IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, ANTHONY FUTIA, Jr.

Plaintiffs

v.

STATE OF NEW YORK, ANDREW CUOMO, individually and in his official capacity as Governor of the State of New York; JOHN J. FLANAGAN, individually and in his former capacity as Majority Leader of the New York State Senate; ANDREA-STEWART COUSINS, individually, and in her former capacity as Minority Leader of the New York State Senate; CARL E. HEASTIE, individually and in his official capacity as Speaker of the New York State Assembly; BRIAN KOLB, individually and in his official capacity as Minority Leader of the New York State Assembly; THOMAS DINAPOLI, in his official capacity as Comptroller of New York State,

Defendants

SECOND NOTICE OF MOTION AND MOTION FOR RECONSIDERATION

CASE No. 1:19-CV-56

GTS/TWD

Date: February 28, 2018
Time: 10 AM
Ctrm:

PLEASE TAKE NOTICE that at the above stated date, time and courtroom, located at 445 Broadway, Albany, New York 12207, Plaintiffs will move the Court for a second time, pursuant to L.R. 7.1(g) for reconsideration of the Court's TEXT Order, filed January 28, 2019. This motion is based on the accompanying Memorandum of Law and Affidavit and all prior pleadings.

Dated: February 8, 2018

ROBERT L. SCHULZ, pro se
2458 Ridge Road
Queensbury, NY 12804
Phone: (518) 656-3578

To: LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendants Andrew Cuomo,
Andrea Stewart-Cousins, Carl Heastie,
Brian Kolb, John J. Flanagan and
Thomas DiNapoli
The Capitol
Albany, NY 12224

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

IN ROBERT L. SCHULZ, ANTHONY FUTIA, Jr. Plaintiffs v. STATE OF NEW YORK, ANDREW CUOMO, individually and in his official capacity as Governor of the State of New York; JOHN J. FLANAGAN, individually and in his former capacity as Majority Leader of the New York State Senate; ANDREA-STEWART COUSINS, individually, and in her former capacity as Minority Leader of the New York State Senate; CARL E. HEASTIE, individually and in his official capacity as Speaker of the New York State Assembly; BRIAN KOLB, individually and in his official capacity as Minority Leader of the New York State Assembly; THOMAS DINAPOLI, in his official capacity as Comptroller of New York State, Defendants	CASE No. 1:19-CV-56 GTS/TWD

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION

ROBERT L. SCHULZ, under penalty of perjury, deposes and says:

1. I am a Plaintiff ("Schulz") in the matter captioned above.

2. I submit this Affidavit, pursuant to Local Rule 7.1(g), in support of the Memorandum of Law of even date filed in support of Plaintiff's motion for reconsideration of the Court's TEXT ORDER filed 1/28/19 at Docket No. 10 that denied Plaintiffs' motion for summary judgment filed 1/24/19 at Docket No. 8.

3. To the best of my knowledge and belief, the evidence referred to within the four corners of the Memorandum of Law, including all footnotes in support of each of the Memorandum's arguments, is factual and contained in the record of this case.

Robert L. Schulz, pro se
2458 Ridge Road,
Queensbury, NY 12804

Sworn to before me this
8th day of February, 2019

Notary

VERONICA A. STILLMAN
Notary Public, State of New York
Warren County No. 04ST6376010
Commission Expires June 4, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, ANTHONY FUTIA, Jr. Plaintiffs v. STATE OF NEW YORK, ANDREW CUOMO, individually and in his official capacity as Governor of the State of New York; JOHN J. FLANAGAN, individually and in his former capacity as Majority Leader of the New York State Senate; ANDREA-STEWART COUSINS, individually, and in her former capacity as Minority Leader of the New York State Senate; CARL E. HEASTIE, individually and in his official capacity as Speaker of the New York State Assembly; BRIAN KOLB, individually and in his official capacity as Minority Leader of the New York State Assembly; THOMAS DINAPOLI, in his official capacity as Comptroller of New York State, Defendants	**SECOND MOTION FOR RECONSIDERATION** CASE No. 1:19-CV-56 GTS/TWD

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION

Pursuant to Local Rule 7.1(g), Plaintiff ("Schulz") submits this Memorandum in support of his second motion for reconsideration of the TEXT ORDER filed 1/28/19 at Docket No. 10 that denied Plaintiffs' motion for summary judgment [8].

