UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Roy Den Hollander,

Plaintiff on behalf of himself and all others similarly situated,

-against-

Members of the Board of Regents of the University of the State of New York, in their official and individual capacities, *et al.*

Defendants.

---x

Docket No.
10 CV 9277
(LTS)(HBP)(ECF)

MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO VACATE ORDER AND AMEND COMPLAINT

Oral argument is requested.

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PRELIMINARY STATEMENT

The motions request that:

(1) this Court's order granting the defendants summary judgment based on collateral estoppel be vacated, and

(2) the complaint be amended to add two newly discovered plaintiffs, which would remove the application of collateral estoppel, and delete certain provisions concerning student aid as well as delete the request for class certification.

This Court held that collateral estoppel applied because

> Plaintiff commenced a similar action against Defendants (or their predecessors) and the University in 2008 alleging, among other things, that Defendants violated the Establishment Clause . . . . (Citation omitted). In *Den Hollander I,* the issue of Plaintiff's standing thus was litigated at the District Court level and on appeal. (Citation omitted).

Order, pp. 1-2, October 31, 2011.

Since the entry of the *Order*, the plaintiff discovered two individual taxpayers willing to join the case as plaintiffs.

Prior to the filing of *Den Hollander I*, the plaintiff had started an ongoing effort to find additional plaintiffs to join litigation that opposed the governmental imposition of a state approved belief system—Feminism—on higher education. The plaintiff initially found another plaintiff for *Den Hollander I*, but the social opprobrium directed toward him as a result caused his withdrawal from the case. Other attempts at enrolling individuals and even alleged men's rights organizations that were taxpayers in New York State were unsuccessful. The fear among most citizens, including females, and organizations in America today is so great that those opposed to Feminism or its sister doctrine "political correctionalism" are largely intimidated into silence and paralysis.

Efforts to enforce unanimity of belief in any dogma claiming itself the sole possessor of the truth are doomed to fail. As U.S. Supreme Court Justice Jackson so aptly wrote in 1943, during another time of intolerance and hatred directed by the majority at those in the minority:

> Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishments must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to efforts of totalitarian [regimes]. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640-41 (1943). Today in America, it is Feminism and political correctionalism that are succeeding in stamping their brand of thought, speech, and action on the nation at the expense of liberty.

Relegating Feminism and political correctionalism to the trash heap of history is still a distant and difficult horizon, but in recent days, some citizens have demonstrated a willingness to standup to the most powerful institutions in the country and local tyrants who aim to exploit, control, and silence others with personal attacks, lies, and deception. Two of those citizens are the plaintiffs who, subsequent to the entry of the October 31st *Order*, agreed to join this suit to exorcise the state religion of Feminism from higher education in New York.

FACTS

The pertinent facts for these motions to vacate and amend are in the accompanying affidavit of plaintiff Den Hollander.

ARGUMENT

"As a procedural matter, '[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)." *Williams v. Citigroup Inc.*, Docket No. 10-538-cv, 2011 U.S. App. LEXIS 16526 * 10 (2d Cir. August 11, 2011)(citing *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2010); *see also Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991)). Otherwise, the liberal policy of permitting amendments might vitiate the "philosophy favoring finality of judgments and the expeditious termination of litigation." *Williams* at *11 (citing *Nat'l Petrochem.*, 930 F.2d at 245 (quoting 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1489 (2d ed. 1990)).

The Second Circuit's precedents, however, make clear "that considerations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment." *Williams* at *11. Since leave to amend should be freely given when justice so requires, "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." *Ruotolo*, 514 F.3d at 191; *see also State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990). In *State Trading Corp. of India, Ltd.* the movant had the opportunity to amend the complaint before judgment was entered, so the court denied vacating the judgment. In the case before this Court, *Den Hollander II*, the plaintiff did not have the opportunity to add the two new plaintiffs because that opportunity arose only after judgment was entered.

The Second Circuit's decision in *Williams* relied on the U.S. Supreme Court's ruling in *Foman v. Davis*, 371 U.S. 178 (1962)(Goldberg, J.), to vacate an order denying a postjudgment motion to replead. Quoting the Supreme Court in *Foman*:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'

Williams at *13 (quoting *Foman* at 182). The liberal spirit of Rule 15 does not dissolve as soon as final judgment is entered. *Williams* at *15.

The exceptions cited in *Foman* for not freely granting leave to amend are not present in this case.

"Leave to amend need not be granted . . . where the proposed amendment would be 'futil[e],'" *Advanced Magnetics, Inc. v. Bayfront Partners, Inc*., 106 F.3d 11, 18 (2d Cir. 1997)—but such is not the situation here. The addition of the two new plaintiffs would prevent collateral estoppel from applying, *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940), and, therefore, summary judgment for the reasons cited in the *Order* would be inappropriate.

