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JACOBY & MEYERS, LLP, and JACOBY & MEYERS USA II, PLLC, Plaintiffs, -against- THE PRESIDING JUSTICES OF THE FIRST, SECOND, THIRD AND FOURTH DEPARTMENTS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al., Defendants.

11 Civ. 3387 (LAK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

118 F. Supp. 3d 554*; *2015 U.S. Dist. LEXIS 92041

July 15, 2015, Decided
July 15, 2015, Filed

PRIOR HISTORY: *Jacoby & Meyers, LLP v. Presiding Justices of the Appellate Div., 847 F. Supp. 2d 590, 2012 U.S. Dist. LEXIS 30971 (S.D.N.Y., 2012)*

COUNSEL: [**1] For Plaintiffs: Todd S. Garber, D. Greg Blankinship, Jeremiah Frei-Pearson, FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER; David J. Meiselman, MEISELMAN, PACKMAN, NEALON, SCIALABBA & BAKER.

For Defendants: Daniel A. Schulze, Special Litigation Counsel, Michael J. Siudzinski, Assistant Attorney General, ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK.

JUDGES: Lewis A. Kaplan, United States District Judge.

OPINION BY: Lewis A. Kaplan

OPINION

[*560] **MEMORANDUM OPINION**

LEWIS A. KAPLAN, *District Judge*.

This putative class action challenges--on *First* and *Fourteenth Amendment* and dormant *Commerce Clause* grounds--the constitutionality of several New York laws and regulations that, like those of all or most other states, prohibit non-lawyer equity ownership in law firms. The matter, which the Court previously dismissed for lack of standing, is on remand from the Court of Appeals and is before the Court on a motion to dismiss the third amended complaint ("TAC"). The Court concludes that (1) it is constrained by the mandate rule to hold that the plaintiffs have standing and that their dispute is justiciable, but (2) the plaintiffs' constitutional challenges are entirely without merit.

I

New York Rule of Professional Conduct 5.4

Rule 5.4 of the New York Rules of Professional [**2] Conduct[1] ("New York *Rule 5.4*") and comparable provisions in effect across all or most of the country provide in substance that "[l]awyers in the United States are not now permitted to obtain equity investments in their practices from non-lawyers, which precludes them from, among other things, selling stock in their practices to the public."[2] It has its most recent origins in Rule 5.4 of the American Bar Association's Model Rules of Professional Conduct, which was adopted in 1983 and which, among other things, prohibits a lawyer from "practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit if . . . a nonlawyer owns any interest therein."[3] In the intervening years, nearly every state, including New York, has adopted Model Rule 5.4(d) or a variant thereof.[4]

1 *N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0* (*Rule 5.4*).

2 *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep'ts, Appellate Div. of Supreme Court of N.Y., 847 F.*

Supp. 2d 590 (S.D.N.Y. 2012), remanded, 488 F. App'x 526 (2d Cir. Nov. 21, 2012).

3 MODEL RULES OF PROF'L CONDUCT R. 5.4(d).

4 *See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0* (*Rule 5.4*); *see also* AM. BAR ASS'N & BUREAU OF NAT'L AFFAIRS, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 91:402 (2015) ("Most jurisdictions that base their ethics rules on the ABA Model Rules do not deviate appreciably from Rule 5.4(b) and Rule 5.4(d)."); Renee Newman Knake, *Democratizing the Delivery of Legal Services, 73 OHIO ST. L.J. 1, 14 & n.64 (2012)* . [**3]

[*561] *Prior Proceedings*

The Complaint and the Amended Complaint

This action originally was filed on May 18, 2011 by Jacoby & Meyers Law Offices, LLP.[5] At a November 2011 hearing on defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, however, it became clear that there in fact was no such entity.[6] In part to cure that problem, and in part to respond to the Court's concerns about justiciability, the plaintiff moved orally for leave to amend its complaint--a request the Court granted on the record.[7]

5 Compl. [DI 1].

6 Hr'g Tr. (Nov. 3, 2011) [DI 21], at 2:17-3:13.

7 *Id.* at 25:15-25; 27:24-25.

On November 23, 2011, Jacoby & Meyers, LLP ("J&M") and Jacoby & Meyers USA, LLC ("J&M LLC")--a limited liability company formed by J&M, allegedly to receive non-lawyer equity investment and to conduct J&M's practice following a proposed transfer to it of J&M's assets--filed an amended complaint ("AC") which did not vary from the original in any respect that remains material.[8] The AC, like the original complaint, named as defendants the presiding justices of the four appellate divisions of the New York Supreme Court, and sought principally a declaration [**4] that New York *Rule 5.4* violated the *First* and *Fourteenth Amendments* and the dormant *Commerce Clause*.[9]

8 AC [DI 23] ¶ 14.

9 *Id.* ¶ 11.

This Court's Prior Decision

Defendants moved to dismiss the AC, arguing, among other things, that the plaintiffs lacked standing, that their claims were unripe, and, alternatively, that the Court should abstain. At the heart of defendants' motion was an assertion that provisions of New York law independent of New York *Rule 5.4* would preclude plaintiffs from accepting non-lawyer equity investors even if the Rule were deemed unconstitutional. In consequence, defendants argued, plaintiffs lacked standing because "their injury can neither be traced to the Rule, nor remedied by striking it down."[10]

10 Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Am. Compl. [DI 27], at 10.

> Article III standing, which is an essential prerequisite to federal subject matter jurisdiction, has an "irreducible constitutional minimum" of three elements. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. The plaintiff must allege an "injury in fact" that is (1) "concrete," "particularized," and "actual or imminent;" (2) "fairly . . . trace[able] to the challenged action of the defendant;" and (3) "redress[able] by a favorable decision." *Id. at 560-61* (ellipsis and first alteration in original) (internal quotation marks omitted).

At oral argument, the Court advised plaintiffs of its preliminary view that [**5] their failure to challenge any of the other provisions of New York law said by defendants to prohibit plaintiffs from accepting non-lawyer equity investment could result in dismissal for lack of standing.[11] Nevertheless, plaintiffs expressly confirmed that they were challenging only New York *Rule 5.4*, though they did dispute whether the other New York laws relied upon by the defendants applied, arguing that those laws "by necessity . . . would fall" if this Court issued a decision declaring New [*562] York *Rule 5.4* unconstitutional.[12]

11 Hr'g Tr. (Feb. 7, 2012) [DI 36], at 2:2-3:20.

12 *Id.* at 5:4-6:2.

The Court began its analysis by examining state statutes (other than New York *Rule 5.4*) claimed by the defendants to foreclose non-lawyer equity investment in law firms. It held that *Section 495 of the New York Judiciary Law* and *Section 121-1500 of the New York Partnership Law* foreclosed J&M LLC and J&M, respectively, from accepting equity investment from non-lawyers.[13] Accordingly, the Court concluded that plaintiffs had not sufficiently alleged that New York *Rule 5.4* caused their alleged injuries or that a decision invalidating the Rule

would redress any such injury.[14] It therefore dismissed the AC for lack of subject matter jurisdiction.[15]

13 *Jacoby & Meyers, 847 F. Supp. 2d at 597-98*.

> In view of these holdings, it was unnecessary for the Court to consider the effect of other [**6] state law provisions relied upon by the defendants for their theory that plaintiffs lacked standing to challenge the constitutionality of New York *Rule 5.4*.

14 *Id. at 598*.

15 *Id. at 598-99*.

> The Court indicated also that, had it found the relevant state law provisions unclear, it would have abstained under *Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941)*, to permit state court resolution of those issues. *See Jacoby & Meyers, 847 F. Supp. 2d at 599*.

The Appeal

On appeal, plaintiffs asserted that this Court's standing determination was erroneous, arguing in a conclusory fashion, that "[w]here, as here, the plaintiff itself is the subject of the government action (or inaction) at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.'"[16] Plaintiffs' appellate briefs for the most part did not even address the question whether their failure to challenge the constitutionality of state laws distinct from--but with the same practical effect as--New York *Rule 5.4*, deprived them of standing to challenge the Rule for the reasons provided by this Court in its opinion granting defendants' motion to dismiss the AC. The lone exception was a terse statement in plaintiffs' reply brief that assumed--as plaintiffs had argued [**7] unsuccessfully before this Court--that a ruling striking down New York *Rule 5.4* necessarily would invalidate the other relevant state laws and thus would redress their alleged injury.[17]

16 Brief and Special Appendix for Plaintiffs-Appellants at 13, *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep'ts, Appellate Div. of Supreme Court of N.Y., 488 F. App'x 526 (2d Cir. Nov. 21, 2012)* (No. 12-1377-cv), ECF No. 31 (filed May 31, 2012) (second alteration in original) (quoting *Lujan, 504 U.S. at 561-62*).

17 *See* Reply Brief for Plaintiffs-Appellants at 2, *Jacoby & Meyers, 488 F. App'x at 526*, ECF No. 43 (filed July 19, 2012); *see also* DI 21, at 22:8-11; DI 36, at 5:4-6.

> Plaintiffs' assertion is not necessarily correct. The state interests underlying rules of professional conduct for lawyers are not necessarily the same as those underlying each of the statutes that the defendants claim independently forecloses non-lawyer equity investment in law firms. It therefore is theoretically possible that a constitutional challenge might prevail as to New York *Rule 5.4* but fail as to a state statute that had precisely the same effect as the Rule.

