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)

REPLY IN SUPPORT OF MOTIONS TO VACATE ORDER AND AMEND COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ……ii

PRELIMINARY STATEMENT……... 1

PREVIOUS PROCEEDINGS……... 2

ARGUMENTS

POINT I, newly discovered evidence and manifest injustice are two grounds for vacating. ……..….. 4

POINT II, this Court has the power to vacate its prior *Order* and allow amendment of the complaint to prevent the application of collateral estoppel…….....……..... 6

POINT III, the Defendants improperly move for dismissal under Fed. R. Civ. P. 12(b)(6)…….…... 7

CONCLUSION…… 10

TABLE OF AUTHORITIES

Page

Cases

Arista Records LLC v. Doe, 604 F.3d 110 (2d Cir. 2010) 7

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 7, 8, 9

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 7, 8

Cullen v. City of New York, 2010 WL 6560742 (E.D.N.Y. July 13, 2010) 9

Cullen v. City of New York, 2011 U.S. Dist. Lexis 44867 (E.D.N.Y. April 26, 2011) 9

Den Hollander I, 2009 U.S. Dist. LEXIS 131582 (S.D.N.Y. April 24, 2009)…….. 2

Den Hollander I, 372 Fed. App'x 140 (2d Cir. 2010)…… 3

Dougherty v. North Hempstead Board of Zoning Appeals, 282 F.3d 83 (2d Cir. 2002) 9 n.4

E.R. Squibb & Sons, Inc. v. Lloyd's & Co., 241 F.3d 154 (2d Cir. 2001)……7

Foman v. Davis, 371 U.S. 178 (1962) 4, 5

Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010) 8

Heckler v. Mathews, 465 U.S. 728 (1984) 6

In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677 (2d Cir. 2009) 8

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)(Frankfurter J., concurring) 10

Lans v. Gateway 2000, Inc., 110 F. Supp. 2d 1 (D.D.C. 2000) 6 n.3

Le Blanc v. Cleveland, 248 F.3d 95 (2d cir. 2001)……..……... 7

Local 538 United Bhd. of Carpenters & Joiners v. U.S. Fid. & Guar. Co., 154 F.3d 52, 55 (2d Cir. 1998). 2

Lucente v. IBM Corp., 310 F.3d 243 (2d Cir. 2002) 9 n.4

Nettis v. Levitt, 241 F.3d 186 (2d Cir. 2001), ... 9 n.4

Offut v. United States, 348 U.S. 11 (1954) 5

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 9

Ruotolo v. City of New York, 514 F.3d 184 (2d Cir. 2010) 4

South Cherry St., LLC v. Hennessee Group LLC, 573 F.3d 98 (2d Cir. 2009) 8

U.S. ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969) 3

Welsh v. U.S., 398 U.S. 333 (1970) 3

Williams v. Citigroup Inc., 2011 U.S. App. LEXIS 16526 (2d Cir. August 11, 2011) 4

Statutes

Fed. R. Civ. P. 12(b)(6) 2, 7, 8, 9, 10

Fed. R. Civ. P. 59(e) or 60(b) 5 n.2, 6 n.3

Other Authorities

31A C.J. S. *Evidence* § 3 (1996) 5

5 The Writings and Speeches of Daniel Webster, 163 10

Black's Law Dictionary, 9th ed. 5

Equity for Women in the 1990s, Regents Policy and Action Plan, Background Paper (1993) 8

Moore's Fed. Prac., 3 ed. 1 n.1

PRELIMINARY STATEMENT

The Establishment Clause issue in this case is before the federal courts again because in the prior proceeding the courts chose to resort to the hyper-technical pleading requirements of the 19th century when the slightest misstep would immediately and forever end an aggrieved party's chance at justice.

The putative class representative failed to include four words in the *Den Hollander I* complaint: "I am a taxpayer." That's it! Based on the absence of those four words, the Second Circuit threw the case into the street.[1] The Second Circuit did not bother to consider the obvious fact that the class representative was a taxpayer—after all he was admitted to practice in the Second Circuit and the complaint stated he was a resident of New York. What person living and working in this country does not have taxpayer status—none. The Second Circuit did not bother to consider using judicial notice to find the class representative was a taxpayer even though the Federal Defendants conceded such. And the Second Circuit did not bother to consider remanding the case to the district court for a hearing on whether the class representative was a taxpayer, which the Second Circuit had the power to do and the class representative requested.

