's that?" a spokesman for Reid said. "We're happy to have a reputable company who runs a multitude of successful marathons throughout the country."

Palm Beach Post researchers Niels Heimeriks and Michelle Quigley and staff writer Jane Musgrave contributed to this story.

Exhibit 4

The Palm Beach Post

SPORTS

Chamber of Commerce reassumes control of Palm Beaches Marathon

Hal Habib hhabib@pbpost.com

Published 11:01 p.m. ET Feb. 29, 2012 | **Updated 7:55 p.m. ET Dec. 3, 2013**

Much like a marathoner intent on moving forward and barely looking back, the founding Chamber of Commerce of the Palm Beaches confirmed Wednesday that it has reassumed control of the Palm Beaches Marathon, ending a turbulent three-year run under owner Chris Devine.

The chamber is negotiating with four organizations interested in producing the event for a few years with the hope that if all goes well, that group eventually would purchase it outright. Although the chamber oversaw the race the first five years, it has no desire to do so again - nor does it want to sell the race right away.

"We've learned some lessons in the first transaction," said attorney Paul Krasker, a member of the executive committee that founded the race.

Devine, based in Chicago, arrived with a checkered past that included IRS liens and complaints of nonpayments to vendors and runners. He said Palm Beach represented a fresh start, but last December's event was criticized for a myriad of problems, including confusing signage that led some runners off course, several refreshment stations running out of water and untold runners either not receiving medals and awards or enduring long delays. Krasker and Dennis Grady, the chamber president whose wife, Iva, conceived of the race, said the chamber assumed control from Devine without an exchange of cash. Instead, the chamber agreed to forgo current and future payments Devine may owe. But despite the boardroom negotiations to take place before a new operator is selected within a month, the biggest chore might be from a public-relations standpoint.

"A tremendous amount of work needs to be done," Krasker said. "The running community was let down by the race. There's no doubt about that."

At least two of the negotiating groups said they might bring back Dave McGillivray, the original race director who also directs the Boston Marathon. Krasker said the chamber "would be thrilled" to have McGillivray return.

For the average runner, the shift in ownership means that the ninth annual race weekend, Dec. 1-2, will more closely resemble the first five years rather than 2011, when Devine held a bike tour, 5K, 10K and half-marathon concurrently with the marathon on a Sunday morning. Some events likely will shift

to Saturday, and there is a good chance that the highly successful kids' races and "wacky water stations" will be reinstated.

The chamber's agreement with Devine included a non-disparagement clause protecting the former owner. Krasker made it clear that the chamber wishes to distance itself from him.

For his part, Devine said: "From the beginning of my involvement I have been interested in the success of The Palm Beaches Marathon. The race will be in capable hands and so the goals we had, and share with the community will be met."

Devine recently sold the Salt Lake City Marathon, which had nonpayment issues, but officials there were surprised to learn that the new owners intended to bring in Hank Zemola - who directed last year's Palm Beaches Marathon for Devine.

With that in mind, the chamber said not only will Devine and Zemola not be associated with this year's Palm Beaches Marathon, but Devine won't help select those who will be.

"We've made it clear to Chris, who wanted to introduce us to people that he knew in the running community, that we wanted to take ownership back and we wanted to negotiate with all third parties and we did not want him involved in those negotiations. In fairness to Chris - and I know a lot of people don't want to be right now - he was gracious and understanding and backed down and transferred the race to us without any hesitation and without any requirements. He could have held out. He stood up and took his licks and he acknowledged what happened in Salt Lake, and he acknowledged that was happened here, was not right."

Exhibit 5

C
Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Plaintiff,
v.
, d/b/a KRKI-FM/KXDC-FM, as successor in interest to Marathon Media, LLC, Defendants.
No. 07 Civ.2099(DC).

April 1, 2008.

Dickstein Shapiro LLC, by: Alfred R. Fabricant, Esq., Lawrence C. Drucker, Esq., Peter Lambrianakos, Esq., New York, NY, for Plaintiff.

Locke Lord Bissell & Liddell LLP, by: Jay G. Safer, Esq., Allen C. Wasserman, Esq., Sarah M. Chen, Esq., New York, NY, for Defendants.

MEMORANDUM DECISION

CHIN, District Judge.

***1**

BACKGROUND

A. *The Facts*

As alleged in the complaint, the facts are as fol- lows:

Plaintiff Arbitron, Inc. ("Arbitron") is a marketing research company that produces and distributes reports that measure, among other things, the size of radio audiences throughout the United States. (Compl.¶ 8). It also provides consumer market research to its customers, including, for example, information regarding demographics, media usage, and shopping patterns. (*Id.* ¶ 9). Arbitron is a Delaware corporation with its principal place of business in New York. (*Id.* ¶ 1).

During the relevant time period, Marathon owned and operated a radio station in Denver, Colorado, with the call letters KRKI-FM. (*Id.* ¶ 2). Lakeshore is the successor-in-interest to Marathon and it currently operates the radio station KRKI-FM. (*Id.* ¶¶ 3, 4). Marathon and Lakeshore are Illinois limited liability companies with their principal places of business in Illinois.(*Id.* ¶¶ 2, 3).

