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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANDREW SNITZER, et al.,

Plaintiffs,

v. 17 CV 5361 (VEC)

THE BOARD OF TRUSTEES OF THE AMERICAN FDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, et al.,

Defendants.

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New York, N.Y.
March 1, 2019
10:00 a.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

CHIMICLES & TIKELLIS LLP
Attorneys for Plaintiffs
BY: ROBERT J. KRINER JR.
VERA BELGER
STEVEN A. SCHARTZ

PROSKAUER ROSE LLP
Attorneys for Defendants
BY: MYRON D. RUMELD
DEIDRE ANN GROSSMAN
-AND-
COHEN WEISS AND SIMON LLP
BY: JANI K. RACHELSON
ZACHARY NATHAN LEEDS

(Case called)

MR. KRINER: Robert Kriner, on behalf of the plaintiffs.

MR. BELGER: Vera Belger, your Honor. I would like to be admitted pro hac today.

THE COURT: Just for the day?

MR. KRINER: No, for the case.

THE COURT: Well, you've got to pay your money for that.

MR. BELGER: I will.

THE COURT: For today, you're okay.

MR. SCHWARTZ: Steve Schwartz, for plaintiff.

MR. RUMELD: Myron Rumeld, for the defendants.

MS. GROSSMAN: Deidre Grossman, for the defendants.

MR. LEEDS: Zachary Leeds, for the defendants.

MS. RACHELSON: Jamie Rachelson, for the defendants.

THE COURT: Okay.

It looks like on fact discovery you guys have a few hanging chads, correct?

MR. SCHWARTZ: Yes.

MR. RUMELD: Yes.

THE COURT: Can you get them all done by March 29th?

MR. RUMELD: I think that's the plan. We have one deposition scheduled that last week in March, but there's no reason we should not --

THE COURT: So I'm going to extend your fact discovery deadline until March 29th.

You've indicated on the proposed schedule that you can get your expert discovery done by June 27th; is that correct?

MR. SCHWARTZ: Yes.

MR. KRINER: That's correct.

THE COURT: You've proposed internal deadlines for when you're exchanging reports and things like that. I don't really care about those, as long as everything is done by 6/27. So if you want to shift the internal dates a little, you don't have to come back to me for that.

MR. SCHWARTZ: Thank you.

THE COURT: My inclination is to bring you back in for a status conference on July the 12th. At that point, we will discuss whether either side is going to have a Daubert motion, so that will give you a couple of weeks after the close of discovery to make that decision. If anybody is going to make a Daubert motion, I'm going to resolve those before we move to the next step, so that you know what you're working with.

If there are not going to be any Daubert motions, then I'm likely to set a trial schedule at that point. I'm not convinced. I'm happy to hear further from you, Mr. Rumeld, if you want to explain why we should go through summary judgment on this, but it seems very facty to me.

MR. RUMELD: If you don't mind, I would like to at

least take a swing.

THE COURT: Sure.

MR. RUMELD: I can appreciate why it seems facty. I mean, I've read plaintiffs' 20-page or 17-page letter.

THE COURT: 17, 20, whatever.

MR. RUMELD: Right, what's the difference?

So a couple of points:

First of all, it may be facty, but, ultimately, the question is whether there are material facts in dispute. I know your Honor knows that. Both sides are relying on this written record of what took place, and the record is very, very robust. I know your Honor was aware of that already at the time of the motion to dismiss.

Since then, we have produced rather detailed attorney notes of everything that took place of the meeting. So, regardless of whether it's truth or fiction that there were any issues with respect to how the minutes were compiled, for most of these meetings, we have something coming pretty close to a transcript of what everybody said.

So your Honor does really have an opportunity to evaluate for herself whether in fact the assertions that the plaintiffs have made are truthful when viewed in context, and perhaps, more importantly, whether they're really material, because at the end of the day, we have two issues here: We have an issue of asset allocation, and there is a fairly robust

record for why the trustees increased their targeted returns, that your Honor can evaluate; and, secondly, there's an issue about the selection of investment managers, where, similarly, there's a record about who said what to whom, including the context in which trustees expressed their frustrations and expressed their criticisms of McCay, and your Honor really will have an opportunity to evaluate whether that's an indication that somebody did something wrong or whether people were very reflective about what they were doing.

I would also make one additional point, because I've been here before and I know summary judgment is difficult in a case like this: Right now, we have a case with many, many diverse assertions; in our view, only some of which really go to the case. If we were really going ahead to try this case, I really think there would be some serious issues about rightsizing this case, deciding what really has to go in the case and what doesn't, the extent to which expert testimony is going to help you or not.