The question is why was the Second Circuit so determined to prevent even the appearance of rendering justice on the issue of whether Feminism is a religion aided by government? Because to do so would mean a modern-day excommunication from the Feminist Establishment—a barrage of personal attacks from Feminist ideologues, criticism from the media, and ostracism from the politically correct elite. The courts of the Second Circuit once

[1] In oral argument, the Second Circuit inferred that the complaint did not include the relevant State and Federal Statutes. That is wrong. The substance of those statutes were pleaded, but the statutes were not cited. "Affirmative pleading of the precise statutory basis for subject matter jurisdiction is not required if the complaint alleges facts to establish jurisdiction…." *Moore's Fed. Prac.*, § 8.03[3], 3 ed. (citations from 2d, 5th, 7th, and 9th Circuits omitted).

again confirmed that when it comes to protecting the rights of men, a case will never make it to trial unless it is to eliminate those rights.

PREVIOUS PROCEEDINGS

The State and Federal Defendants' recounting of the prior action *Den Hollander I* are not fully accurate.

In *Den Hollander I*, Magistrate Judge Fox never addressed the Establishment Clause claims and therefore never made a decision on taxpayer or non-economic standing. Nowhere in Magistrate Judge Fox's Report and Recommendation does he even mention taxpayer or non-economic standing. (*Den Hollander I*, 08 Civ 7286, Docket Doc. 33). Magistrate Judge Fox only addressed standing under the Equal Protection Amendment and Title IX, which are not issues in this case.

When District Court Judge Kaplan adopted Magistrate Judge Fox's Report and Recommendation, he said in the first paragraph of his order:

> Having reviewed the amended complaint, the report and recommendation, and plaintiffs' objections, I have concluded that there was no error and that the action should be and hereby is dismissed for lack of standing. *Den Hollander I*, 2009 U.S. Dist. LEXIS 131582 *2 (S.D.N.Y. April 24, 2009)(emphasis added).

He also held that "the Magistrate Judge did not reach the merits . . . ." on the Establishment Clause claims. *Id.* at *4. So by adopting the Report and Recommendation, Judge Kaplan dismissed *Den Hollander I* for lack of standing under Equal Protection and Title IX. When Judge Kaplan did that, the court no longer had subject matter jurisdiction; that is, the authority to rule that the Establishment Clause claim was also dismissed on the merits under Rule 12(b)(6). "Jurisdiction, whether it be subject-matter or personal, concerns the authority of the court to hear and determine the controversy." *Local 538 United Bhd. of Carpenters & Joiners v. U.S. Fid. & Guar. Co.*, 154 F.3d 52, 55 (2d Cir. 1998). Without it, a court lacks the power to adjudicate an

action. *U.S. ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969). So when District Court Judge Kaplan wrote in *Den Hollander I* at *4-5 that

> "Feminism is no more a religion than physics, and at least the core of the complaint is frivolous. . . . The Establishment Clause claims are dismissed also on the alternative ground that they are absurd and utterly without merit,"

the court had no jurisdiction to make such a decision.

As for the Second Circuit's decision, the only Establishment Clause standing issue it addressed was the plaintiff's failure to include in his complaint the words "I am a taxpayer." *Den Hollander I*, 372 Fed. App'x 140, 142 (2d Cir. 2010). The Second Circuit never reached a decision on the Establishment Clause non-economic standing issue.

The Second Circuit also never reached and never even considered the issue of whether Feminism—as with other moral and ethical belief systems that impose a duty of conscience, *Welsh v. U.S.*, 398 U.S. 333, 339-340 (1970)—is a religion under the Establishment Clause analyzes of the U.S. Supreme Court and the Third, Fourth, Eighth, Ninth, and Tenth Circuit Courts. And the Second Circuit clearly did not infer that the application of such analyzes to Feminism was "bizarre," as the Federal Defendants claim. (*Fed. Opp. Ltr.* p. 1).