PRELIMINARY STATEMENT

Plaintiff files this motion due to a continuation of the need to prevent clear error of law and manifest injustice. In denying Plaintiff's motion for reconsideration the Court gave **new and different reasons** for its denial of Plaintiff's motion for summary judgment. In support of their Motion for Summary Judgment, this motion addresses the Court's new reasons

PROCEDURAL HISTORY

On 1/16/19, Plaintiffs filed their Complaint and served the Summonses. [Dkt. No. 1].

On 1/24/19, Plaintiffs filed a pre-answer Motion for Summary Judgment and the Court issued a scheduling order, requiring Defendants' Response by 2/19/19, a Reply by 2/26 and set 3/7/19 for the Motion Hearing. [8].

On 1/28/19 the Court denied [10] the Motion [8] giving three reasons as follows:

1. "The **likelihood** of a meritorious challenge pursuant to Fed. R. Civ. P. 56(d) is significant." (emphasis added).
2. "[T]hat answer **may** be part of the record for purposes of a summary judgment motion." (emphasis added).
3. "[I]n **many** cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been held," citing Rule 56 Advisory Committee Notes and *Frederick v. Capital One*, 2015 WL 5521769 at 2 (S.D.N.Y. 9/17/15).(emphasis added).

On 2/4/19, Schulz filed a Motion for Reconsideration [11] that addressed the three reasons the Court gave for denying Plaintiff's Motion for Summary Judgment. In sum, Schulz argued:

1. It was inappropriate and prejudicial for the Court to forecast the future and deny the current motion for summary judgment on the ground that Defendants would likely succeed on the merits of a 56(d) affidavit if they were to file one. **Defendants have not filed a 56(d) affidavit and have not indicated they would be following that direction.**
2. While it was true that any Answer by Defendants would be part of the record for purposes of a summary judgment motion**, the same would be true of Defendants'**

response to Plaintiffs' pre-answer motion for summary judgment, which response would keep the case on track and prevent manifest injustice.

3. Plaintiff's review of *Frederick* and other cases where a motion for summary judgment was found to be premature had revealed **a fact that distinguishes those cases from the instant case. In each of those cases there was a prior proceeding and evidence in the record of a fact(s) in dispute. Here, there were no prior proceedings or evidence of facts in dispute.**

On 2/5/19, the Court denied [13] Schulz's Motion for Reconsideration [11] on the basis of three new and different reasons, as follows :

4. *Haddock v. Nationwide*, 419 F. Supp.2d 156, 160 n.2 [D. Conn. 2006] in which this Court said "provides authority for the point of law that a Rule 56(d) affidavit is not always required before a Rule 56(d) ruling," and "Plaintiffs have not shown that they have been prejudiced by a denial of their motion without prejudice."
5. "Defendants' Answer **may** narrow the scope of Plaintiffs' contested claims…" (emphasis added).
6. "Plaintiffs' motion for summary judgment **would have been** denied on the merits. Plaintiffs did not **appear** to meet their threshold burden … Paragraphs 6,9,10 and 11 of their Rule 7.1 Statement rely on citations to record evidence that does not **appear** to support all the facts asserted in those paragraphs…Paragraphs 12,13, and 14 of their Rule 7.1 Statement rely on citations to record evidence that is … conclusory, argumentative and/or not based on personal knowledge …Similar defects **appeared** to exist with regard to … Paragraphs 19-21, 27-31, 33, 35-36…." (emphasis added).

ARGUMENT

Re: The Court's Fourth Reason for Denying the Motion

Rule 56 (d) reads in full:

> **(d) When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> **(1)** defer considering the motion or deny it;
> **(2)** allow time to obtain affidavits or declarations or to take discovery; or
> **(3)** issue any other appropriate order.