(*Id.* ¶¶ 13-17).

B. *Prior Proceedings*

(*Id.* ¶¶ 18-31). Subject matter jurisdiction is based on diversity of citizenship of the parties. (*Id.* ¶¶ 1-3, 6).

On March 30, 2007, Arbitron filed proofs of service of the summons and complaint on Marathon and Lakeshore. (2/4/08 Fabricant Decl., Exs. B, C). Marathon and Lakeshore did not answer the complaint or otherwise appear in the action. (*Id.* ¶ 5).

On April 17, 2007, Arbitron filed a "Request for Clerk's Certificate of Default," and copies were mailed to both Marathon and Lakeshore. (*Id.* ¶ 6 & Ex. D). Marathon and Lakeshore did not respond.

***2** Finally, by order to show cause filed January 3, 2008, defendants brought on this motion to vacate the default judgment.

C. *Service of Process*

The affidavits of service show that the process server served the summons and complaint on Marathon and Lakeshore at their offices in Illinois on March 19, 2007:

> by personally delivering and leaving the same with *Brooke Lada* who informed deponent that *she* holds the position of *Auth. to Accept* with that company and is authorized by appointment to receive service at that address.

(2/4/08 Fabricant Decl., Exs. B, C). The underscored portions were written in hand and the rest of words were typed.

In moving to set aside the default judgment, defendants submit an affidavit from Lada, who attests to the following: At the time in question, she worked for Lakeshore as a receptionist at the offices where service was made. (1/28/08 Lada Aff. ¶ 2). Lakeshore shared the offices with Marathon. (*Id.*). Her duties as receptionist did not include acceptance of legal process, and at no time during her employment as a receptionist at Lakeshore was she authorized to accept legal service for Lakeshore or Marathon. (*Id.* ¶¶ 3, 4). From time to time Lakeshore and Marathon were served with legal papers, and her "regular practice" was to notify either Chris Devine (a managing member of Lakeshore) or Bruce Buzil (a member of both Lakeshore and Marathon) to ask that they come to the front desk to receive the papers. (*Id.* ¶ 5;*see* 1/29/08 Bonick Aff. ¶ 4). She would not "ever" accept service of process on the companies herself. (1/28/08 Lada Aff. ¶ 6). On the other hand, she has "no specific recollection" of the service in this case. (*Id.* ¶ 7).

Richard J. Bonick, the Vice President of Finance of Lakeshore, also submits an affidavit in support of the motion to set aside the default. He states that "[u]nder no circumstances would a receptionist have been authorized to accept service."(1/29/08 Bonick Aff. ¶ 5). He acknowledges, however, that the summons and complaint were received by defendants. He states:

> I have determined that at some point after the summons and complaint were served, they were given to Lee Sussman, a vice president of finance at the time, and he, in turn, gave them to Daniel O'Donnell, who was the Chief Financial Officer for Lakeshore. At or about that time, Mr. O'Donnell was involved in a major acquisition and, because there was no general counsel to give the papers to, he apparently lost sight of the matter and the relevant deadlines.

Id. ¶ 11). Bonick also acknowledges that defendants received a copy of the default judgment in August 2007, and that they turned to outside counsel at that time "to determine what our legal rights were and how we needed to respond."(*Id.* ¶ 12).

This motion to set aside the default judgment, however, was not filed until more than four months later.

DISCUSSION

***3** Defendants' motion to set aside the default judgment presents two issues. The first is whether defendants were properly served with the summons and complaint. If not, the default judgment must be

vacated. *See Grace v. Bank Leumi Trust Co.,* 443 F.3d 180, 193 (2d Cir.2006) (judgment issued by court without personal jurisdiction over defendant is void); 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2682, at 14 (3d ed. 1998) ("Before a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought.") (footnote omitted). If service of process was proper, the second issue is whether the Court should set aside the default judgment pursuant to Fed.R.Civ.P. 60(b)(1) for excusable neglect.

A. *Was Service of Process Proper?*

1. *Applicable Law*

Rule 4(h) (1) of the Federal Rules of Civil Procedure provides that a corporation may be served "in the manner prescribed by Rule 4(e)(1) for serving an individual."[FN1]Rule 4(e)(1) authorizes service "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made."As defendants were served in Illinois, service was proper if it complied with either New York or Illinois law.

> FN1. The 2007 amendments did not amend Rule 4 in any respect material here. Rule 4(h)(1) provides that a corporation may also be served by delivery of the summons and complaint to an officer or managing or general agent or other authorized agent, but requires that copies be served by mail as well. Fed.R.Civ.P. 4(h)(1)(B).

a. *New York Law*

Under New York law, personal service may be made on a corporation "by delivering the summons ... to an officer, director, managing or general agent, or cashier or assistant cashier or to any agent authorized by appointment or by law to receive service."N.Y. C.P.L.R. § 311(a)(1) (McKinney 2001).