What is bizarre, however, is the Federal Defendants stating this Court found that *res judicata* applied to this action. This Court and the Magistrate based their grant of summary judgment on *collateral estoppel* –not *res judicata*. "[T]he Report unambiguously recommends dismissal of the entire Complaint on the ground of collateral estoppel making a ruling on res judicata unnecessary." (*Order*, p. 4). "Thus, collateral estoppel bars Plaintiffs attempt to re-litigate his standing to bring an Establishment Clause claim . . . ." (*Order*, p. 6). *Collateral estoppel* and *res judicata* are not the same and the Federal Defendants failure to understand the

grounds for this Court and the Magistrate's decision calls into question the reliability of their arguments concerning this motion.

The Federal Defendants also disingenuously claim that the motion to amend is the "third attempt to craft a complaint . . . ." (*Fed. Opp. Ltr.* p. 1). The plaintiff did turn the original complaint into a verified complaint by adding the declared under penalty of perjury language so that it could be considered by Magistrate Pitman in the summary judgment proceeding that he ordered. That was the only change to the original complaint as the Federal Defendants know because they received a copy of the June 27, 2011 letter which notified Magistrate Pitman of that sole change. Substantively speaking, this motion is the first effort to amend the complaint.

Further, the Federal Defendants even missed the changes in the proposed amended complaint. The Federal Defendants still claim that the Establishment Clause issue is one of "federal . . . funding provided for students at Columbia University . . . ." (*Fed. Opp. Ltr.* p. 1). That is wrong. The Notice of Motion plainly states the amended complaint deletes "prior allegations pertaining to certain New York State and federal student aid programs . . . ."

ARGUMENTS

POINT I, newly discovered evidence and manifest injustice are two grounds for vacating.

The heart of the State Defendants' argument is that the plaintiff's motion to vacate and amend "fails to so much as mention any grounds . . . ." (*State Memo. Opp.*, p.5). The grounds that the motion relies on are the U.S. Supreme Court case *Foman v. Davis*, 371 U.S. 178 (1962)(Goldberg, J.), and the Second Circuit cases *Williams v. Citigroup Inc.*, 2011 U.S. App. LEXIS 16526 (2d Cir. August 11, 2011) and *Ruotolo v. City of New York*, 514 F.3d 184 (2d Cir. 2010). The State Defendants ignore all three cases. The cases hold that "[i]f 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." *Foman* at 182. The decision for this Court then is whether the accurate facts, not those spun by the State and Federal Defendants, depict circumstances concerning an important issue of our time in which justice, or at least the appearance of such, requires a hearing on the merits. As Mr. Justice Frankfurter said, "justice must satisfy the appearance of justice." *Offut v. United States*, 348 U.S. 11, 14 (1954).

The State Defendants take a one-dimensional, technical approach by arguing that this Court should first decide whether to vacate, and only after deciding to vacate, then decide whether to allow leave to amend the complaint. (*State Memo. Opp.*, pp. 5-7). In trying to narrow the Court's discretion and equitable powers to vacate a judgment, the State Defendants declare without any citations that newly discovered evidence does not include newly discovered parties willing to testify. "Evidence, broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact . . . ." *Black's Law Dictionary*, 9th ed. (quoting 31A C.J. S. *Evidence* § 3, at 67-68 (1996)). With the two new plaintiffs in the case, the logical inference is that the ultimate fact of collateral estoppel does not apply; therefore, summary judgment based on collateral estoppel would be obviated and the case would continue.[2]

The State Defendants also claim the plaintiff does not raise any "manifest injustice" resulting from this Court's *Order* because the two new plaintiffs will still be able to bring a plenary action, which they intend to do if this motion fails. (*State Memo. Opp*., p. 7). But what of the manifest injustice already leveled against not just the class representative and the two newly proposed plaintiffs, but all those men, members of the putative class, who tied their hopes for equity in higher education to this case and the prior one. Through the international media and

[2] The State Defendants assert that even with the addition of the two new plaintiffs, the current plaintiff would still lack standing. (*State Memo. Opp.* p. 7). The State Defendants, however, cite for authority to a case dealing with the requirements for F.R.C.P 60(b), which they admit in their *Opposition* at 5 n.4 does not apply to this motion.