We will have completed these expert reports by the end of June. And even if it turns out that we were wrong and that the case was not suitable for summary judgment, or perhaps some of the case wasn't, your Honor wouldn't really have an opportunity to effectively have the equivalent of robust pretrial papers, to decide what's the most appropriate way to adjudicate this case and, hopefully, keep it under two weeks

and not running even longer than that, because there have been a lot of witnesses examined, if they all testified here this would be a very long trial. We're contemplating five experts at the moment, with a fairly big agenda of issues.

So I actually think the Court's interests and the parties' interests would be served if we went through the summary judgment exercise even if summary judgment wasn't granted at the end of the day.

THE COURT: Okay.

MR. SCHWARTZ: Feel free to cut me off if you don't need to hear from me.

THE COURT: Trust me, I will.

MR. SCHWARTZ: Besides the paper record, which is important, there are witnesses who need to testify and have your Honor evaluate them.

Second, there's a big difference between taking the various documents and making a decision when your Honor is wearing your Honor's summary judgment hat than there is when your Honor is wearing your finder-of-fact hat, and in order to make the prudence or no-prudence decision, we need fact-finding.

On the issue of using summary judgment as a vehicle to either educate your Honor or to try to see if we can focus the case, when we go to trial, according to your Honor's procedures, there's going to be a very robust proposed findings

of fact and whatnot. If you want to do it twice, that's one way to do it, but we think it makes sense to do it once.

THE COURT: I'm not going to make a decision at this point. You've all got to go through expert discovery. I'll talk to you again after that.

I hear you. This still strikes me as a case that ultimately I'm not going to be able to decide on the paperwork, although I get your point, that there are detailed minutes and the like, but I think the plaintiffs have some arguments about what the trustees were really doing and the like. It's just going to be hard to decide on the paper record.

MR. RUMELD: Can I raise one other possibility?

THE COURT: Sure.

MR. RUMELD: And we can, of course, take this up later.

THE COURT: Right.

MR. RUMELD: But I would certainly be willing -- our side would certainly be willing -- to submit a summary judgment brief, even without a ruling yet, as to whether we could proceed to summary judgment, so your Honor would at least have an opportunity to see what the case looks like on our side, why are people really quite offended by what's been done here, and to evaluate on that basis whether maybe it is a little more concrete than it seems.

THE COURT: As I think I said at the time of the

motion to dismiss, I hear you, I get that the trustees were meeting and they were talking to experts and the like, but what they ended up with is just hard to see why they thought that was a good idea for a pension fund. I mean, they adopted an exceedingly risky strategy, and that is part of the gestalt of the facts. Again, there may well be a good record that makes it all make sense. I'm trying to not just look at this like, looking back, it was really a bad decision, but even at the time, they were getting into very risky, illiquid investments, which just doesn't seem like what a pension fund should be invested in.

I get there are actuarial problems. I remember the case, and I remember all the problems, and I am confident it's going to be an interesting case. It seems to me the other side of this is: Why are we throwing more money at like a summary judgment? The summary judgment brief is not worth a whole lot without the 56.1 statements. To me, by the time you put together a good 56.1 statement and they respond to a good 56.1 statement and you reply to it, you could have tried the case for that amount of money. And without the 56.1 statement, with a response, it is very difficult for me to assess whether there is a question of fact or not.

MR. RUMELD: I understand, and I would be happy to do that as well.

THE COURT: I got it.

MR. RUMELD: What I find --

THE COURT: I'm not closing the door.

MR. RUMELD: What I find a little concerning is: Respectfully, your Honor already said a few things based on your take of the allegations that were made by the other side, and it would be my intention, whether it's at trial or whether it's at summary judgment, to walk your Honor through what risk means here, what liquidity risk means here --

THE COURT: Right.

MR. RUMELD: -- and to show you the documentation that shows exactly how that risk was evaluated, because we're in this case exactly because people out there have this kind of catchall way of describing investments when there's a very nuanced, sophisticated way that needs to be examined. And I know your Honor will do this when the time comes; I'm only suggesting there is a way to walk your Honor through this because, for example, emerging market equities, it's not an issue of liquidity, and even if there were issues --

THE COURT: Agreed.

MR. RUMELD: -- of liquidity, I could show you how that very issue was examined and how other solutions were rejected exactly because of the liquidity.

THE COURT: Okay. Let's think of whether there might be some other creative ways of dealing with this. But I don't have to decide that yet, because you're going off to expert

discovery and I'm going to see you again, and I will put my thinking cap on between now and then, and maybe I'll come up with some other ideas.