Rule 56(f) reads in full:

> **(f) Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:
> **(1)** grant summary judgment for a nonmovant;
> **(2)** grant the motion on grounds not raised by a party; or
> **(3)** consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

The full text of *Haddock v. Nationwide*, 419 F. Supp.2d 156, 160 n.2 reads as follows:

> "Although the plaintiffs did not move for a continuance, I would have granted a Rule 56(f) motion. *HN3*[↑] When a party requires **additional discovery** in order to oppose a motion for summary judgment, Rule 56(f) permits the court to deny or to continue the motion *sua sponte*. *See Rustin v. City of Seaside*, 1995 WL 492629, *2 (N.D. Cal. Aug. 10, 1995)."

In its denial of Plaintiff's Motion for Summary Judgment the Court said, "The likelihood of a meritorious challenge pursuant to Fed. R. Civ. P. 56(d) is significant."

Schulz responded, "It was inappropriate and prejudicial for the Court to forecast the future and deny the current motion for summary judgment on the ground that Defendants would likely succeed on the merits of a 56(d) affidavit if they were to file one. **Defendants have not filed a 56(d) affidavit and have not indicated they would be following that direction.**

The Court has replied with a different reason, saying *Haddock v. Nationwide*, 419 F. Supp.2d 156, 160 n.2 [D. Conn. 2006] "provides authority for the point of law that a Rule 56(d) affidavit is not always required before a Rule 56(d) ruling,"

However, said n.2 addressed a potential Rule **56(f)** motion for additional discovery, not a Rule **56(d)** Affidavit.

Just as it is clear error of law for the Court to have denied Plaintiffs' pre-answer Motion for Summary Judgment under Rule 56(d) without having received a 56(d) Affidavit from Defendants, it is clear error of law for the Court to deny Plaintiffs' pre-answer Motion for Summary Judgment under Rule 56(f) without "giving notice and a reasonable time to respond." In fact, after initially giving Defendants notice and time to respond [8], the Court essentially nullified the notice and time to respond by proceeding to deny the Motion for Summary Judgment within days of the notice, without waiting for a response! [10].

In addition, **it is not an option under Rule 56(f) for the Court to deny Plaintiffs' motion for summary judgment after identifying for the parties material facts that "may be" generally in dispute.** This is what the Court has done (see below), which is further evidence of clear error and manifest injustice.

In addition, in *Haddock*, unlike the case at bar, it was the Defendants who requested summary judgment, and they did so after prior proceedings including some discovery that provided the Haddock Court with factual information sufficient to deny Defendants' motion. Haddock reads in part:

> **Procedural Posture**
>
> Plaintiff trustees of retirement plans sued defendants, the plans' investment providers, alleging that providers breached fiduciary duties and engaged in prohibited transactions in violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1101 et seq., by receiving payments under a contractual

> arrangement with mutual funds. **The providers moved for summary judgment.** (emphasis added).
>
> **Overview**
>
> The **trustees contended** that the providers violated ERISA by offering the mutual funds as investment options to the plans in exchange for contractual payments from the mutual funds to the providers based on the percentage of plan assets invested. The **providers asserted** that their contracts with the mutual funds required the providers to perform investment, administrative, and other services in exchange for the payments. **The court held that the trustees sufficiently raised triable issues of fact with regard to their claims.** From the trustees' evidence, a reasonable fact-finder could infer that the contracts between the mutual funds and the providers were merely a guise for payments to the providers for only nominal services. Further, the providers were plan fiduciaries to the extent that they exercised control over the selection and offering of particular mutual funds as investment options and, since the payments were made to the providers in their fiduciary capacities and at the expense of plan participants, the payments could be deemed plan assets. **Thus, a reasonable jury could conclude that the providers violated ERISA by engaging in self-dealing involving plan assets.** (emphasis added).