Although it is true, as defendants assert, that an administrative employee such as a receptionist or receptionist generally is not an "agent" authorized to accept service of process, *see, e.g., M. Prusman, Ltd. v. Ariel Maritime Group, Inc.,* 719 F.Supp. 214, 219 (S.D.N.Y.1989), numerous decisions have upheld service where a secretary or receptionist accepted the papers and the corporate defendant in fact received them. *See, e.g., M'Baye v. World Boxing Ass'n,* 429 F.Supp.2d 652, 659-60 (S.D.N.Y.2006) (upholding service on corporation where papers were left with receptionist at its offices and corporation had actual notice of suit); *Dai Nippon Printing Co. v. Melrose Publ'g Co.,* 113 F.R.D. 540, 544 (S.D.N.Y.1986) (upholding service on corporation where papers were left on receptionist's desk after corporate officer refused them); *Kuhlik v. Atlantic Corp.,* 112 F.R.D. 146, 148 (S.D.N.Y.1986) (upholding service on corporation where receptionist accepted papers, stating that "she *could* accept" papers, after she was unable to find someone else "in charge" who could accept them). In fact, even in *M. Prusman, Ltd.,* the decision relied on by defendants for the proposition that generally receptionists and secretaries are not authorized to accept service of process, the court upheld service on the corporate defendants where a secretary at the corporate offices accepted the papers. 719 F.Supp. at 217, 219-20.

***4** The leading New York case in this respect is *Fashion Page, Ltd. v. Zurich Insurance Co.,* where a summons was delivered to the secretary for the vice president of a corporate defendant. 428 N.Y.S.2d 890, 891 (1980). The secretary was not an agent authorized to accept service on behalf of the corporation. *Id.* at 891-92.The Court of Appeals nonetheless upheld the service, explaining that "the purpose of CPLR 311 (subd. 1) is to give the corporation notice of the commencement of the suit." *Id.* at 893.The Court further held that "if service is made in a manner which, objectively viewed, is calculated to give the corporation fair notice, the service should be sustained." *Id.* at 894;*accord M'Baye,* 429 F.Supp.2d at 659-60.

b. *Illinois Law*

The Illinois Code of Civil Procedure is not substantially different from § 311 of the C.P.L.R.: "[a] private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law."735 Ill. Comp. Stat. Ann. 5/2-204 (West 2002). If anything, Illinois law appears to be even more liberal in allowing service by delivery of the papers to a clerical employee at the corporation's offices, as service is permitted on "any ... agent of the corporation found anywhere in the State."*Id.* Hence, under Illinois law "service upon an intelligent clerk of a company who acts as a receptionist and who understood the purport of the service of summons was sufficient." *Megan v. L.B. Foster Co.,* 275 N.E.2d 426, 427-28 (Ill.App.1971) (upholding service on corporation by delivery of papers to "clerk-receptionist" in corporation's office).

2. *Application*

I conclude that service here was proper, under both New York and Illinois law. Service on Lada was certainly sufficient under Illinois law, for Lada was an "agent" of both Lakeshore and Marathon located within the state-she was the receptionist in their corporate offices and accepted the papers for both Lakeshore and Marathon. As her affidavit shows, she was an "intelligent" receptionist who appreciated the importance of legal papers. She accepted the papers and got them into the hands of senior personnel; the papers made their way to the vice president of Finance and the chief financial officer. Although she now denies that she was authorized to accept legal process, she took the papers, apparently without objection, and without advising the process server that she was unable to accept them. Accordingly, the service was valid under Illinois law.

Likewise, I hold that the service was proper under New York law. The process server proceeded in a manner that was reasonably calculated to give defendants notice of the suit-the process server went to their corporate offices, spoke to the receptionist, and delivered the papers to her. Although Lada now states that she does not recall the specific exchange, she undeniably accepted the papers. Even assuming she was generally not authorized to accept legal process, she accepted the papers on this occasion. Moreover, the process server executed affidavits contemporaneously, when the matter was still fresh in her mind, stating that Lada represented that she was authorized to accept the papers.

***5** In contrast, now months later, Lada cannot recall the specific transaction. Her statement of her general lack of authorization and her general practice, coupled with her lack of a specific recollection as to this delivery and the fact that she did accept the papers, are not sufficient to outweigh the process server's specific recollection. Finally, there is nothing in these facts to suggest that somehow the process server deceived Lada into accepting papers that she otherwise would have rejected. The process server acted reasonably, and defendants received actual notice of the suit. *See M'Baye,* 429 F.Supp.2d at 657 ("when a process server 'serves someone who does not have express authorization to accept service for a corporation, service is proper under N.Y. C.P.L.R. § 311 if it is made in a manner which, objectively viewed, is calculated to give the corporation fair notice of the suit' " (quoting *Krape v. PDK Labs Inc.,* 194 F.R.D. 82, 85 (S.D.N.Y.1999)).