World Wide Web, they have witnessed the preeminent federal circuit judiciary of the first country ever to place human rights over governmental might, treat men as a group of non-humans whose rights are to be abrogated time and again through mere technicalities and re-writing of the facts.

> "Discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, … can cause serious noneconomic injuries to those persons who are personally denied equal treatment…." *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984).

POINT II, this Court has the power to vacate its prior *Order* and allow amendment of the complaint to prevent summary judgment based on collateral estoppel.

The State and Federal Defendants cite to cases—none from Second Circuit courts—which they claim hold that when a court grants summary judgment by applying collateral estoppel to the issue of standing, that court cannot (1) alter or amend its decision under Fed. R. Civ. P. 59(e) and (2) then allow amendment to the complaint so as to eliminate the use of collateral estoppel as the basis for summary judgment.[3] According to the Defendants, nothing can change the original decision—not change in controlling law, not newly discovered evidence, not clear legal error, and not manifest injustice. In sum, nothing under the sun can change that decision—clearly an absurd result.

The Second Circuit, however, has held that

> Once subject matter jurisdiction is 'cured' by an amendment, courts regularly have treated the defect as having been eliminated from the outset of the action. In other words, where a change in parties, necessary to the existence of jurisdiction, is appropriate and is made (even on or after appeal), appellate courts have acted as if the trial court had jurisdiction from the beginning of the litigation.

[3] None of the cases cited by the defendants deal with collateral estoppel or Rule 59(e) and only one district case in the D.C. Circuit, *Lans v. Gateway 2000, Inc.*, 110 F. Supp. 2d 1 (D.D.C. 2000), deals with Rule 60(b). The court in *Lans* denied a Rule 60(b) motion because the purported newly discovered was not newly discovered, which is not the case here.

Le Blanc v. Cleveland, 248 F.3d 95, 99 (2d cir. 2001)(quoting *E.R. Squibb & Sons, Inc. v. Lloyd's & Co.*, 241 F.3d 154, 163 (2d Cir. 2001). The addition of the two new plaintiffs would be as if the original complaint included them as named plaintiffs. So, regardless of what the Court does regarding Den Hollander, the two new defendants will not be denied standing on collateral estoppel grounds. Therefore, the case cannot be terminated through summary judgment based on collateral estoppel.

POINT III, the Defendants improperly move for dismissal under Fed. R. Civ. P. 12(b)(6).

The State and Federal Defendants argue that even if this Court vacated its prior order and granted amendment to the complaint, the amended complaint would be dismissed anyway under Fed. R. Civ. P. 12(b)(6). (*State Memo. Opp.*, pp. 8, 9; *Fed. Opp. Ltr.* p. 2, 3).

The State Defendants' *Opposition* at 9 to 23 is nearly an exact copy of most of the State's memorandum of law in support of its motion to dismiss that was initially submitted to Magistrate Judge Pitman. The Federal Defendants refer this Court to their motion to dismiss papers also submitted to Judge Pitman. (*Fed. Opp. Ltr.*, p. 3 n.2).

No ruling under Rule 12(b)(6) has even been made either in *Den Hollander I* or *Den Hollander II*. So, the State and Federal Defendants must now be making motions for such a dismissal; otherwise, they would be asking this Court to skip the procedural due process required for determining dismissal and jump right to the result that they want.

The current procedure in determining dismissal under Rule 12(b)(6) requires the application of a "plausibility standard." The plausibility standard requires "a complaint with enough *factual* matter (taken as true) to suggest that" the elements of the cause of action are satisfied. *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A court's determinations are context-specific. *Ashcroft*

v. Iqbal, 129 S. Ct. 1937, 1950 (2009); *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 110 (2d Cir. 2009).