Thus, *Haddock* is inapposite for a number of reasons: a) there, unlike here, the motion for summary judgment was filed by the Defendants; b) there, unlike here, there had been some discovery **before** Defendants' filed their motion for summary judgment, thereby providing the Court with enough information regarding the parties' dispute and the factual background of the case to enable a properly informed decision on **Defendants'** motion for summary judgment; and c) there, unlike here, the Court gave notice and a reasonable time to respond to the motion.

Here, the Court has denied Plaintiffs' comprehensive, fact-filled 7.1(a)(3) motion for summary judgment without hearing from Defendants, whether through a 7.1(a)(3) response or through some other form of denial of any of Plaintiffs' facts and documentary evidence.

"[T]he court 'shall if practicable' ascertain facts existing without substantial controversy." See Committee Advisory Notes for the 2007 Amendments to Rule 56. Here, the Court would prevent the most productive and lawful approach to ascertaining what facts exist without controversy. It is practicable to determine what material facts are or are not genuinely at issue.

"Motion may be made at any time for summary judgment, and motion is not premature because discovery has not been completed and pretrial narrative statements are not yet due; in event that additional time to secure evidentiary material by way of discovery or otherwise is required, FRCivP 56(f) [current Rule 56(d)] provides for allowance of time to secure these materials." Groover v. Magnavox Co., 71 FRD 638 (W.D. Pa. 1976).

Re: The Court's Fifth Reason for Denying the Motion

In its denial of Plaintiff's pre-answer Motion for Summary Judgment the Court said, "[T]hat answer **may** be part of the record for purposes of a summary judgment motion." (emphasis added).

Schulz responded, "While it was true that any Answer by Defendants would be part of the record for purposes of a summary judgment motion**, the same would be true of Defendants' response to Plaintiffs' pre-answer motion for summary judgment, which response would keep the case on track and prevent manifest injustice**."

The Court has replied with a somewhat different reason, saying "Defendants' Answer **may** narrow the scope of Plaintiffs' contested claims… (emphasis added)."

However, **the same would be true of Defendants' response to Plaintiffs' pre-answer motion for summary judgment, which response would keep the case on track and prevent manifest injustice.**

Plaintiffs' right to due process under 7.1(a)(3) requires: a) a decision based on a more definitive statement than there is "the possibility" that an Answer would narrow the scope of the Complaint; and b) a proper 7.1 response from Defendants.

In addition, if past is prologue, with the Court's denial of Plaintiffs' motion for summary judgment in hand, Defendants will file a motion to dismiss rather than an Answer, with the

expectation that the Court will simply decide the case by applying "the law" not to any facts of the case but to what would be in effect a case freed from the facts.

Re: The Court's Sixth Reason for Denying the Motion

In its denial of Plaintiff's Motion for Summary Judgment the Court said, "[I]n **many** cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been held," citing Rule 56 Advisory Committee Notes and *Frederick v. Capital One*, 2015 WL 5521769 at 2 (S.D.N.Y. 9/17/15). (emphasis added).

Schulz responded, "Plaintiff's review of *Frederick* and other cases where a motion for summary judgment was found to be premature had revealed **a fact that distinguishes those cases from the instant case. In each of those cases there was a prior proceeding and evidence in the record of a fact(s) in dispute. Here, there were no prior proceedings or evidence of facts in dispute."**

The Court has replied with a different reason, saying "Plaintiffs' motion for summary judgment **would have been** denied on the merits. Plaintiffs did not **appear** to meet their threshold burden … Paragraphs 6,9,10 and 11 of their Rule 7.1 Statement rely on citations to record evidence that does not **appear** to support all the facts asserted in those paragraphs…Paragraphs 12,13, and 14 of their Rule 7.1 Statement rely on citations to record evidence that is … conclusory, argumentative and/or not based on personal knowledge …Similar defects **appeared** to exist with regard to … Paragraphs 19-21, 27-31, 33, 35-36…." (emphasis added).