At oral argument before the Court of Appeals, plaintiffs confirmed that they "had declined to challenge the other provisions of New York state law out of concern that the district court . . . would [have] abstain[ed] from deciding the case pursuant [*563] to" *Pullman*.[18] But after defendants argued that "alternative provisions of New York law *unambiguously* prohibit non-lawyer investment in law firms," [**8] plaintiffs voiced no objection to a remand "so that [they] could amend [their] complaint to challenge the other provisions of New York law as well."[19] Ultimately, the Court of Appeals vacated this Court's judgment without explicitly discussing standing, remanded the case with instructions to grant plaintiffs leave to amend their complaint, and said:

> "Because the district court and appellees agree that Judiciary Law *§ 495* and LLC Law § 201, as authoritatively interpreted by the state courts, unambiguously prohibit non-lawyer investment in law firms, *Pullman* abstention is unnecessary, and the district court can proceed to adjudicate the parties' dispute as to whether those statutes, and *Rule 5.4*, are constitutional."[20]

18 *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep'ts, Appellate Div. of Supreme Court of N.Y., 488 F. App'x 526, 527 (2d Cir. Nov. 21, 2012)* (amended summary order filed January 9, 2013).
19 *Id.* (emphasis added).
20 *Id. at 527-28.*

Proceedings on Remand -- the Second and Third Amended Complaints

On June 21, 2013, seven months after the Second Circuit's remand, J&M and J&M LLC filed a second amended complaint ("SAC") challenging, in addition to New York *Rule 5.4* and consistent with the Second Circuit's suggestion, more than a dozen state laws that allegedly prohibited non-lawyer equity investment in law firms.[21] Defendants again moved to dismiss. During briefing on that [**9] motion, however, it became clear that J&M--nearly three weeks after defendants filed their motion but 10 days before J&M filed its opposition--had organized a new entity, Jacoby & Meyers USA II PLLC ("J&M PLLC"), presumably on the theory that it (unlike J&M LLC) would not run afoul of Section 201 of the LLC Law or *Section 495* of the Judiciary Law, both of which prohibit limited liability companies from practicing law *regardless of who their investors are*.[22] J&M LLC soon merged with and into J&M PLLC.[23] Thus, one of the two plaintiffs in the case ceased to exist. Moreover, plaintiffs' opposition to defendants' motion to dismiss relied heavily on claims that appeared to be asserted by J&M PLLC, which was not a party to the action. Accordingly, the Court (1) dismissed the action as moot insofar as it was brought on behalf of J&M LLC, (2) denied defendants' motion to dismiss the SAC as to J&M without prejudice to renewal, and (3) permitted the filing of a motion for leave to amend the complaint to add J&M PLLC as a plaintiff.[24]

21 SAC [DI 47].
22 *See* Order (Mar. 2, 2015) [DI 123], at 3.
23 Decl. of D. Greg Blankinship [DI 118], Ex. 1.
24 DI 123, at 4.

Plaintiffs filed the TAC on March 13, 2015. Aside from adding J&M PLLC as a plaintiff, it adds nothing [**10] to the SAC, which itself added little beyond the additions noted above to the AC.[25] The facts [*564] alleged, in substance, have remained the same throughout this litigation.

25 As they did in the SAC, plaintiffs challenge here the constitutionality of New York *Rule 5.4*; Sections 478, 484, 485, 491, and 495 of the New York Judiciary Law; *Section 121-1500(a)(i) of the New York Partnership Law*; and Sections 201, 1201, 1203, 1207(a), 1209, 1210, and 1211 of the New York Limited Liability Company Law. TAC [DI 125] ¶¶ 5, 10.

J&M contends, with debatable justification, that it "has become synonymous with legal services for underserved populations" and that it "has been at the vanguard of overturning obstacles that impede robust competition for lawyers."[26] It goes on at some length, as it did in the AC and in the SAC, about what it characterizes as its "pioneer[ing]" efforts to provide "quality legal services at a reasonable cost to economically challenged individuals who would otherwise have no access to the legal system."[27] To accomplish its purported goals--and, no doubt, to increase its profitability--J&M wants to "expand [its] operations, hire additional attorneys and staff, acquire new technology, and improve [its] physical offices and infrastructure."[28] To do this, J&M says it "requires a substantial infusion of new capital"--capital it admits [**11] is, in some circumstances, available to it in the form of partner contributions, retention of earnings on fees, and commercial bank loans, but which it says is now "too expensive."[29] In light of the alleged unavailability of these traditional means of financing, J&M contends, New York's prohibition on non-lawyer equity investment in law firms has jeopardized J&M's commitment to providing low-cost legal services to the poor.[30]

26 *Id.* ¶ 30.
27 *Id* ¶ 3; *see also* SAC ¶ 3; AC ¶ 4.
28 TAC ¶ 34.
29 *Id.* ¶¶ 39-40; *see also id.* ¶ 43.
30 *See id.* ¶ 3.

But fear not. J&M says it has received "numerous offers . . . from prospective non-lawyer investors . . . who are prepared to invest capital in exchange for owning an interest in the firm."[31] Indeed, there allegedly are "several high net-worth individuals" and institutional investors who "have expressed their commitment to invest significant sums of money" in J&M in exchange for equity in the firm.[32] It is only the ban on non-lawyer equity ownership of law firms, the TAC asserts, that has prevented J&M from entertaining these offers.[33] But for the ban--a ban that J&M contends "unnecessarily restrict[s]" its ability to raise capital by eliminating "critical sources of funding" for lawyers who [**12] practice, or are admitted to practice, in New York--J&M says it already would have "consummated these investments and allowed non-lawyers to own an interest" in J&M, J&M PLLC, or "whatever form is required."[34]

31 *Id.* ¶ 40.
32 *Id.* ¶41.
33 *See id.* ¶ 40.
34 *Id.* ¶¶ 3, 6, 42, 44; Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss [DI 129], at 3.

The Pending Motion to Dismiss

Defendants have moved to dismiss the TAC. They argue, once again, that this case is not justiciable--that plaintiffs lack standing because their alleged prospective injury neither would be caused by the challenged statutes nor redressed by a favorable decision, and that their claims are unripe because "no disciplinary, criminal or other proceeding regarding the Rule and statutes at issue against either plaintiff is imminent."[35] Defendants argue in the alternative that the Court should abstain from deciding this case to give the New York state courts an opportunity to hear, in the first instance, plaintiffs' challenge [*565] to the constitutionality of New York *Rule 5.4* and the other New York laws at issue here.[36] Finally, defendants contend that plaintiffs' *First* and *Fourteenth Amendment* and dormant *Commerce Clause* claims lack merit.[37]

35 Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Third Am. Compl. [DI 128], at 7-15.
36 *Id.* at 15-19.
37 *Id.* at 19-31.

II

A. Preliminary Issues: Justiciability & Abstention

The judicial power of the United States extends only to "cases" and controversies." [**13] [38] This "case-or-controversy limitation on federal judicial authority underpins," among other doctrines, the principles of standing and ripeness,[39] which seek to "preserve the 'the proper--and properly limited--role of the courts in a democratic society.'"[40] No doubt aware of these and other limitations of Article III jurisdiction--and of the Court's corresponding duty to avoid reaching constitutional questions if it can decide a case on other, more limited grounds[41]--the parties argue at length about whether (1) J&M has standing to bring this suit, (2) J&M's claims are ripe for adjudication, and (3) the Court, on grounds of comity, should abstain from deciding this case now.

38 *U.S. CONST. art. III, § 2*.
39 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (citation omitted); *see also Nat'l Park Hospitality Ass'n v. DOI, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)*.
40 *Wight v. Bank of Am., 219 F.3d 79, 86 (2d Cir. 2000)* (quoting *Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)*).
41 *Allstate Ins. Co. v. Serio, 261 F.3d 143, 149-50 (2d Cir. 2001)* ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.").

To be sure, this pre-enforcement facial constitutional challenge presents some interesting--and arguably difficult--questions of justiciability, for the law governing standing and ripeness in such cases is complicated and unsettled.[42] In the ordinary case, of course, the Court would consider those "threshold issue[s]" before reaching the merits of J&M's constitutional challenge. [**14] [43] But this is not an ordinary case.

42 *See, e.g., Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143, 185 L. Ed. 2d 264 (2013)*; *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)*; *Hedges v. Obama, 724 F.3d 170, 195-98, 199-200 (2d Cir. 2013)* (discussing Supreme Court and Second Circuit precedent on standing in the context of a pre-enforcement facial challenge to the constitutionality of a statute and noting that courts will "presume that the government will enforce the law" even, in some cases, where the government argues that the relevant statute does not proscribe the plaintiff's conduct or that it never has enforced the statute), *cert. denied, 134 S. Ct. 1936, 188 L. Ed. 2d 960 (2014)*; *Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 689 (2d Cir. 2013)* ("[W]e assess pre-enforcement *First Amendment* claims . . . under somewhat relaxed standing and ripeness rules."); *Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376, 382 (2d Cir. 2000)*.
43 *Horne v. Flores, 557 U.S. 433, 445, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009)*.