The procedure begins with "taking note of the elements a plaintiff must plead to state a claim …," *Iqbal*, 129 S. Ct. at 1947, then proceeds in two steps: (1) Identifying the specific allegations in a complaint that are not entitled to the presumption of truth. *Iqbal*, 129 S. Ct. at 1950-1951; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Those are statements that cut and copy the elements of a cause of action; that is, they are conclusory. *Twombly*, 550 U.S. at 555. (2) Next, the analysis considers the remaining factual allegations in a complaint as true and determines if they plausibly—not probably but more than possibly— infer that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161. In doing so, the courts "draw[] all inferences in favor of the plaintiff," *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692 (2d Cir. 2009), and a complaint cannot be dismissed based on a judge's or opposing counsel's <u>disbelief</u> of the factual allegations even if it strikes them that actual proof is improbable. *Twombly*, 550 U.S. at 555-56.

If the State and Federal Defendants are not making motions for Rule 12(b)(6) dismissal, then they are asking this Court to skip this required procedure and make finding's based on their, and they hope this Court's personal beliefs, that perhaps Feminism is no more a religion than physics and the State Defendants' major policy statement *Equity for Women in the 1990s, Regents Policy and Action Plan, Background Paper* (1993), which the Federal Defendants help enforce with federal dollars, does <u>not</u> institutionalize Feminism in higher education. Such a request ignores the fundamental fairness required by procedural due process. "Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of

justice based on fairness to the individual." *Regents of University of California v. Bakke*, 438 U.S. 265, 319 n. 53 (1978).

The State Defendants cite to three cases that they claim do not require observance of the procedure cited in *Iqbal*. (*State Memo. Opp.* pp. 8 to 9). Those cases, however, were decided before *Iqbal* and are factually inapposite.[4]

The Federal Defendants deceptively disguise their request for circumventing Rule 12(b)(6) procedures by quoting from a magistrate's opinion in the Eastern District of New York that "[a]mendment is futile when the proposed amendment is frivolous . . . ." *Cullen v. City of New York*, 2010 WL 6560742 *14 (E.D.N.Y. July 13, 2010)(citation omitted); (*Fed. Opp. Ltr.*, p. 3). What they left out was that both the Magistrate Judge and the District Court Judge in *Cullen* relied on the proposed amended complaint to resolve a Rule 12(b)(6) motion and that both Judges applied the required procedure of *Iqbal* to the proposed amended complaint in reaching their decision to dismissed. "The Magistrate Judge relies on the amended complaint in its analysis of defendants' motion to dismiss, and the Court will likewise treat the amended complaint as the operative complaint for purposes of resolving this motion." *Cullen v. City of New York*, 2011 U.S. Dist. Lexis 44867 at *3 n.1 (E.D.N.Y. April 26, 2011)(citations omitted). The District Judge in *Cullen* proceeded to apply the *Iqbal* procedure at a point in the proceedings when much of the discovery had already taken place: "Iqbal identifies a 'two-pronged' approach to determining the sufficiency of a complaint." *Cullen* at *5. No discovery has occurred in either *Den Hollander I* or *Den Hollander II*.

[4] *Lucente v. IBM Corp.*, 310 F.3d 243 (2d Cir. 2002) involved a change of legal theory, *Nettis v. Levitt*, 241 F.3d 186 (2d Cir. 2001), a fraud case in which two years of discovery had failed to produce evidence, and *Dougherty v. North Hempstead Board of Zoning Appeals*, 282 F.3d 83 (2d Cir. 2002), dealt with the application of the ripeness doctrine to equal protection and due process claims.

The Federal Defendants then engage in another rouge inferring that Judge Kaplan in *Den Hollander I* legally dismissed the Establishment Clause claims under Rule 12(b)(6). (*Fed. Opp. Ltr.*, p. 3). As stated above, when Judge Kaplan expressed his personal opinion about Feminism, his court no longer had jurisdiction over the case *Den Hollander* I. The Federal Defendants would have us believe that America is no different than an Orwellian Oceania where government officials decree what people must believe as true without any evidence or fairness of procedure.

CONCLUSION

"In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 n. 19 (1951)(Frankfurter J., concurring)(quoting 5 The Writings and Speeches of Daniel Webster, 163). By vacating the October 31, 2011 *Order* and granting leave to amend, at least a fair number of those in the minority of that community will again begin to believe that this social order has the capacity to do the right thing.

Dated: New York, N.Y.
December 10, 2011

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