B. *Should the Default Judgment Be Set Aside?*

1. *Applicable Law*

Rule 60(b) of the Federal Rules of Civil Procedure provides that the court, "on motion and just terms," [FN2] may relieve a party from a final judgment for, among other things, "excusable neglect." Fed.R.Civ.P. 60(b)(1). The Second Circuit has expressed its preference that "litigation disputes be re-

solved on the merits, not by default." *Cody v. Mello,* 59 F.3d 13, 15 (2d Cir.1995).

> FN2. This language is from the amended version of Rule 60(b) that took effect December 1, 2007. The change was stylistic only.

When considering a Rule 60(b)(1) motion to vacate a default judgment, a court will consider whether (1) the default was wilful; (2) the defendant has a meritorious defense; and (3) the plaintiff would be prejudiced if the motion were granted. *State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada,* 374 F.3d 158, 166-67 (2d Cir.2004); *Gucci America, Inc. v. Gold Ctr. Jewelry,* 158 F.3d 631, 634 (2d Cir.1998); *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 96 (2d Cir.1993). Bad faith is not a "necessary predicate" to a finding of wilfulness; "it is sufficient that the defendant defaulted deliberately." *Gucci America,* 158 F.3d at 635.

2. *Application*

I consider the three factors.

a. *Wilfulness*

First, defendants defaulted deliberately. By their own admission, two senior corporate officers had actual notice of the suit, but defendants did nothing. Moreover, it was not just the summons and complaint that were ignored. After defendants failed to respond to the complaint, Arbitron's counsel mailed them copies of its request for the clerk to enter the default. Defendants did not respond. Arbitron then moved for a default judgment, again sending copies of the papers to defendants. Defendants ignored these papers as well. Hence, over the course of some three and a half months, defendants received actual notice of this case three times, and yet they did nothing to respond.

The default judgment was entered in August 2007, and again Arbitron sent a copy to defendants, who consulted outside counsel right away. Yet, inexplicably, defendants waited more than four months to file this motion. Defendants' pattern of ignoring the process demonstrates clearly that they defaulted wilfully, and that they deliberately disregarded their obligation to appear and defend themselves in this lawsuit.

b. *Existence of Meritorious Defense*

***6** Second, I am not persuaded that defendants have a meritorious defense.

Arbitron has certainly made a prima facie showing that it is entitled to a judgment against Marathon and Lakeshore. It sues for the breach of four licensing agreements. The agreements show, on their face, that they were signed on behalf of "Marathon Media, LLC," by Randy Rodgers, as its general manager. (Compl., Exs.1-4). All four of the agreements reference station KRKI-FM. (*Id.*).[FN3] From the time the agreements were executed (October 2000) until November 2002, Marathon paid license fees to Arbitron. (2/4/08 Basila Decl. ¶ 5). At that time, the license agreements were amended by addenda signed by Bonick, as Marathon's chief financial officer, and the license agreements were put on a one-year "hiatus" with all other obligations remaining the same after the one-year period expired. (1/29/08 Wasserman Decl., Exs. B, C). After Marathon defaulted, Arbitron's representatives repeatedly contacted Bonick in an effort to obtain payment of the outstanding amounts. While these efforts were unsuccessful, Bonick never claimed that Marathon was the wrong party to the agreements or that Rogers was not authorized to enter into the agreements. (Basila Decl. ¶ 11).

> FN3. At some point, the call letters were changed to KXDC-FM. (*See* 2/1/08 Garten Decl., Exs. E, F).

Lakeshore is the "successor management company to Marathon." (2/1/08 Garten Decl. Ex. E at 2). On January 25, 2005, Bonick sent an e-mail to Arbitron

to which was attached a letter dated June 9, 2005, from Bonick promising that the "entire outstanding balance" due Arbitron would be paid when KXDC was sold.(*Id.* Ex. B at 2). The letter was signed by Bonick, as chief financial officer of "Superior Broadcasting, LLC." (*Id.*). The email came from Bonick as "CFO" of Lakeshore, and his email address was listed as "rbonick @marathonmedia.com." (*Id.* at 1). On January 31, 2007, Daniel O'Donnell, chief financial officer of Lakeshore, wrote to Arbitron. (*Id.* Ex. E). O'Donnell "tried to reconstruct the history of the KXDC-FM under our ownership," and acknowledged that Arbitron's billings were "contractual," but asked for Arbitron's understanding as to "why the billings were not paid in a timely manner."(*Id.* at 3). He acknowledged the "sanctity of a contract," and noted that he "appreciated [that] we have some obligation in this situation," but expressed the view, in essence, that the terms of the contract were "somewhat onerous and excessive ." (*Id.* at 3-4). He stated his hope that the matter could be resolved in a "mutually acceptable" manner. (*Id.* at 4).