On the prior appeal, J&M confirmed that it deliberately had challenged only the constitutionality of New York *Rule 5.4* in the AC, claiming that it did so in an attempt to avoid any possibility of abstention in favor of state court proceedings. But it then changed its position before the Court of Appeals, agreeing to a remand to permit it to amend the complaint it had declined [*566] to expand below. The Second Circuit saw "no reason not to remand the case . . . in order to permit the plaintiffs to amend their complaint to name additional state defendants and challenge the other provisions of New York law that prohibit non-lawyer investment in law [**15]

firms."[44] In so doing, the Court of Appeals gave this Court very clear instructions. It said that "abstention is unnecessary."[45] And it directed this Court "to adjudicate the parties' dispute as to whether [Judiciary Law *§ 495* and LLC Law § 201], and *Rule 5.4*, are constitutional."[46]

44 *Jacoby & Meyers, 488 F. App'x at 527.*
45 *Id.*
46 *Id.*

The issue concerning Section 201 of the LLC Law now is out of the case by virtue of the merger of J&M LLC with and into J&M PLLC, as there no longer is a limited liability company plaintiff. But implicit in--and necessary to--the Second Circuit's directive was a conclusion that J&M's anticipated TAC would contain allegations that, if proved, would establish J&M's standing to bring constitutional claims against New York *Rule 5.4*, *Section 495* of the Judiciary Law, and the additional state statutes identified by defendants, as well as the ripeness of those claims.[47] Under the "so-called 'mandate rule,'" then, this Court must do what the Second Circuit has asked.[48] It must reach the legal sufficiency of J&M's constitutional challenge.[49]

47 The Court thus frames the matter because this is a motion to dismiss, which assumes the truth of the factual allegations in the TAC and draws all reasonable inferences therefrom in plaintiffs' favor. Assuming that this case were to proceed beyond the Rule 12(b)(6) stage, [**16] it would remain plaintiffs' obligation to prove the facts alleged, which at this stage are assumed to be true and which, if proved, might establish standing. *See, e.g., Comer v. Cisneros, 37 F.3d 775, 790-92 (2d Cir. 1994)*; *Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 551 (S.D.N.Y. 2014)* ("[A] plaintiff ultimately bears the burden of proving, not merely alleging, facts sufficient to satisfy the standing requirements as of the date an action is begun . . . .").
48 *United States v. Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002)* ("The law of the case doctrine . . . requires a trial court to follow an appellate court's previous ruling on an issue in the same case. This is the so-called 'mandate rule.'" (citation omitted)); *see also United States v. Cirami, 563 F.2d 26, 32-33 (2d Cir. 1977)* (noting that "the trial court must adhere to" decisions on "matters" that are "expressly *or implicitly* part of the decision of the court of appeals" (emphasis added)).
49 For the sake of completeness, the Court notes that the mandate of the Court of Appeals applies only to the parties that were before it: J&M and J&M LLC, the latter of which no longer exists. As noted above, however, J&M PLLC subsequently was added as a plaintiff. As its constitutional claims parallel those of J&M, the Court henceforth uses "J&M" to refer collectively to both entities unless otherwise stated. Moreover, the Court considers the Second Circuit to have required [**17] a decision on the legal sufficiency of J&M's constitutional claims without further assessment, at the pleading stage, of standing and/or ripeness.

B. Constitutional Claims

J&M argues that the New York laws it challenges here violate the *First* and *Fourteenth Amendments* and the dormant *Commerce Clause* by prohibiting it, and other firms like it, from practicing law if they accept non-lawyer equity investment. Two points bear mention at this stage.

First, this is a facial, not an as-applied, challenge.[50] Facial challenges are [*567] "disfavored for several reasons," not least of which being that they inevitably require decisions to be made "on the basis of factually barebones records."[51] That perhaps is at least part of the reason that many of the cases J&M cites in support of its *First Amendment* claims address *as-applied* challenges.[52]

50 To the extent J&M attempts to characterize its lawsuit as an as-applied challenge, it simply does not appreciate the distinction between as-applied and facial challenges. This is a quintessential facial challenge.
51 *Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)*; *see also United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)* (describing facial challenges in the *First Amendment* context); *L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999)* (noting that facial overbreadth challenges are "an exception to the traditional rule").
52 *See, e.g., United Transp. Union v. State Bar of Mich., 401 U.S. 576, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971)*; *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967)*; *Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89, 94 Ohio Law Abs. 33 (1964)*.

Second, state statutes regulating the conduct of lawyers [**18] are entitled to a strong presumption of constitutionality, for there is an "important state obligation to regulate persons who are authorized to practice law."[53] Indeed, the Supreme Court repeatedly has reflected on

the "extremely important interest in maintaining and assuring the professional conduct of the attorneys" that are licensed by a particular state, and it has looked favorably upon the "extensive control" that states "traditionally have exercised . . . over the professional conduct of attorneys."[54] A state's interest in regulating lawyers, the Supreme Court has said, is "especially great" because "lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts."[55] For that reason, and because the judiciary and the public depend upon the "professionally ethical conduct of attorneys," courts themselves have "a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice."[56]

53 *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432-33, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982).*

54 *Id. at 434*; *see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460, 467, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)* (noting that the State "bears a special responsibility for maintaining standards among members of the licensed professions" and has a "strong interest in regulating members of the [**19] Bar").

55 *Goldfarb v. Va. State Bar, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)* (internal quotation marks omitted).

56 *Middlesex Cnty. Ethics Comm, 457 U.S. at 434*.

From that starting point, we proceed to plaintiffs' constitutional arguments.

1. First Amendment

Employing at times soaring rhetoric about, among other things, the "right of access to courts" and the "essential essence of legal representation," J&M claims, broadly speaking, that New York *Rule 5.4* and the various other provisions of New York law here at issue unconstitutionally restrict the core *First Amendment* protections of free speech and association.[57] Specifically, J&M says that New York law (1) is "an impermissible ban" on "free speech through corporate expenditure," (2) "infringe[s] on the right of individuals and corporations from forming associations for the purpose of providing legal representation," and (3) restricts lawyers' "right to speak for clients."[58] [*568] Ultimately, J&M's *First Amendment* claim, in effect, is largely this: lawyers and, by extension, law firms have a constitutional right to associate with others, including non-lawyers, for the purpose of providing clients with legal services. By prohibiting such associations, New York law unconstitutionally bans corporate speech and restricts the receipt of that speech by the public at large.

57 *See* TAC ¶¶ 72-80.

58 *Id.* ¶ 75.

To the extent plaintiffs seek [**20] to vindicate the rights of their clients, current and perhaps future, their claims face quintessential third party standing issues. *See, e.g., Warth v. Seldin, 422 U.S. 490, 499-502, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).* Nonetheless, "[v]endors are routinely accorded standing to assert the constitutional rights of customers and prospective customers," 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9.3 (3d ed. 2008), and the Supreme Court has said that those with a "commercial interest" in speech may "challenge the facial validity of a statute on the grounds of its substantial infringement of the *First Amendment* interests of others." *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n.11, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* (plurality opinion) (internal quotation marks omitted); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)* ("If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by [third parties]."). Thus, the Court concludes that J&M and J&M PLLC may assert all of their *First Amendment* claims.

J&M's argument at best is unpersuasive. At worst, it makes a mockery of the *First Amendment*. It lacks logical coherence. At times, it misstates the law, misconstrues Supreme Court precedent, and misunderstands critical distinctions in *First Amendment* jurisprudence. In the end, the theory on which it depends--and on which it bases the proposed transaction--falls outside even the most expansive [**21] reading of the *First Amendment*.

It is true, of course, that "*First Amendment* protection extends to corporations,"[59] that "speech that other-

wise would be within the protection of the *First Amendment*" does not "lose[] that protection simply because its source is a corporation,"[60] and that "restriction[s] on the amount of money a person or group can spend" on certain kinds of speech violate the *First Amendment* by "reduc[ing] the quantity of expression."[61] It is true also that "the right of access to the courts is an aspect of the *First Amendment* right to petition the Government for redress of grievances"[62] and that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the *First Amendment*."[63] Whatever the reach of those principles, however, J&M's argument that lawyers have a constitutional right to associate with non-lawyers in the practice of law is not within it.

> 59 *Citizens United v. FEC, 558 U.S. 310, 342, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)*.
> 60 *First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)*.
> 61 *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 2820, 180 L. Ed. 2d 664 (2011)* (first alteration in original) (internal quotation marks omitted).
> 62 *Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)*.
> 63 *United Transp. Union, 401 U.S. at 585*.

For one thing, this case has nothing to do with speech, despite J&M's best efforts to convince the Court otherwise. The transaction that J&M proposes to undertake--that is, its plan to accept non-lawyer equity investment--is not [*569] speech at all.[64] It is neither an advertisement, paid or unpaid, nor a solicitation of money [**22] or business, in-person or otherwise.[65] Indeed, whereas "commercial [*570] speech serves to inform the public of the availability, nature, and prices of products and services" and to convey "information of import to significant issues of the day,"[66] the proposed transaction here does neither. It therefore is not speech. It is conduct.

> 64 Moreover, even if the proposed activity were construed as speech, laws regulating it would not warrant the level of scrutiny J&M urges the Court to apply. The *First Amendment* does not "offer all speech the same degree of protection." *Garcetti v. Ceballos, 547 U.S. 410, 444, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)* (Breyer, J., dissenting). "Political speech, of course, is at the core of what the *First Amendment* is designed to protect." *Morse v. Frederick, 551 U.S. 393, 403, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007)* (internal quotation marks omitted). The Supreme Court has said that political speech "must prevail against laws that would suppress it, whether by design or inadvertence," and that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United, 558 U.S. at 340, 365*. For this reason, laws that burden political speech "are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id. at 340* (internal quotation marks omitted). [**23]
>
> Like political speech, "commercial speech," or "speech that does no more than propose a commercial transaction, is protected by the *First Amendment*." *United States v. United Foods, Inc., 533 U.S. 405, 409, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)*. But commercial speech is "a sort of second-class expression," *R.A.V. v. City of St. Paul, 505 U.S. 377, 422, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)* (Stevens, J., concurring), that "receives a limited form of *First Amendment* protection." *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 535, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987)* (internal quotation marks omitted); *see also Ohralik, 436 U.S. at 455-56* (noting the "common sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech" and explaining that commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of *First Amendment* values" (internal quotation marks omitted)).
>
> The proposed transaction here is unambiguously commercial--and apolitical--in nature. Were it speech within the meaning of the Constitution, then, the Court would apply something less than strict scrutiny to any law alleged to regulate it. *See, e.g., Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 2667-68, 180 L.*

> *Ed. 2d 544 (2011)* ("Under a commercial speech inquiry, . . . the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." (citation omitted)). Indeed, the subject at issue [**24] here--that is, the professional relationship between lawyers and non-lawyers--is "only marginally affected with *First Amendment* concerns. It falls within the State's proper sphere of economic and professional regulation." *Ohralik, 436 U.S. at 459*. And the "State's interest in protecting the lay public" from the conflicts of interest and other adverse consequences for clients that could arise were non-lawyers permitted to invest in law firms "demonstrate[s] the need for prophylactic regulation" restricting, or even barring, such investment. *Id. at 468*.
>
> Thus, were the Court to read the New York laws challenged here to restrict speech, which it does not, it would uphold them as permissible means by which to advance the state's "especially great" interest in regulating the lawyers operating within its borders. *Goldfarb, 421 U.S. at 792*.