"Mere delay . . . absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). Here plaintiff Den Hollander began to prepare these motions immediately on discovering that two other taxpayers were willing to join this action. Prior to the two plaintiff's agreements to join this suit, no other individuals or organizations agreed to participate as plaintiffs in *Den Hollander II*; therefore, no other opportunities to join plaintiffs existed. That opportunity only arose after judgment was entered on October 31st.

In determining what constitutes "prejudice," the Second Circuit considers whether the request to "amend [was] sought promptly after learning new facts, where 'no trial date had been set by the court and no motion for summary judgment had yet been filed by the defendants' and where 'the amendment will not involve a great deal of additional discovery.'" *Routolo* at 192 (quoting *Fluor Corp*., 654 F.2d at 856).

In this case, summary judgment, which was opposed by the defendants, was granted on the Magistrate's own motion and concerned only the issue of collateral estoppel. The request for leave to amend by adding the new plaintiffs was sought promptly after learning about their willingness to join the case. Further, no trial date had been set, and the Amended Complaint will only result in additional discovery as to whether the two new plaintiffs are taxpayers and whether Hofstra's Women's Studies program benefits from government funds and propagates the religion Feminism.

In addition, the Amended Complaint would not change "the theory on which the case has been proceeding" and would not require the defendants "to engage in significant new preparation." *Routolo* at 192 (quoting 6 Wright, Miller & Kane, § 1487, at 623 and n.9 (1990 & 2007 Supp.)). Joinder of the two plaintiffs is before any discovery has taken place; therefore, it is <u>not</u> disfavored. *Giorgio Morandi, Inc. v. Textport Corp.*, 761 F. Supp. 12, 14 (S.D.N.Y. 1991).

The legal issues raised by the Amended Complaint remain the same, as does the nature of the factual issues. The rights asserted by the plaintiffs in the Amended Complaint are infringed by the same series of ongoing transactions as alleged in the original Complaint by which the Regents and SED inculcate Feminism into higher education using State taxes and funds from USDOE. The State's financial support of Hofstra's Women's Studies program is new, but of the same type of support, Bundy Aid, as provided Columbia's IRWG. USDOE's financial support

of Hofstra's Women's Studies is also new, but again of the same type of support via awards, contracts, and research grants as provided IRWG.

The courts when exercising their discretion whether to vacate a judgment consider principles of fundamental fairness. *See United States v. Philatelic Leasing*, 794 F.2d 781, 788 (2d Cir. 1986). In permitting leave to amend, the courts consider not only principles of fundamental fairness but also judicial efficiency. *German v. Fed. Home Loan Mortg. Corp.*, 896 F.Supp. 1385, 1400 (S.D.N.Y. 1995).

Judicial economy will be served by allowing the addition of the two new plaintiffs. Without leave to amend, the two plaintiffs will have to start a separate identical action in federal court that alleges Feminism is a religion and the Regents and SED, as well as USDOE, aid the institutionalization of Feminism in higher education in the State.

Another reason for vacating the *Order* and permitting amendment of the complaint is that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957)(this is <u>not</u> the section that the Supreme Court retired in *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007)). "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . technicalities." *Foman v. Davis*, 371 U.S. at 181.

The use of an overbroad application of collateral estoppel in order to ban unpopular citizens from a fair adjudication of their claims is inconsistent with the Federal Rules and sends a clear message that those principles spoken about so often with such apparent passion by politicians, the judiciary, and Hollywood actors do not apply to men. For example, "[t]he Courts

are supposed ‘to protect unpopular individuals … and their ideas from suppression—at the hand of an intolerant society.” *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 357 (1995). Nice words, but for men who dare to fight for their rights—just words.

All too often these days, the courts abdicate their responsibility by effectively barring meaningful recourse to the judiciary by nonconformists when the courts declare a case over in the bottom half of the first inning by dismissing it before any discovery occurs,

> [I]n times of repression, when interests with powerful spokes[persons] generate symbolic pogroms against nonconformists, the federal judiciary … has special responsibilities to prevent an erosion of the individual’s constitutional rights.

Younger v. Harris, 401 U.S. 37, 58 (1971)(Douglas, J. dissenting).

> The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [*Marbury v. Madison*, 5 U.S. 137] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

Justice Powell in his concurring opinion in *United States v. Richardson*, 418 U.S. 166, 192 (1974).

When the judiciary uses the many technicalities provided it for summarily ridding the courts of countermajoritarian and nonconformist cases and forgets its power in equity to do justice with at least a fair hearing on the merits of grievances brought by society’s minority—men,

> [H]istory shows that people have a way of not being willing to bear oppressive grievances without protest. Such protests, when bottomed upon facts, lead almost inevitably to an irresistible popular demand for either a redress of those grievances or a change in the Government.

Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 167 (1961) (Black, J. dissenting).

CONCLUSION

By vacating the *Order* and allowing amendment of the Complaint, collateral estoppel will no longer provide a reason for dismissal under summary judgment, which will allow this men's rights case to proceed rather than being thrown into the street based on a technicality and the modern day popular aversion to men in general.

Dated: New York, N.Y.
November 20, 2011

/S/

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