Defendants' purported meritorious defenses do not hold water. For example, they argue that Marathon is not liable because Rodgers was not an officer of Marathon and therefore was not authorized to sign the licensing agreements. (Def. Mem. at 10). But Rodgers did sign the agreements, as "general manager," representing-at least implicitly-that he was authorized to do so.[FN4]Defendants also argue that Marathon is not liable because it was not a party to the agreements and the appearance of its name in the agreements was a typographical error. (*Id.* at 10). The argument is absurd. Marathon's name *is* in the agreements, repeatedly, and Rogers signed the agreements for Marathon. Most tellingly, Marathon *paid* the amounts due under the agreements for some two years. Bonick essentially ratified the agreements when he signed the addenda placing the agreements on a one-year hiatus but confirming that the agreements would resume after the one-year period expired. And O'Donnell, on behalf of Lakeshore, acknowledged the "contractual" nature of the billings without raising any objection as to whether Marathon was a party, whether Rodgers was authorized to sign, and whether Lakeshore was responsible.

> FN4. Remarkably, Rodgers now contends that he did not review the agreements before he signed them. (2/11/08 Rodgers Decl. ¶ 3). I reject this contention.

*7 Indeed, these objections to the agreements were not raised until defendants filed this motion. Not only do the objections come too late, it is clear they lack any merit.

c. *Prejudice To Plaintiff*

Finally, Arbitron would be prejudiced if this motion is granted. The case is already more than a year old, and Arbitron has already expended substantial resources trying to collect on the debt. If defendants' default were set aside and defendants were permitted to appear and answer, the case would, in effect, be starting anew and all of Arbitron's efforts would be wasted. Moreover, Arbitron gave defendants notice every step of the way, and defendants did nothing. In addition, defendants' actions-both during the course of the business relationship and during these proceedings-betray an effort, as Arbitron argues, "to shuffle assets amongst their related companies."(Pl. Mem. at 21). Defendants' arguments-they did not read what they signed and the inclusion of "Marathon" as the licensee under the agreements was the result of a typographical error-give me pause as they show a willingness to resort to desperate measures. Setting aside the judgment would give defendants a greater opportunity to improperly avoid or delay meeting their obligations. Indeed, defendants did not file this motion until after Arbitron had commenced ancillary proceedings in the United States District Court for the Northern District of Illinois and attached certain of defendants' assets.

CONCLUSION

For the reasons set forth above, defendants' motion to set aside the default judgment entered herein is denied.

SO ORDERED.

S.D.N.Y.,2008.
Arbitron, Inc. v. Marathon Media, LLC
Slip Copy, 2008 WL 892366 (S.D.N.Y.)

END OF DOCUMENT

Exhibit 6

Federal Communications Commission Washington, D.C. 20554	Approved by OMB 3060-0010 (June 2002)	FOR FCC USE ONLY
FCC 323		
OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATIONS Read INSTRUCTIONS Before Filling Out Form		FOR COMMISSION USE ONLY FILE NO. BOS - 20040720AED

Section I - General Information

1.	Legal Name of the Applicant 3 POINT MEDIA - COALVILLE, LLC		
	Mailing Address 980 NORTH MICHIGAN AVE. SUITE 1880		
	City CHICAGO	State or Country (if foreign address) IL	ZIP Code 60611 -
	Telephone Number (include area code) 3122049900	E-Mail Address (if available)	
	FCC Registration Number: 0011233780 / Call Sign KCUA	Facility ID Number 13483	
2.	Contact Representative (if other than Licensee/Permittee) KENNETH D. SALOMON, ESQ.	Firm or Company Name DOW, LOHNES & ALBERTSON, PLLC	
	Telephone Number (include area code) 2027762000	E-Mail Address (if available) KSALOMON@DOWLOHNES.COM	
3.	Name of entity, if other than licensee or permittee, for which report is filed		
	Mailing Address		
	City	State or Country (if foreign address)	ZIP Code -
	Telephone Number (include area code)	E-Mail Address (if available)	
4.	If this application has been submitted without a fee, indicate reason for fee exemption (see 47 C.F.R. Section 1.1114): ○ Governmental Entity ○ Fee-exempt Report ◉ Other POST-CONSUMMATION REPORT ○ N/A (Fee Required)		

Section II - Ownership Information

5. a. ○ Biennial b. ◉ Transfer of Control or Assignment of License/Permit c. ○ Other

d. ○ Amendment to pending application

for the following stations:

[Enter Station Information]

Station List

This Report is filed for the following stations:

Call Letters	Facility ID Number	Location (City/State)	Class of service
KCUA	13483	COALVILLE UT	FM

All of the information furnished in this Report is accurate as of 07/14/2004 *(Date must comply with 47 C.F.R. Section 73.3615(a), i.e., information must be current within 60 days of filing of this report, when 5(a) below is checked.)*

This Report is filed for *(check one)*

6. Respondent is:

○ Sole proprietorship ○ Not-for-profit corporation ○ Limited partnership
○ For-profit corporation ○ General partnership ◉ Other

If "Other", describe nature of the respondent in an Exhibit. [Exhibit 1]

7. List all contracts and other instruments required to be filed by 47 C.F.R. Section 73.3613. (Only licensees, permittees, or a reporting entity with a majority interest in or that otherwise exercises de facto control over the subject licensee or permittee shall respond.)