65 The Supreme Court has held that commercial advertisements constitute speech within the meaning of the *First Amendment*. *See, e.g., Citizens United, 558 U.S. at 325* (describing the communication in question as "in essence, . . . a feature-length negative advertisement that urges viewers to vote against [Hillary] Clinton for President"); *Bates v. State Bar of Ariz., 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)* (cloaking a "truthful advertisement concerning the availability and terms of routine legal services" with constitutional protection); *Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)*; *N.Y. Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*. So too has it deemed [**25] the solicitation of money or business "speech" within the meaning of the Constitution. *See, e.g., Ohralik, 436 U.S. at 455* (concluding that "in-person solicitation of professional employment by a lawyer" is "speech" within the meaning of the *First Amendment* but that the state nonetheless may regulate it); *Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)*.

66 *Bates, 433 U.S. at 364*.

a. Freedom of Speech

The *First Amendment* protects, among other things, freedom of "speech." It says nothing about "conduct." To be sure, *First Amendment* "rights are not confined to verbal expression,"[67] and the Supreme Court has extended constitutional protection to some forms of particularly expressive conduct--that is, to conduct that is "sufficiently imbued with elements of communication to fall within the scope of the *First* and *Fourteenth Amendments*."[68] But this so-called "symbolic speech"[69] is where the *First Amendment's* protection of conduct ends. The Supreme Court has "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[70] Indeed, "virtually *every* law restricts conduct and virtually *any* prohibited conduct can be performed for an expressive purpose--if only expressive of the fact that the actor disagrees with the prohibition."[71] Thus, *First Amendment* protection has been extended "only to conduct [**26] that is inherently expressive."[72] That is, it extends only to conduct motivated by "[a]n intent to convey a particularized message"[73] such as: burning the American flag in political protest,[74] wearing black armbands to protest American involvement in the Vietnam War,[75] and conducting a sit-in to protest racial segregation.[76]

67 *Brown v. Louisiana, 383 U.S. 131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966)*.

68 *Spence v. Washington, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974)*.

69 *United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)*.

70 *Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)* (internal quotation marks omitted).

71 *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991)* (Scalia, J., concurring).

72 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)*; *see also Johnson, 491 U.S. at 405-06* (noting the "expressive, overtly political nature" of flag burning).

73 *Johnson, 491 U.S. at 404* (alteration in original) (internal quotation marks omitted).

74 *Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).*

75 *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).*

76 *Brown v. Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).*

The proposed conduct here--and that the laws at issue seek to preclude--is of a different hue. It lacks the "expressive, overtly political nature" of flag burning[77] or the moral *gravitas* of a "peaceable and orderly" sit-in to protest "the unconstitutional segregation of public facilities."[78] [*571] It does not "communicat[e] . . . ideas by conduct," as often was so of draft card burning during the Vietnam War.[79] Nor is it "closely akin to 'pure speech,'" as sometimes is true of the wearing of an armband to evidence solidarity with a movement.[80] Rather, J&M seeks non-lawyer equity investors as a means to commercial end: without a "substantial infusion of new capital," J&M says it will be unable, among [**27] other things, to "expand its operations, hire additional attorneys and staff, acquire new technology, and improve its physical offices and infrastructure."[81] What J&M wants, in other words, is to engage freely with non-lawyers in conventional commercial conduct--conduct that "manifests absolutely no element of protected expression."[82] The New York laws that prevent J&M from accomplishing its commercial goals thus are merely "restriction[s] on a commercial practice."[83] Such laws, directed as they are at "commerce or conduct," fall outside the purview of the *First Amendment* even if they impose "incidental burdens on speech."[84] After all, "every civil and criminal remedy imposes some conceivable burden on *First Amendment* protected activities,"[85] and "it has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[86]

77 *Johnson, 491 U.S. at 406*.

78 *Brown, 383 U.S. at 142*.

79 *O'Brien, 391 U.S. at 376*.

80 *Tinker, 393 U.S. at 505-06*.

81 TAC ¶¶ 34, 39.

82 *Arcara v. Cloud Books, Inc., 478 U.S. 697, 705, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986).*

83 *IMS Health Inc. v. Sorrell, 630 F.3d 263, 271 (2d Cir. 2010), aff'd, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011).*

84 *IMS Health, 131 S. Ct. at 2664*; *see also id.* ("[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct."); *Virginia v. Hicks, 539 U.S. 113, 123, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)* (noting that laws regulating "nonexpressive *conduct*" do not have "anything to do with the [**28] *First Amendment*"); *Arcara, 478 U.S. at 707* (holding that "the *First Amendment* is not implicated by the enforcement of" laws "directed at unlawful conduct having nothing to do with . . . expressive activity").

85 *Arcara, 478 U.S. at 706*.

86 *Forum for Academic & Institutional Rights, 547 U.S. at 62* (internal quotation marks omitted). In the same vein, the fact that J&M may have spoken, in one form or another, of its proposed plans is of no moment. *See id. at 66* ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

Even if the regulated conduct were expressive, the *First Amendment* would not bar the New York laws here at issue. First, the state "generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[87] Second, the laws in question are not "related to the suppression of free expression" in that they are not "*directed* at the communicative nature of [the] conduct."[88] Rather, they are concerned with its "noncommunicative impact"[89]--*i.e.*, with the conflicts of interests and other client-adverse effects that might [*572] occur were law firms permitted to accept non-lawyer equity investors.[90] Third, the laws (1) are "within the constitutional power of the" state; (2) "further[] an important or [**29] substantial government interest;" and (3) have an "incidental restriction on alleged *First Amendment* freedoms" that "is no greater than is essential to the furtherance of that interest."[91] It is well-established that "[t]he States enjoy broad power to regulate the practice of professions within their boundaries"[92] and that states have "an extremely important interest in maintaining and assuring the professional conduct of the attorneys [they] license[]."[93] Finally, it is indisputable that New York's interest in regulating attorney conduct "would be achieved less effectively absent the regulation."[94] Neither J&M's unsubstantiated promise that it "shall ensure that client confidences and lawyers' independence of professional judgment are at all times preserve[d]," nor its sweeping, conclusory statements about the purported benefits of non-lawyer equity investment in British and Australian law firms, among others, counsels differently.[95]

87 *Johnson, 491 U.S. at 406*.

88 *Id. at 403, 406* (internal quotation marks omitted). The state may not "proscribe particular conduct" precisely "because it has expressive elements." *Id. at 406*.

89 *O'Brien, 391 U.S. at 382*.
90 *See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0* cmt. [1] (*Rule 5.4*) (stating that *Rule 5.4* exists "to protect the lawyer's professional independence of judgment").
91 *O'Brien, 391 U.S. at 377*.
92 *In re Primus, 436 U.S. 412, 422, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978)* (internal quotation marks omitted).
93 *Middlesex Cnty. Ethics Comm, 457 U.S. at 434*.
94 *Forum for Academic & Institutional Rights, 547 U.S. at 67* (internal [**30] quotation marks omitted).
95 TAC ¶¶ 41, 49-52.

Ultimately, J&M's challenge to these New York laws on free speech grounds is without merit. To the extent that the contested provisions of New York law incidentally affect expression--if indeed they do at all--J&M's effort to cast itself and other law firms like it as victims of a heavy-handed, outmoded regulatory regime "plainly overstates the expressive nature of their activity and the impact of the [New York laws] on it, while exaggerating the reach of [the Supreme Court's] *First Amendment* precedents."[96]

96 *Forum for Academic & Institutional Rights, 547 U.S. at 70*.

b. Freedom of Association

These New York laws regulate non-expressive commercial conduct and do not violate J&M's freedom of speech, but that conclusion does not end the Court's analysis under the *First Amendment*, the protection of which extends beyond the right to speak to the "right to associate for the purpose of engaging in those activities protected by the *First Amendment*."[97] This right, also called a "right of expressive association,"[98] protects, among other things, "the freedom of individuals to associate for the purpose of engaging in protected speech."[99] Courts safeguard this unenumerated right to associate because the "right to speak is often exercised most effectively by combining [**31] one's voice with the voices of others."[100] Indeed, an "individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless [*573] a correlative freedom to engage in group effort toward those ends were not also guaranteed."[101] Thus, the Supreme Court has "long understood as implicit in the right to engage in activities protected by the *First Amendment* a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[102]

97 *Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)*.
98 *BSA v. Dale, 530 U.S. 640, 644, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000)*.
99 *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987)*.
100 *Forum for Academic & Institutional Rights, 547 U.S. at 68*.
101 *Roberts, 468 U.S. at 622*; *see also Forum for Academic & Institutional Rights, 547 U.S. at 68* ("If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the *First Amendment* is intended to protect.").
102 *Roberts, 468 U.S. at 622*.