You also told me that you got partners who were going to be witnesses in this case. The plaintiffs don't raise any objection to that; is that correct?

MR. SCHWARTZ: That's correct. We raise no objection. Our only interest is, we don't want to have anything happen that would cause delay because of that fact, because that's not within our control.

MR. KRINER: We wanted to bring the issue to your Honor's attention so your Honor knows that it's on the slate at this point.

THE COURT: Okay.

MR. KRINER: No surprises for the Court.

THE COURT: You've run the ethics traps, and there's not a problem with you calling a partner as a witness?

MR. RUMELD: First of all, whether we will or won't, we're simply reserving our right to, depending on how the case comes out, because there are various assertions about what our partner's notes say and what their emails say, so we felt that we needed that protection.

But, no, we have investigated this, we have no expectation that any of the partners will say something adverse to their clients. If we did have that concern, we would have

been out of here sometime ago. So we're comfortable this won't be a problem.

THE COURT: Okay.

You've also raised with me the issue of sealing the plaintiffs' submission, the 17 pages or 20 pages or 16 pages, whatever it is. I can tell you I'm not going to allow you to seal the whole thing. If you want to submit a proposal for what you think is actually confidential and deserving of being sealed, I'll let you do that by next week. Okay?

Take a look at *Lugosch* before you spend a lot of time on it. I'm willing to consider it, but it needs to be narrowly tailored.

MR. RUMELD: We did point out that there is some authority for the idea of having unsubstantiated, or unresponded to, allegations not being the type of communications that ought to be necessarily in the public record. To be candid here, the only reason we're harping on this issue is because, for better or worse, there is a separate public trial going on at the same time with this plan and the participants.

So, in realtime, unless this plan performs spectacularly well between now and the end of March, when the plan's fiscal year ends, the trustees of -- the plan will be in what's known critical and declining status. The trustees are planning to make an application for relief with the government.

That application for relief involves cuts in certain people's benefits, and there are many, many participants who are very exercised about this issue.

THE COURT: Understandably.

MR. RUMELD: And there are requests by the new union leadership to have the trustees meet with them so they can vet these issues.

That's all well and good, and that's not what's in this case, but it isn't particularly helpful if, at the time we're having these discussions, accusations that are, one, unsubstantiated and, two, we have not had a chance to respond to, are filtering around the Internet. So we have an unusual concern about this attachment, which was only submitted for the purpose of having discussion about summary judgment being left in the public record for a period of weeks and maybe months, because if we never move for summary judgment, it will be a long time before the trustees get their day in court.

THE COURT: Although if it's already out on the Internet, what I do is really going to have no impact.

MR. RUMELD: Well, this attachment is not on the Internet. Our opposing counsel have been courteous about observing that confidentiality until your Honor's ruling.

THE COURT: Okay.

MR. RUMELD: So that's the concern.

THE COURT: Got it, okay.

I still think just sealing up the whole thing does not make sense to me, so give me something that's more narrowly tailored.

You've got a private mediator; is that correct?

MR. KRINER: We do, your Honor.

THE COURT: Are you considering meeting with him or her again?

MR. RUMELD: So this is more in my court.

We are. As your Honor can imagine, there are insurance carriers involved, and my hope and expectation is that we will schedule mediation sometime within the next few weeks, but it takes several players to be onboard at the same time, in the same place, and I'm not quite there yet.

THE COURT: Okay. If you ever decide what you wanted, instead of a private mediator, is a meeting with the magistrate judge, just let me know. I'm not sure that that makes any sense whatsoever if you've already got a mediator engaged, but I make that offer to you.

MR. KRINER: Thank you, your Honor.

THE COURT: Anything further from the plaintiffs?

MR. KRINER: Nothing, your Honor.

MS. GROSSMAN: Your Honor, just one question about the letter and sealing, and I don't think I'm going to get an objection from my adversary: In light of the fact your Honor is not effectively ruling on the issue of the motion for leave

and is going to revisit it later, is there any chance that we could have a temporary seal subject to reopening when we revisit the issue in July?

THE COURT: Do you understand what they're saying?

MR. KRINER: No.

THE COURT: So this was all kind of premature? You all buried me on a paper on an issue that's not really a live issue? Because we're not to the point of whether we're going to have trial or summary judgment. It's just, seal them up or essentially I reject them and not come back to you so they go off the docket. If you want to resubmit, you resubmit.

MR. SCHWARTZ: My feeling was that there was a specific request that was triggered by defendants to get an exception to the general rule at trial, where there's a bench trial, to get summary judgment, so there was a specific issue that was placed in front of your Honor. So we all responded, both of us.