[Enter Contract/Instrument Information]

Contracts/Instruments Information

List all contracts and other instruments required to be filed by 47 C.F.R. Section 73.3613. (Only licensees, permittees, or a reporting entity with a majority interest in or that otherwise exercises de facto control over the subject shall respond.)

Description of contract or instrument	Name of person or organization with whom contract is made	Date of Execution	Date of Expiration
PLEASE SEE EXHIBIT 1			

8. Capitalization (Only licensees, permittees, or a reporting entity with a majority interest in or that otherwise exercises de facto control over the subject licensee or permittee shall respond.)

[Enter Capitalization Information]

Capitalization

Capitalization (Only licensees, permittees, or a reporting entity with a majority interest in or that otherwise excercises de facto control over the subject licensee or permittee shall respond.)

Class of stock (preferred, common or other)	Voting or Non-voting	Number of Shares			
		Authorized	Issued and Outstanding	Treasury	Unissued
PLEASE SEE EXHIBIT 1					

9. (a.) List the respondent, and, if other than a natural person, its officers, directors, stockholders and other entities with attributable interests, non-insulated partners and/or members. If a corporation or partnership holds an attributable interest in the respondent, list separately its officers, directors, stockholders and other entities with attributable interests, non-insulated partners and/or members. Create a separate row for each individual or entity. Attach supplemental pages, if necessary.
[Enter Owner Information]

Owner Information

List the respondent, and, if other than a natural person, its officers, directors, stockholders and other entities with attributable interests, non-insulated partners and/or members. If a corporation or partnership holds an attributable interest in the respondent, list separately its officers, directors, stockholders and other entities with attributable interests, non-insulated partners and/or members. Create a separate row for each individual or entity. Attach supplemental pages, if necessary.
(Read carefully - The numbered items below refer to line numbers in the following table.)

1. Name and address of respondent and each party to the respondent holding an attributable interest (if other than individual also show name, address and citizenship of natural person authorized to vote the stock or holding the attributable interest). List the respondent first, officers next, then directors and, thereafter, remaining stockholders and other entities with attributable interests, and partners.
2. Gender (male or female).
3. Ethnicity (check one).
4. Race (select one or more).
5. Citizenship.
6. Positional interest: Officer, director, general partner, limited partner, LLC member, investor/creditor attributable under the Commission's **equity/debt plus** standard, etc.
7. Percentage of votes.
8. Percentage of total assets (equity debt plus).

1. Name and Address	PLEASE SEE EXHIBIT 1
2. Gender (male or female)	
3. Ethnicity (check one)	○ Hispanic or Latino ○ Not Hispanic or Latino
4. Race (select one or more)	○ American Indian or Alaska Native ○ Asian ○ Black or African American ○ Native Hawaiian or Other Pacific Islander ○ White
5. Citizenship	
6. Positional Interest	
7. Percentage of votes	
8. Percentage of total assets (equity debt plus)	

(b)	Respondent certifies that equity and financial interests not set forth in response to Question 9(a) are non-attributable.	◉ Yes ○ No ○ N/A See Explanation in [Exhibit 2]
(c)	Is the respondent or any party holding an attributable interest in the respondent also the holder of an attributable interest in any other broadcast station or in any cable or newspaper entities in the same market or with overlapping signals in the same broadcast service, as described in 47 C.F.R. Sections 73.3555 and 76.501?	◉ Yes ○ No
	If "Yes", submit an Exhibit identifying the holder of that other attributable interest, listing the call signs, locations and facilities identifiers of such other broadcast stations, and describing the nature and size of the ownership interest and the positions held in the other broadcast, cable or newspaper entities.	[Exhibit 3]
(d)	Are any of the individuals listed in response to Question 9(a) related as parent-child, husband-wife, brothers and sisters?	○ Yes ◉ No
	If "Yes", submit an Exhibit setting forth full information as to the family relationship	[Exhibit 4]
(e)	Is respondent seeking an attribution exemption for any officer or director with duties unrelated to the licensee or permittee?	○ Yes ◉ No [Exhibit 5]

	If "Yes", submit an Exhibit identifying that individual by name and title, fully describing that individual's duties and responsibilities, and explaining why that individual should not be attributed an interest.	

SECTION III - CERTIFICATION

I certify that I am MANAGING MEMBER

(Official Title)

of 3 POINT MEDIA - COALVILLE, LLC

(Exact legal title or name of respondent)

and that I have examined this Report and that to the best of my knowledge and belief, all statements in this Report are true, correct and complete.

(Date of certification must be within 60 days of the date shown in Question 5, Section II and in no event prior to that date.)

Signature BRUCE BUZIL	Date 07/20/2004
Telephone Number of Respondent (Include area code) 3122049900	

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

Exhibits

Exhibit 1
Description: OWNERSHIP INFORMATION

PLEASE SEE ATTACHED.