> A second and distinct line of Supreme Court decisions granting *First Amendment* protection to "choices to enter into and maintain certain intimate human relationships" does not apply here. *Id. at 617*. Certain characteristics of law firms, namely that they are "neither small nor selective," clearly place such firms and their lawyers' professional relationships with non-lawyers "outside of the category of relationships worthy of this kind of constitutional protection." [**32] *Id. at 620-21*.

Once again, however, J&M's claim faces an insurmountable threshold issue. Just as its proposed professional partnership (here in the colloquial, not legal, sense) with non-lawyer equity investors would be non-expressive commercial conduct outside the scope of the *First Amendment*, so too does J&M--like other law firms--propose to engage primarily in non-expressive commercial association undeserving of constitutional protection.[103]

103 To whatever extent J&M occasionally engages in protected expressive activity, that activity is "incidental" to its "ordinary law practice for commercial ends," which has "never been given special *First Amendment* protection." *Id. at 635, 637* (O'Connor, J., concurring).

J&M admits that the primary purpose of its plan to accept non-lawyer equity investors is to "expand its operations, hire additional attorneys and staff, acquire new

technology, and improve its physical offices and infrastructure to increase its ability to serve its existing clients and to attract and retain new clients and qualified attorneys." Its attempt to highlight the *kinds* of clients it says it has and wants to attract--those from "working-class, blue-collar and immigrant families"--is mere misdirection.[104] The demographic and socioeconomic [**33] characteristics of J&M's clientele are not constitutionally relevant to the question of whether these New York laws abridge law firms' "expressive associational" rights.[105] Ultimately, there is "only minimal constitutional protection" for the sort of "*commercial* association" in which J&M and other law firms regularly engage, and associations "whose activities are not predominantly of the type protected by the *First Amendment* [are] subject to rationally related state regulation."[106]

104 TAC ¶ 34.

105 *Dale, 530 U.S. at 648*.

106 *Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 473 n.16, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997)* (internal quotation marks omitted); *see also Roberts, 468 U.S. at 634* (O'Connor, J., concurring) ("The Constitution does not guarantee a right to choose . . . those with whom one engages in simple commercial transactions, without restraint from the State.").

> To be sure, some lawyering is constitutionally protected expressive activity. As J&M points out *ad nauseam*, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the *First Amendment*." *United Transp. Union, 401 U.S. at 585*; *see also In re Primus, 436 U.S. at 426*.
>
> And yet, there are important differences between this case and those in which the Supreme Court has deemed lawyering sufficiently expressive to warrant *First Amendment* protection. Among them are the identity and motivations of the party seeking that protection. [**34] First, the constitutionally protected parties generally are cause lawyers--not-for-profit associations litigating on behalf of their members, not for-profit firms with paying clients. *See NAACP v. Button, 371 U.S. 415, 429-30, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)* ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment . . . for the members of the Negro community in this country. It is thus a form of political expression."). Second, lawyers engage in expressive association only when they "intend[] to advance beliefs and ideas." *In re Primus, 436 U.S. at 438 n.32* (internal quotation marks omitted). Where a lawyer engages in "associational activity" not "for the advancement of beliefs and ideas," but for "the advancement of his own commercial interests," the *First Amendment* will not protect him. *See id.*
>
> Try as it might, J&M has not convinced this Court that it is more akin to the *NAACP* than to the lawyer in *Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)*, whose profit-seeking motives took his conduct outside the protection of the *First Amendment*. J&M is a commercial law firm, and little--if any--of its business "constitutes protected expression on political, economic, cultural, [or] social affairs," *Roberts, 468 U.S. at 626*, even if it does, as J&M describes it, benefit "people [**35] of modest or average means." TAC ¶ 29. No, J&M's business is the same as any other commercial law firm's: to make money. The *First Amendment* thus provides it no shield from reasonable regulation by the state.

[*574] There is no question that the New York laws challenged here survive rational basis review, which requires courts to uphold legislation "if any reasonably conceivable state of facts could demonstrate that the statute is rationally related to a legitimate government purpose."[107] For one thing, statutes come with a "strong presumption of rationality,"[108] and J&M has not met its burden of alleging facts that, if proved, would

show "that no set of circumstances exists under which the Act would be valid."[109] For another, the New York laws "promote[] the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law" and by, among other things, "attempt[ing] to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests."[110] The state's "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses" is a more-than-adequate justification for the various restrictions on relationships [**36] between lawyers and non-lawyers and for the prohibition on non-lawyer equity ownership in law firms.[111]

107 *Rojas-Reyes v. INS, 235 F.3d 115, 123 (2d Cir. 2000)* (internal quotation marks omitted).
108 *Beatie v. City of N.Y., 123 F.3d 707, 712 (2d Cir. 1997)*.
109 *United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*.
110 *See Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1385 (7th Cir. 1992)*.
111 *Middlesex Cnty. Ethics Comm, 457 U.S. at 434*.

Moreover, even if J&M were engaged in constitutionally protected expressive association, the New York laws it challenges here would not violate the *First Amendment*. Indeed, "the freedom of expressive association, like many freedoms, is not absolute."[112] It may be overriden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive [*575] of associational freedoms."[113] As the Court has discussed, New York passed these laws to serve its "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses,"[114] and the laws in question "do[] not aim at the suppression of speech, do[] not distinguish between prohibited and permitted activity on the basis of viewpoint, and do[] not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."[115] Finally, J&M has not alleged sufficiently that the laws actually "impose[] any serious burdens" on its constitutionally protected [**37] *associational* freedoms, as distinct from, for example, its bottom line or its economic viability.[116] In the last analysis, New York's "especially great" interest in regulating lawyer conduct--an interest that is unrelated to the suppression of expression--justifies any incidental impact that application of these laws may have on J&M's associational freedoms.[117]

112 *Dale, 530 U.S. at 648*.
113 *Roberts, 468 U.S. at 623*; *see also Buckley, 424 U.S. at 25* ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (internal quotation marks omitted)).
114 *Middlesex Cnty. Ethics Comm, 457 U.S. at 434*.
115 *Roberts, 468 U.S. at 623*.
116 *Id. at 626*; *see also Dale, 530 U.S. at 658*.
117 *See Roberts, 468 U.S. at 623-24*.

> The fact that other jurisdictions allegedly have allowed non-lawyers to invest in law firms, and that the ABA allegedly has discussed allowing such arrangements, is of no moment. There is no indication whatsoever that New York could accomplish its goals--regulation of its bar, ensuring the professional conduct and independence of the lawyers it licenses, and preventing conflicts of interest--were it not permitted to prevent lawyers from accepting non-lawyer equity investment in their law practices.

Finally, J&M contends that [**38] Supreme Court precedent "make[s] clear that association for the purpose of providing access to the courts is a fundamental right which cannot be trumped by state regulation of the practice of law." It is true that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the *First Amendment*."[118] But J&M's theory that the Constitution grants *it* the right to associate with non-lawyer equity investors in particular forms of business organizations for the benefit of its clients misunderstands to whom the right of access adheres. The Constitution "protects the right of *individuals*" and legal persons "to appeal to courts and other forums established by the government for resolution of legal disputes."[119] It does not confer protection on lawyers with respect to the nature and forms of the associations and organizations into which they may enter for the purpose of representing their clients. It is, in fact, those clients whose access to the legal system the Constitution protects. And while the constitutionally protected right of access to the courts "would be a hollow promise if courts could deny associations of workers or others the means of enabling their [**39] members to meet the costs of

legal representation,"[120] the [*576] Court's conclusion in this case--that the Constitution does not forbid state laws precluding lawyers from accepting non-lawyer equity investors--has no such effect. J&M has no members. It is not an advocacy organization. It is a law firm with paying clients. Whether or not J&M receives a financial boost from non-lawyer equity investors will have no constitutionally problematic impact on the public's right of access to courts. If anything, of course, laws that forbid lawyers from entering into financial arrangements with non-lawyers *protect* the public "by preventing non-lawyers from controlling how lawyers practice law" and by attempting to "minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests."[121] The *First Amendment* does not bar these laws.

118 *United Transp. Union, 401 U.S. at 585*.
119 *Borough of Duryea v. Guarnieri, 564 U.S. 379, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011)* (emphasis added).
120 *United Transp. Union, 401 U.S. at 585-86*.
121 *Lawline, 956 F.2d at 1385*.

2. Dormant Commerce Clause

J&M argues also that the New York laws prohibiting non-lawyer equity investment in law firms violate the dormant *Commerce Clause* because they (1) "substantially dampen" the flow of "capital, goods, services, lawyers, and employees across state lines," thereby burdening interstate commerce in a way that is "clearly [**40] excessive" relative "to any putative local benefit [the laws] might otherwise advance," and (2) "reach across state lines" to bar non-New York law firms from accepting non-lawyer equity investors in such a way that they "constitute[] extraterritorial regulation."[122] This argument relies on a fundamental misunderstanding of the dormant *Commerce Clause*.

122 TAC ¶¶ 85, 88-89, 92; *see also id.* ¶¶ 81-94.

The Constitution gives Congress "the power to regulate commerce among the States," but "many subjects of potential federal regulation"--owing to their "local character and their number and diversity"--are "open to control by the States so long as they act within the restraints imposed by the *Commerce Clause* itself."[123] These restraints--which, in effect, are "an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce"[124]--constitute the dormant *Commerce Clause*, which is "driven by concern about economic protectionism"--that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[125]

123 *City of Philadelphia v. New Jersey, 437 U.S. 617, 623, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978)* (internal quotation marks omitted).
124 *Ark. Electric Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 389, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983)* (internal quotation marks omitted).
125 *Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)* (internal quotation marks omitted).