This is not my issue. We just filed what we had to file for purposes of this conference. So I don't really care what your Honor does, other than whatever the Court's interests are in terms of transparency and the Court's rules and the governing law on what gets put out to the public and what doesn't. We have already gone through the process, though, of identifying which areas meet the usual standards for sealing and which ones don't, and there's not going to be any dispute

coming from either side, I don't think, because we went through that process as late as yesterday. There was a little bit of the a reverse course, "we'll seal certain portions like we did before for the initial motion to dismiss," to, "and now we want to seal the entire thing."

So we've done that work, and we can get that to your Honor very quickly, but, as I said, I'm not going to be arguing or debating or making arguments whether it should or should not be publicly filed. I just want to follow the rules.

MR. RUMELD: One last point is: If we were actually submitting premotion letters or any kind of letters pursuant to your Honor's rule, once they got past about five pages, I think your Honor would have been entitled to reject them on that basis alone, so what we end up with is 17 pages of allegations, some of which won't meet your Honor's criteria for skilling but are pejorative statements.

THE COURT: I got you. I'm going to strike both of them. It's premature. We're not to that point. You're not even finished with discovery yet.

So, in advance of the July conference, I think I would like to hear from you again -- now you're going to have expert discovery -- of whether it makes sense to go to summary judgment or not, and any creative ideas you might have for something that might be in between. I don't know if there's a way do that, but there may be. Maybe you give me what you

think clearly creates a question of fact, and you give me your best evidence that doesn't, and I decide on that.

MR. KRINER: Your Honor, I'd like to say that the parties knew what we were going to be submitting to the Court in the form of these submissions, so there was some kind of notice to the parties. We don't want to make your Honor's life more difficult with having to reject things after they're on the record. That complicates things.

We do hear Mr. Rumeld say that maybe there's an interest of the plan, that having this being opened up, even in part, would harm the plan, so we're certainly cognizant of that, but we'll work with defendants, next time we're going to submit something, and contact your Honor's chambers maybe in advance so we don't have this issue for the Court to deal with.

THE COURT: That's a good idea.

I'm more than happy to give you all the time you want, to try to persuade me that we should or we shouldn't go through summary judgment. I just think it's premature at this point. So we'll we will resolve it that way.

Anything further from the plaintiff?

MR. SCHWARTZ: One other point, and we can deal with this in July too, but my focus is being efficient but finding a way for purposes of trial to be efficient so we can get what your Honor needs on the paper, and then we'll add to that with the witnesses in the appropriate way, but do it in a way so we

can minimize the number of trial days, minimize the amount of burden, and also avoid what I'll call doing the same thing more than once but in a different venue and different style, because that just creates what I'll call work that just disappears downs the memory hole.

So I'd like to add to the agenda: What can we do to minimize and streamline trial so it gets presented efficiently and fairly for everybody? And the good news is, as you can tell, we've worked very well together, and I think we'll continue to do that, to try to both have ourselves be efficient and ease the burden on your Honor.

THE COURT: Perfect.

Anything further from the defense?

MR. RUMELD: Two more small points.

One is: I believe your Honor extended the expert discovery until June 27th. I'm just going to point out: I don't think either party will object to that, but we had actually, I think jointly, asked for June 12th.

THE COURT: You did. I gave you more time.

MR. RUMELD: Okay. I just wanted to make sure that was conscious.

THE COURT: It was.

MR. RUMELD: The second thing is --

THE COURT: Out of hopes that I'm not going to get a request to extend it.

MR. RUMELD: No, I think, for our side, I think that's going to work pretty well.

As to the extension of the fact discovery till the end of March, I think the parties did have an agreement as to what discovery needs to carry over. I wouldn't want the extra month to be an opportunity to expand the discovery further than what we've already agreed to.

THE COURT: Right. I'm extending it for the hanging chads that you've all identified.

MR. SCHWARTZ: Okay. And, as Mr. Rumeld knows, just I believe this week one of the nonparty deponents mentioned there is a file of these handwritten notes of every meeting from the beginning. We haven't decided whether we want to pursue that or not for discovery, but we may we just have to evaluate that. That was new information.

MR. KRINER: It would have been within our original request, your Honor.

THE COURT: Okay.

MR. RUMELD: I wasn't asked, so I haven't said yes yet, but we'll try and work it out.

THE COURT: Anything further from the defendant?

MR. RUMELD: No, thank you, your Honor.

THE COURT: Thank you, all. Have a nice weekend. See you in July.

COUNSEL: Thank you, your Honor. * * *