Attachment 1

Description
EXHIBIT 1

Exhibit 3
Description: OTHER MEDIA INTERESTS

PLEASE SEE ATTACHED.

Attachment 3

Description
EXHIBIT 3

EXHIBIT 3
Other Media Interests

3 Point Media – Coalville, LLC ("3 Point Coalville")
Bruce Buzil, Andrew Barrett, Robert E. Neiman, and Northland Holding Trust ("Northland") are members of 3 Point Coalville. and Mr. Buzil are 3 Point Coalville is the licensee of the following radio broadcast station:

KCUA (FM)	Facility ID 13483	Coalville, Utah

Parties with attributable interests in 3 Point Coalville also hold attributable interests in the following entities.

3 Point Media – Salt Lake City, LLC ("3 Point SLC")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and New Bedford Trust ("New Bedford") are members of 3 Point SLC.[5] 3 Point SLC is the licensee of the following radio broadcast station:

KHTB(FM)	Facility ID 6545	Provo, Utah
K248AK	Facility ID 70564	Draper, Utah

3 Point Media – Ogden, LLC ("3 Point Ogden")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and New Bedford are members of 3 Point Ogden. 3 Point Ogden is the licensee of the following radio broadcast station:

KPQP(FM)	Facility ID 2444	Ogden, Utah

3 Point Ogden has applied for Commission consent to assign the following radio broadcast station to Citadel Broadcasting Company, an entity that has no common ownership or control with 3 Point Coalville:

KPQP(FM)	Facility ID 2444	Ogden, Utah	BALH-20040601BEP

[5] With respect to KXDC(FM), Estes Park, Colorado, and KFVR-FM, La Junta, Colorado, Mr. Devine and Mr. Buzil each control 50% of the vote and assets of New Bedford Trust as co-trustees. With respect to all other stations, Mr. Devine controls 100% of the vote and assets of New Bedford Trust. Ultimate beneficiaries of New Bedford Trust include minor children, relatives and other individuals holding no other attributable media interests.

Lakeshore Media, L.L.C. ("Lakeshore")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and are members of Lakeshore. Lakeshore is the licensee of the following radio broadcast stations:

KHIL(AM)	Facility ID 72656	Willcox, Arizona
KWCX-FM	Facility ID 72659	Willcox, Arizona
KMXQ(FM)	Facility ID 72615	Socorro, New Mexico

The Commission has consented to the assignment of the following radio broadcast station to Clear Channel Broadcasting Licenses, an entity that has no common ownership or control with 3 Point Coalville:

KWCX-FM	Facility ID 72659	Willcox, Arizona	BALH-20030303ACW

3 Point Media – Florida, LLC ("3 Point Florida")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and are members of 3 Point Florida. 3 Point Florida is the licensee of the following radio broadcast stations:

WSOS-FM	Facility ID 74071	St. Augustine, Florida
WSOS(AM)	Facility ID 70404	St. Augustine Beach, Florida

3 Point Media – Franklin, LLC ("3 Point Franklin")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and are members of 3 Point Franklin. 3 Point Franklin is the licensee of the following radio broadcast station:

KTPM(FM)	Facility ID 87974	Franklin, Idaho

3 Point Media – Utah, LLC ("3 Point Utah")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and are members of 3 Point Utah. 3 Point Utah is the licensee of the following radio broadcast station:

KBNZ(FM)	Facility ID 20304	Tremonton, Utah

3 Point Media – Delta, LLC ("3 Point Delta")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and are members of 3 Point Delta. 3 Point Delta is the licensee of the following radio broadcast station:

KMGR(FM)	Facility ID 65377	Delta, Utah

3 Point Media – Arizona, LLC ("3 Point Arizona")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and New Bedford are members of 3 Point Arizona. 3 Point Arizona is the licensee of the following radio broadcast station:

KVNA-FM	Facility ID 68566	Flagstaff, Arizona

3 Point Media – Prescott Valley, LLC ("3 Point – Prescott Valley")
Mr. Buzil, Mr. Barrett, Mr. Neiman, [redacted] and [redacted] are members of 3 Point-Prescott Valley. The Commission has consented to the assignment of the following station to 3 Point – Prescott Valley:

KKLD(FM)	Facility ID 41462	Prescott Valley, Arizona	BALH-20020322AAJ

3 Point Media – Kansas, LLC ("3 Point Kansas")
Mr. Buzil, Mr. Barrett, Mr. Neiman, [redacted] and [redacted] are members of 3 Point Kansas. 3 Point Kansas is the licensee of the following radio broadcast station:

KKYD(FM)	Facility ID 7946	Osage City, Kansas

Superior Broadcasting of Nevada, LLC ("Superior Nevada")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and New Bedford are members of Superior Nevada. The Commission has consented to the assignment of the following radio broadcast station to Superior Nevada:

KBZB(FM)	Facility ID 78999	Pioche, Nevada	BALH-20031112AHL

3 Point Media – San Francisco, LLC ("3 Point San Francisco")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and New Bedford are members of 3 Point San Francisco. The Commission has consented to the assignment of the license for the following radio broadcast station to 3 Point San Francisco. Also, 3 Point San Francisco is providing programming to the following radio broadcast station pursuant a time brokerage agreement:

KBTB(FM)	Facility ID 36029	Alameda, California	BALH-20031010ACK

Superior Broadcasting of Denver, LLC ("Superior Denver")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and New Bedford are members of Superior Denver. Superior Denver is the licensee of the following radio broadcast stations and FM translator station:

KKCS-FM	Facility ID 70822	Colorado Springs, Colorado
KXDC(FM)	Facility ID 76780	Estes Park, Colorado
KFVR-FM	Facility ID 81305	La Junta, Colorado
K240CH	Facility ID 70823	Cripple Creek, Colorado

MidValley Radio Partners, L.L.C. ("MidValley")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and Northland are members of MidValley. MidValley is the controlling shareholder of Harlan Communications, Inc. ("Harlan"), which is the licensee of the following radio broadcast station:

KUBA(AM)	Facility ID 56365	Yuba City, California

Harlan has applied for Commission consent to assign the following radio broadcast station to Nevada County Broadcasters, Inc., an entity that has no common ownership or control with 3 Point Coalville:

KUBA(AM)	Facility ID 56365	Yuba City, California	BAL-20040312AAS

Marathon Media Group, L.L.C. ("Marathon Media")
Marathon Media, L.P. is the sole member/manager of Marathon Media. Mr. Buzil, Mr. Barrett, and Northland are non-voting limited partners in Marathon Media, L.P. Marathon Media, Inc. is the sole general partner of Marathon Media, L.P. Mr. Buzil is an officer, director and a shareholder of Marathon Media, Inc. Mr. Barrett is a director of Marathon Media, Inc. Marathon Media is the licensee of the following radio broadcast stations:

KLPW(AM)	Facility ID 70303	Union, Missouri
KLPW-FM	Facility ID 70301	Union, Missouri
KPLD(FM)	Facility ID 55399	Kanab, Utah

Marathon Media has applied for Commission consent to assign the following radio broadcast station to Broadcast Properties, Inc., an entity that has no common ownership or control with 3 Point Coalville:

KLPW(AM)	Facility ID 70303	Union, Missouri	BAL-20040621AAM

Millcreek Broadcasting, L.L.C. ("Millcreek")
Mr. Buzil, Mr. Barrett, Mr. Neiman, and are members of Millcreek. Mr. Buzil, Mr. Neiman, and Northland also hold non-voting, preferred equity in Millcreek. Millcreek is the licensee of the following radio broadcast stations and FM translator station:

KDUT(FM)	Facility ID 88272	Randolph, Utah
KUUU(FM)	Facility ID 37876	Tooele, Utah
KUDD(FM)	Facility ID 33438	Roy, Utah
KUDE(FM)	Facility ID 72769	Nephi, Utah
KNJQ(FM)	Facility ID 59034	Manti, Utah
K274AV	Facility ID 59029	Rural Juab County, Utah
KOVO(AM)	Facility ID 65665	Provo, Utah

Millcreek has entered into a Time Brokerage Agreement to broker more than 15% of the programming of radio broadcast station KTCE(FM), Payson, Utah (Facility ID 4339).

The Commission has consented to the assignment of the following radio broadcast station to Bustos Media Holdings of Utah, LLC, an entity that has no common ownership or control with 3 Point Coalville:

KDUT(FM)	Facility ID 88272	Randolph, Utah	BALH-20040316ACS

The Commission has consented to the assignment of the following radio broadcast station to Simmons-SLC, LS, LLC, an entity that has no common ownership or control with 3 Point Coalville:

KOVO(AM)	Facility ID 65665	Provo, Utah	BAL-20040304ACU

Rocky Mountain Radio Network, Inc., a wholly owned subsidiary of Millcreek, is the licensee of the following radio broadcast station:

KOTB(FM)	Facility ID No. 20029	Evanston, Wyoming

Desert Sky Media, LLC ("Desert Sky")
Mr. Buzil, Mr. Devine, and Mr. Barrett are members of Desert Sky. Desert Sky is the licensee of the following radio broadcast stations:

KOAS(FM)	Facility ID 25692	Dolan Springs, Arizona
KVGS(FM)	Facility ID 25752	Laughlin, Nevada

Sky Media, L.L.C. ("Sky Media")
Mr. Devine, Mr. Buzil, and Mr. Barrett are members of Sky Media. Sky Media is the licensee of the following radio broadcast station:

KPKK(FM)	Facility ID 87384	Amargosa Valley, Nevada

Portland Broadcasting, L.L.C. ("Portland")
Mr. Buzil, Mr. Barrett, and Northland are members of Portland. Portland is the licensee of the following radio broadcast station:

KXPC-FM	Facility ID 61987	Lebanon, Oregon