The critical question in a dormant *Commerce Clause* challenge is whether the state [**41] law in question "regulates evenhandedly with only incidental effects on interstate commerce"[126] or, instead, "discriminates on its face against interstate commerce."[127] A facially discriminatory [*577] law motivated by "simple economic protectionism" is subject to a "virtually *per se* rule of invalidity"[128] and may survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[129] A state law that "regulates even-handedly to effectuate a legitimate local public interest" and that has only "incidental" effects on interstate commerce, however, "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[130]

126 *Fulton Corp. v. Faulkner, 516 U.S. 325, 331, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996)* (internal quotation marks omitted).
127 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007)*. "In this context, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (internal quotation marks omitted).
128 *City of Philadelphia, 437 U.S. at 624*.
129 *Davis, 553 U.S. at 338* (internal quotation marks omitted).
130 *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*.

> Incidental burdens on interstate commerce, after all, "may be unavoidable when a State legislates to safeguard . . . its people." *City of Philadelphia, 437 U.S. at 623-24*.

This is not a high bar: "State laws frequently survive this . [**42] . . scrutiny."[131] In fact, "[f]or a state statute to run afoul of the *Pike* standard, the statute, at a mini-

mum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce."[132] If the party challenging the law has not alleged facts that, if proved, would show such an "unequal burden," the "reviewing court need not proceed further."[133]

131 *Davis, 553 U.S. at 339* (citing cases).
132 *Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 109 (2d Cir. 2001).*
133 *Id.*

J&M's dormant *Commerce Clause* claim relies on the woefully misguided premise that the laws at issue here are facially discriminatory. But they are not. They provide no special or beneficial treatment to New York lawyers or law firms. They treat in-state and out-of-state interests identically. They do not have a "disparate impact on any non-local commercial entity;"[134] rather, they treat all commercial entities equally, without regard to in-state or out-of-state status. They do not "regulate[] commercial activity that takes place wholly beyond the state's borders;"[135] rather, they apply only to lawyers and law firms practicing in New York. And they do not "impose[] a regulatory requirement inconsistent with those of other states;"[136] rather, as J&M acknowledges, "virtually every jurisdiction in the [**43] United States" bans non-lawyer equity ownership in law firms.[137] Assuming, *arguendo,* that these laws have any effect at all on interstate commerce, that effect is merely incidental.

134 *Town of Southold v. Town of E. Hampton, 477 F.3d 38, 50 (2d Cir. 2007)* (internal quotation marks omitted).
135 *Id.* (internal quotation marks omitted).
136 *Id.* (internal quotation marks omitted).
137 TAC ¶ 21; *see also id.* ¶ 43.

As evenhanded laws that serve New York's "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses"[138] and that have, at most, an incidental effect on interstate commerce, the laws at issue here must be upheld unless the TAC alleges facts that, if proved, would show that the burden those laws impose on interstate [*578] commerce is "clearly excessive" relative to the benefits they have for New York. But the TAC alleges no such facts. Indeed, its factual allegations are insufficient to make out a plausible claim that these laws impose any more than a *de minimis* burden on interstate commerce, if they impose any burden at all. And as the Court explained earlier, New York legislators were entitled to conclude that laws like these yield important benefits for the citizens of that state. They arguably "promote[] the independence of [**44] lawyers by preventing non-lawyers from controlling how lawyers practice law," and by, among other things, "attempt[ing] to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests."[139] Thus, the TAC does not allege sufficiently that these laws violate the dormant *Commerce Clause*.[140]

138 *Middlesex Cnty. Ethics Comm., 457 U.S. at 434*; *see also Ohralik, 436 U.S. at 467* (noting that the State has a "strong interest in regulating members of the Bar").
139 *See Lawline, 956 F.2d at 1385.*
140 The Court's conclusion that the New York laws do not regulate activity that takes place "wholly beyond the state's borders" dispenses with J&M's argument that these laws "constitute[] extraterritorial regulation"--an argument that, assuming without deciding that J&M has standing to raise it, relies on a misunderstanding of the Supreme Court's narrow extraterritoriality doctrine.

> A law "may disproportionately burden interstate commerce if it has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction." *Nat'l Elec. Mfrs. Ass'n, 272 F.3d at 110*; *see also Healy v. Beer Inst., Inc., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)* ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."). These laws have no such effect. They regulate the practice of law in [**45] New York. They have no bearing on the practice of law in any other state.

3. Fourteenth Amendment

J&M's contends finally that the New York laws banning non-lawyer equity investment in law firms violate the *Fourteenth Amendment,* first by "abridg[ing] a fundamental right under Substantive Due Process"[141] and, second, by denying J&M "the equal protection of the laws in violation of the *Equal Protection Clause*."[142] J&M's equal protection argument appears predicated on the idea that the restrictions on outside ownership that apply to lawyers do not apply to other "similarly situated" professionals, such as investment bankers, rendering those restrictions "arbitrary and capricious" and, ulti-

mately, unconstitutional.[143] Both of these arguments are frivolous.

141 TAC ¶¶ 95-100.
142 *Id.* ¶¶ 101-07.
143 *Id.* ¶ 106.

a. Due Process Clause

Neither the TAC nor J&M's briefing is particularly clear about which "fundamental right" (or rights) J&M believes these New York laws "abridge." As best the Court can tell, though, it is the right to free speech, the right of access to the courts, or both.[144] For reasons already discussed herein, however, these laws have nothing to do with speech, and the right of access to the courts inheres in individuals and entities seeking relief or defending themselves as litigants, not in law [**46] firms like J&M in their capacities as legal [*579] representatives.[145] But there are other problems with J&M's argument, as we will see momentarily.

144 To whatever extent J&M argues that it has a fundamental right to practice law, the Supreme Court foreclosed that argument long ago. *See Leis v. Flynt, 439 U.S. 438, 444 n.5, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979)* ("[T]he suggestion that the Constitution assures the right of a lawyer to practice in the court of every State is a novel one, not supported by any authority brought to our attention.").
145 *Guarnieri, 131 S. Ct. at 2494* (noting that the *First Amendment* "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes").

The *Due Process Clause of the Fourteenth Amendment*, in addition to its guarantees of fair process, "provides heightened protection against government interference with certain fundamental rights and liberty interests."[146] But this concept of substantive due process is limited, and "the *Due Process Clause* specially protects" only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[147] Moreover, "if a constitutional claim is covered by a specific constitutional provision, . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of [**47] substantive due process."[148] Finally, a regulation that infringes on a fundamental right will be struck down as a violation of substantive due process under the *Fourteenth Amendment* unless the regulation is "narrowly tailored to serve a compelling state interest,"[149] but "[l]egislative acts that do not interfere with fundamental rights . . . carry with them a strong presumption of constitutionality and must be upheld if rationally related to a legitimate state interest."[150]

146 *Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).*
147 *Id. at 720-21* (quoting *Moore v. City of E. Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)).*
148 *United States v. Lanier, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).*

For this reason, it is only unenumerated rights whose infringement comes within the ambit of substantive due process. Such rights include, among others, the right to marry, *Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*, the right to marry a person of the same sex, *Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609, 2015 WL 2473451 (U.S. 2015)*, the right to have children, *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)*, the right to use contraception, *Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)*, the right to have an abortion, *Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*, and the right to refuse unwanted lifesaving medical treatment, *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)*.

149 *Reno v. Flores, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).*
150 *Beatie, 123 F.3d at 711* (internal quotation marks omitted).

The right to free speech, of course, is covered by the *First Amendment*. The Court already has analyzed J&M's free speech claim in that context and will not do so again under the substantive due process framework. As there is no legally sufficient free speech claim, there is no speech-related substantive due process claim.

The right of access [**48] to the courts, in some contexts, is a fundamental right for substantive due process purposes.[151] In others, however, the Supreme Court has grounded the right of access to courts in the *Privileges and Immunities Clause*.[152] [*580] In still others, as here, it is "an aspect of the *First Amendment* right to petition the Government for redress of grievances."[153] In all contexts, however, "the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court."[154] J&M has no legally sufficient right of access claim and therefore has not alleged a sufficient substantive due process claim of infringement of its right of access to the courts.

151 *See, e.g., Tennessee v. Lane, 541 U.S. 509, 523, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)*; *Wolff v. McDonnell, 418 U.S. 539, 556, 579, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)*; *Morello v. James, 810 F.2d 344, 346-47 (2d Cir. 1987)*; *see also United Transp. Union, 401 U.S. at 585* ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the *First Amendment*.").

152 *See, e.g., Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 151, 28 S. Ct. 34, 52 L. Ed. 143, 6 Ohio L. Rep. 498 (1907)*; *Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1872)*.

153 *Bill Johnson's Rests., 461 U.S. at 741 (1983)*; *see also Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

154 *Christopher v. Harbury, 536 U.S. 403, 415, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*.

Finally, the Court must uphold these laws, which "do not interfere with fundamental rights," if they are "rationally related to a legitimate state interest."[155] For reasons already discussed in its analysis of J&M's *First Amendment* claims, the Court concludes that they are.[156]

155 *Beatie, 123 F.3d at 711* (internal quotation marks omitted).

156 That other jurisdictions have chosen to do away with restrictions on non-lawyer equity ownership in law firms [**49] is irrelevant to the Court's analysis on this issue, which considers only whether there is *some* rational basis for these New York laws. Indeed, the laws need not be the only--or even the best--means of accomplishing New York's legitimate regulatory objectives. *See Dandridge v. Williams, 397 U.S. 471, 487, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)* (noting that courts need not decide, in conducting a rational basis inquiry, whether the legislation is "wise" or that "it best fulfills the relevant social and economic objectives that [the state] might ideally espouse"); *Beatie, 123 F.3d at 712* ("We will not strike down a law as irrational simply . . . because the problem could have been better addressed in some other way . . . .").

b. Equal Protection Clause

J&M's final argument is that New York law draws an "arbitrary" distinction between lawyers and investment bankers who, despite their many alleged similarities, are "treated completely differently under the law." According to J&M, New York prohibits lawyers from accepting non-lawyer equity investment but allows public ownership of investment banks.