However, Plaintiffs' right to due process under 7.1(a)(3) requires: a) a decision based on a more definitive ruling than "at first glance" less than half the 36 facts in Plaintiffs' Statement are "defective"; b) a point-by-point response to each of the Statements from Defendant's (not) the Court; and c) an opportunity for Plaintiffs to provide a point-by-point Reply.

It's up to Defendants to take issue with those 7.1 Statements with Plaintiffs having the Right of Reply, which Plaintiffs are fully prepared and capable of doing successfully and productively.

Contrary to the Court's out-of-place comments, Defendants would not be able to deny most if not all of the statements numbered above because the evidence in the record is irrefutable. For instance, as Plaintiffs have evidenced in the record, there can be no doubt: a) the language of paragraphs 9-11 agrees with the language of the report of the Committee; b) the Social Studies Framework makes no mention of the State Constitution; c) Schulz served said Petition for Redress on 11/28/18 and there was no response; d) there are dozens of unelected, Acting State Supreme Court Justices that have been appointed by the Governor, including seven in Albany County, and so forth.

Assuming arguendo a few of Plaintiffs' facts are not "material" or otherwise "defective," there are dozens of material facts that are fully supported by evidence in the record and thus not in genuine dispute.

Finally, assuming arguendo that in a few instances Plaintiff has not pointed to specific record materials, Rule 56(c)(1)(B) "recognizes that a party need not always point to specific record materials." See Advisory Committee Notes on 2010 Amendments.

Bias and Prejudice

Plaintiffs have indeed shown that they have been "prejudiced by a denial of their motion without prejudice." Should the Court accept from Defendants an Answer or other pre-trial proceeding such as a Motion to Dismiss, absent a proper and legal 7.1(a)(3) Response to Plaintiffs' 7.1(a)(3) motion for summary judgment, Plaintiffs would be prejudiced in that the Court would then need to decide that pre-trial narrative without a full understanding of the facts

material to the case that are or are not genuinely in dispute. The Court's TEXT ORDER provides clear error in law – i.e., a decision where a fully permissible, pre-answer motion for summary judgment that clearly and professionally satisfied the requirements of Rule 56 (c) and N.D.N.Y. Local Rule 7.1(a)(3) was denied in the absence of any prior proceeding or evidence suggestive of a fact(s) that was in dispute, genuine or otherwise.

That the Court would base its denial of Plaintiffs' motion for summary judgment on so many conjectural hypothetical arguments and situations, rather that require a proper and legal response by Defendants, reflects bias and prejudice against Plaintiffs, which Schulz unwillingly attributes to Justice Suddaby's prior role in the so-called Blue Folder case, *United States v Schulz*, et al., 07-cv-352 (N.D.N.Y., August 2007).

Plaintiff Schulz again petitions for reconsideration because an injustice needs to be cured. Plaintiffs' motion complies with the law and easily satisfies its standard of review. Under the circumstances, the law mandates a Response.

CONCLUSION

Schulz respectfully requests an Order:

a. directing Defendants to file a 7.1(a)(3)-compliant response to Plaintiffs' Motion for Summary Judgment, and

b. staying proceedings other than Defendants' response, and

c. for such other relief for Plaintiffs as to the Court may seem just and proper.

Dated: February 8, 2019

Robert L. Schulz, pro se
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Queensbury, NY 12804
518-361-8153

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, ANTHONY FUTIA, JR.	)	**CERTIFICATE OF SERVICE**
Plaintiffs	)	
v.	)	CASE No. 1:19-cv-56
STATE OF NEW YORK, et al.	)	GTS/TWD
Defendants	)	

CERTIFICATE OF SERVICE

ROBERT L. SCHULZ, declares under penalty of perjury:

1. I am a party to the matter captioned above.

2. On February 11, 2019, at 10:10 a.m. I handed a copy of the annexed Second Notice of Motion and Motion for Reconsideration, Memorandum of Law and Affidavit to CRSTAL GAZELONE at the office of LETITIA JAMES, Attorney General of the State of New York, at the Justice Building in Albany, NY 12224.

ROBERT L. SCHULZ, pro se
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