The *Equal Protection Clause of the Fourteenth Amendment* "is essentially a direction that all persons similarly situated should be treated alike."[157] However, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were [**50] the same."[158] Thus, where similarly situated parties are treated differently, the "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[159]

157 *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*.

158 *Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)* (alteration in original) (internal quotation marks omitted).

159 *City of Cleburne, 473 U.S. at 440*.

> To be sure, classifications based on race, gender, national origin, and certain other traits "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.* As a result, laws that make distinctions based on these kinds of "suspect classification[s]" are "subjected to a higher level of scrutiny"--one that is greater than rational basis review. *Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983)*. But there is no suggestion here that lawyers are a suspect class. Indeed, they very clearly are not. Lawyers are not "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973)*.

[*581] Whether lawyers and investment bankers are similarly situated in the first place is a "fact-intensive [**51] inquiry" that the Court need not make in any depth here, for it matters not to the outcome of this claim.[160] Whatever similarities may exist in their day-to-day work, lawyers and investment bankers do not play the same role in the American judicial system or in the administration of justice in this country. As the Supreme Court has recognized, "lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts."[161] No other profession--not even investment banking--fills such a role. The judiciary and the public depend upon the "ethical conduct of attorneys," and these New York laws preventing non-lawyers from investing in law practices are rationally related to New York's legitimate--indeed its "extremely important"--"interest in maintaining and assuring the professional conduct of the attorneys it licenses."[162]

160 *Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006)* (Sotomayor, J.).

161 *Goldfarb, 421 U.S. at 792* (internal quotation marks omitted).

162 *Middlesex Cnty. Ethics Comm, 457 U.S. at 434*.

III

For the foregoing reasons, defendants' motion to dismiss the third amended complaint [DI 127] is granted. The Clerk shall enter judgment and close the case.

SO ORDERED.

Dated: July 15, 2015

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appelate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554, 2015 U.S. Dist. LEXIS 92041 (S.D.N.Y. 2015)

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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary
No subsequent appellate history. Prior history available.
Citing References:
Other Sources: Law Reviews (1)

PRIOR HISTORY (2 citing references)

1. *Jacoby & Meyers, LLP v. Presiding Justices of the Appellate Div.*, 847 F. Supp. 2d 590, 2012 U.S. Dist. LEXIS 30971 (S.D.N.Y. 2012)

2. **Remanded by:**
Jacoby & Meyers, LLP v. Presiding Justices of the Appellate Div., 488 Fed. Appx. 526, 2012 U.S. App. LEXIS 24012 (2d Cir. N.Y. 2012)

On remand at (CITATION YOU ENTERED):
Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appelate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554, 2015 U.S. Dist. LEXIS 92041 (S.D.N.Y. 2015)

LAW REVIEWS AND PERIODICALS (1 Citing Reference)

3. *COMMENT: Limited License Legal Technicians: Non-lawyers Get Access to the Legal Profession, But Clients Won't Get Access to Justice*, 40 Seattle U. L. Rev. 217 (2016)

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DENTONS US LLP, Plaintiff, v. THE REPUBLIC OF GUINEA, et al., Defendants; THE REPUBLIC OF GUINEA, et al., Counterclaims and Third-Party Plaintiffs, v. DENTONS US LLP, et al., Counterclaims and Third-Party Defendants.

Civil Action No. 14-1312 (RDM)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2016 U.S. Dist. LEXIS 130866

September 25, 2016, Decided

PRIOR HISTORY: *Dentons US LLP v. Republic of Guinea, 134 F. Supp. 3d 5, 2015 U.S. Dist. LEXIS 126661 (D.D.C., 2015)*

COUNSEL: [*1] For DENTONS US LLP, A Delaware limited liability partnership formerly known as SNR DENTON US LLP, Plaintiff: Ana C. Reyes, Michael Shobe Sundermeyer, LEAD ATTORNEYS, WILLIAMS & CONNOLLY LLP, Washington, DC; Leslie Cooper Vigen, SCOTT DOUGLASS & MCCONNICO, LLP, Austin, TX.

For REPUBLIC OF GUINEA, A Foreign State, MINISTRY OF MINES AND GEOLOGY, The Republic of Guinea, Defendants: David Harold Dickieson, David Schertler, LEAD ATTORNEYS, Danny C. Onorato, Lisa Manning, SCHERTLER & ONORATO, LLP, Washington, DC.

For MINISTRY OF MINES AND GEOLOGY, The Republic of Guinea, ThirdParty Plaintiff: David Harold Dickieson, David Schertler, LEAD ATTORNEYS, Danny C. Onorato, SCHERTLER & ONORATO, LLP, Washington, DC.

For DENTONS EUROPE, LLP, SALANS FMC SNR DENTON GROUP, DENTONS UKMEA LLP, Third Party Defendants: Michael Shobe Sundermeyer, LEAD ATTORNEY, Ana C. Reyes, WILLIAMS & CONNOLLY LLP, Washington, DC; Leslie Cooper Vigen, SCOTT DOUGLASS & MCCONNICO, LLP, Austin, TX.

For MINISTRY OF MINES AND GEOLOGY, The Republic of Guinea, Counter Claimant: David Harold Dickieson, David Schertler, LEAD ATTORNEYS, Danny C. Onorato, SCHERTLER & ONORATO, LLP, Washington, DC.

For DENTONS US LLP, A Delaware limited liability [*2] partnership, Counter Defendant: Ana C. Reyes, Michael Shobe Sundermeyer, LEAD ATTORNEYS, WILLIAMS & CONNOLLY LLP, Washington, DC; Leslie Cooper Vigen, SCOTT DOUGLASS & MCCONNICO, LLP, Austin, TX.

JUDGES: RANDOLPH D. MOSS, United States District Judge.

OPINION BY: RANDOLPH D. MOSS

OPINION

MEMORANDUM OPINION AND ORDER

In August 2014, Dentons US LLP ("Dentons US") filed a complaint against the Republic of Guinea and its Ministry of Mines and Geology (collectively, "Guinea"), alleging claims for breach of contract, quantum meruit, unjust enrichment, and account stated. *See* Dkt. 1 ("Compl."). Dentons US alleges, in particular, that Guinea has not paid more than $10 million in legal fees for work performed by Dentons US and its British and French affiliates on behalf of Guinea on a large natural resources development project. Compl. ¶¶ 3-6, 59. Guinea answered that complaint and counterclaimed, asserting its own breach of contract claim, as well as claims for breach of fiduciary duty, fraudulent induce-

ment, and injunctive relief. Dkt. 25 ("Countercl."). Guinea also asserted those same claims against three third-party defendants: Salans FMC SNR Denton Group (a Swiss Verein) ("the Dentons Verein"), Dentons Europe LLP ("Dentons [*3] Europe"), and Dentons UKMEA LLP ("Dentons UKMEA") (collectively, "Third-Party Defendants"). Countercl. ¶¶ 2, 8-14.

Dentons US now moves, pursuant to *Rule 12(b)(6)*, to dismiss Counts III (fraudulent inducement) and IV (injunctive relief) for failure to state a claim upon which relief may be granted, and, pursuant to *Rule 12(f)*, to strike Guinea's allegations relating to the Ebola crisis as "[i]rrelevant and [p]rejudicial." Dkt. 39 at 8, 14-23. The Third-Party Defendants, in turn, move to dismiss all of the claims asserted against them on multiple grounds. Dkt. 40. The Dentons Verein argues that because Guinea's claims against it stem from the incorrect "notion that [the Dentons Verein] engages in the practice of law," those claims must fail. *Id.* at 7. Dentons Europe and Dentons UKMEA, in turn, argue that the contract governing their relationships with Guinea "unambiguously provide[s] for exclusive jurisdiction in foreign courts" in accordance with the contract's "forum-selection clauses." *Id.* All three Third-Party Defendants, moreover, contend that Counts I (breach of contract), III, and IV each fail to allege one or more essential elements and thus fail to state a claim. *Id.*

For the reasons explained below, the Court will grant Dentons US's motion [*4] to dismiss Count III; grant, in part, its motion to dismiss Count IV; and deny its motion to strike. The Court will also grant the Third-Party Defendants' motion to dismiss all Counts against Dentons Europe and Dentons UKMEA, and will grant their motion to dismiss Counts II and III, and, in part, Count IV as asserted against the Dentons Verein, but will deny their motion to dismiss Counts I and, in part, Count IV, as asserted against the Dentons Verein.

I. BACKGROUND

For purposes of the pending motions to dismiss, the following facts, which are taken from Guinea's counterclaims and third-party complaint and from documents incorporated by reference, are taken as true. *See Am. Nat'l Ins. Co. v. FDIC, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011)*; *see also Nichols v. Vilsack, No. 13-01502, 2015 U.S. Dist. LEXIS 173138, 2015 WL 9581799, at *1 (D.D.C. Dec. 30, 2015)* (explaining that in "adjudicating a motion to dismiss for failure to state a claim, a court may consider, along with the facts alleged in the complaint, 'any documents either attached to or incorporated in the complaint and matters' subject to 'judicial notice'") (quoting *EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997))*. Most notably, this includes the relevant retainer agreements, which are expressly referenced in Guinea's counterclaims and third-party complaint, and upon which all of the parties rely in their respective briefs. To the extent the plain [*5] terms of those agreements contradict the factual allegations of Guinea's counterclaims and third-party complaint, moreover, the Court need not accept the conflicting allegations. *See Kaempe v. Myers, 367 F.3d 958, 963, 361 U.S. App. D.C. 335 (D.C. Cir. 2004)*.

In an effort to develop natural resources discovered in the Simandou region of Guinea, the Republic of Guinea and its Ministry of Mines and Geology initiated the "Simandou Project" with the sponsorship of several investors and the World Bank. Countercl. ¶15. Guinea "sought legal counsel" for the project and, at the request of its sponsors, targeted "counsel experienced in the development of sovereign resources" who could "advise the government" on the "infrastructure necessary to develop the nationally-owned mineral resources" found at the site. Countercl. ¶¶ 15-16. Guinea retained "SNR Denton" as counsel to work on the Simandou Project, Countercl. ¶ 17, and, on August 25, 2012, Mohamed Lamine Fofana, Guinea's Minister of Mines and Geology, formalized the representation agreement, stating that "SNR Denton US LLP['s]" "appointment as Ministry's Counsel . . . [was] considered to have begun on May 2, 2012" and would "continue . . . until September 30, 2012," Dkt. 1-4 at 33 (Compl. Ex. 4).

On December 24, [*6] 2012, the parties executed an agreement to cover the three months that had passed since September 30, 2012, and to extend the representation into the future. Dkt. 1-4 at 1 (Compl. Ex. 4); Countercl. ¶ 40. The new agreement (the "Retainer Agreement") was divided into two parts: the "Engagement [L]etter," which set out the specific terms of the retention, Dkt. 1-4 at 1-6 (Compl. Ex. 4), and the "Terms of Business," which "contain[ed] the general terms and conditions applicable" to the Firm's "international working groups," *id.* at 3, 8-32.

A. The Retainer Agreement

1. *The Parties*

Dentons US, the Third-Party Defendants, and Guinea dispute which Dentons entities were parties to the Retainer Agreement. According to Dentons US and the Third-Party Defendants, only Dentons US was a party to the agreement. *See* Dkt. 39 at 9; Dkt. 40 at 19-22. In contrast, Guinea alleges that Dentons US and each of the Third-Party Defendants--and perhaps other Dentons entities--were parties to the agreement. *See* Countercl. ¶¶ 3-5. The following facts, however, are not disputed.

First, the Engagement Letter was signed by Jonathan D. Cahn, a partner in Dentons US's Washington, D.C. office. Dkt. 1-4 at 5, 33, 37 (Compl. Ex. 4); Dkt. 39 at 9. He does not, [*7] however, identify his affiliation in the Engagement Letter, which was printed on "SNR DENTON" letterhead. Dkt. 1-4 at 1, 5 (Compl. Ex. 4). Second, the Engagement Letter asserts that Guinea is engaging "the firm SNR Denton US LLP and its affiliates," which it then refers to collectively as "the Firm." *Id.* at 1. Third, the Engagement Letter states that the Terms of Business would apply to the engagement and explains that the Terms of Business apply "to all our international working groups." *Id.* at 3. Fourth, the Terms of Business, which is on "SNR Denton" letterhead similar to that used for the Engagement Letter, in turn, asserts that "SNR Denton is the collective trade name for an international legal practice including SNR Denton Group (a Swiss Verein), SNR Denton UK LLP, SNR Denton US LLP and their affiliated undertakings, each of which is a separate and distinct legal entity." *Id.* at 8. Fifth, under a section captioned "Contracting Parties," the Terms of Business states that "[w]e may appoint other Practices"--that is, other "distinct legal entit[ies] . . . that are Member[s] of" the Dentons Verein--"to assist with your matter" as either a subcontractor or agent. *Id.* at 9. Finally, the Terms of Business includes additional location-specific [*8] contract provisions for Dentons US, *id.* at 29-30, Dentons UKMEA, *id.* at 27-29, and Dentons Europe, *id.* at 17-18, but not for the Dentons Verein, and, aside from the Engagement Letter's outline of the hourly rates of employees at various offices, the Third-Party Defendants are not otherwise mentioned in the Retainer Agreement, *see, e.g.*, *id.* at 1-6.

2. *Compensation*

The Retainer Agreement also addresses the terms of the Firm's compensation in some detail. In particular, the Engagement Letter states that, although the "Firm[']s" "costs and fees" are typically "due upon receipt of [its] invoice," the Firm understood that Guinea did not "currently have the necessary funds to pay for the costs and fees of the representation." Dkt. 1-4 at 4, 10 (Compl. Ex. 4); Countercl. ¶ 18. "[W]ell aware of [Guinea's] urgent needs," the "Firm" agreed to "defer collection of fees and expenses . . . until the appropriate financing [was] in place," so long as Guinea "implement[ed] in good faith all efforts necessary to secure funding for [the Firm's] representation, either through [Guinea's] budget or through external funding." Dkt. 1-4 at 4 (Compl. Ex. 4); Countercl. ¶¶ 18-19. The Engagement Letter further "authorizes the Firm to seek, with third parties, various options [*9] for the financing of its representation, and to present th[o]se options in the form of a written proposal to [Guinea] for its consideration." Dkt. 1-4 at 4 (Compl. Ex. 4). Although the Engagement Letter explains that any amounts collected from those third-parties would be deducted from "the amounts due by [Guinea]," *id.* at 5, the Terms of Business states that even "[w]here [Guinea] expect[s] a third party to reimburse" it for the Firm fees, the Firm remains "entitled to recover payment in full from [Guinea]" whether or not the external funding source pays "on time or at all," *id.* at 10.

3. *Dispute Resolution*

The Retainer Agreement also includes terms that discuss how disputes between the parties were to be handled. Countercl. ¶¶ 66-73. In the Engagement Letter, the Firm states that, should Guinea "have any concern about any aspect of [the Firm's] services, including [its] invoices," it should contact one of three designated employees--two in the Washington, D.C. office of Dentons US and one in the London office of Dentons UKMEA--who were "committed to resolving any issue" raised. Dkt. 1-4 at 5 (Compl. Ex. 4). To this, the Engagement Letter adds that the Firm has "a formal complaints procedure . . . available upon request." [*10] *Id.* The Terms of Business echoes this statement, noting that should Guinea become "dissatisfied with any aspect of [the Firm's] services, including the invoice," it should "contact the Partner with overall responsibility" for Guinea's project and that the Firm has a "complaints policy." *Id.* at 13.

Should a conflict between the parties escalate, the Terms of Business specifies particular "dispute resolution mechanisms" for "each Practice" in its location-specific sections. *Id.* at 13. For disputes relating to Dentons Europe, for example, the Terms of Business states that "French law governs all the agreements and arrangements" made between the parties and that, if "any claim, dispute, or difference of any kind whatsoever arises," the parties "agree to submit to the exclusive jurisdiction of the French courts." *Id.* at 18. The Terms of Business goes on to explain that "[a]ny disputes relating to the amount and payment of [Dentons Europe's] fees shall be submitted to arbitration by the Bâtonnier of the Paris Bar Association." *Id.* Similarly, the Terms of Business states that disputes relating to Dentons UKMEA are "govern[ed]" by "English law" and that the parties agree to "submit to the exclusive jurisdiction of the English courts," [*11] save for instances in which Dentons UKMEA, "at [its] sole option," chooses to "refer the . . . dispute . . . to arbitration in London." *Id.* at 29. In contrast, the Terms of Business does not include forum selection (or arbitration) clauses for claims involving Dentons US's Washington, D.C. office or the Dentons Verein. *See id.* at 14-32.

B. Representation

The parties executed the Retainer Agreement in December of 2012. Countercl. ¶ 40. Pursuant to the agreement, Guinea "retain[ed] . . . attorneys" in the "Washington[, D.C.], London, and Paris offices" of various Dentons entities. Countercl. ¶ 17. Although disputed, Guinea alleges that it "advanced every good faith effort available to it" to "secure funding for [the Firm's work on] the Simandou Project," but those efforts proved unsuccessful. Countercl. ¶ 28. Guinea further alleges that, although it "authorized" the Firm to "communicate directly" with project sponsors like "Rio Tinto" and with the "World Bank," the Firm "failed to secure payment." Countercl. ¶¶ 20-21, 32-33. The parties agree, moreover, that Guinea made a $2 million payment to Dentons US. According to Dentons US, Guinea made the payment in partial fulfillment of its obligations under the Retainer Agreement. [*12] Compl. ¶¶ 42-43. According to Guinea, in contrast, the payment was provided as "a good faith" "advance" in order to provide the Firm "time to arrange third party funding," Countercl. ¶23, but Guinea anticipated that Dentons US would reimburse this amount to it after the Firm obtained third-party funding, Countercl. ¶ 24. Ultimately, the Firm "withdrew as counsel" and Guinea "was forced to retain new counsel" at substantial expense to "complete[ ] the work" on the Simandou Project. Countercl. ¶¶ 33-37.

C. Procedural History

Dentons US filed suit in this Court in 2014, "seek[ing] to recover the value" of unpaid "legal fees and costs" stemming from the Firm's representation of Guinea and its work on the Simandou Project from May 2012 to June 2013. *See generally* Compl. ¶¶ 2-7, 19-59. Guinea moved to dismiss Dentons US's complaint on sovereign immunity and *forum non conveniens* grounds and because the Retainer Agreement purportedly "waived any possible right" for Dentons US to bring its "claim for fees in a U.S. Court." *See* Dkt. 15 at 1-2. The Court denied Guinea's motion on all grounds. *See* Dkt. 21. Guinea then answered Dentons US's complaint, counterclaimed with four of its own causes of action, [*13] and filed a third-party complaint against the Dentons Verein, Dentons Europe, and Dentons UKMEA, alleging the same four causes of action. *See* Dkt. 25.

II. LEGAL STANDARD

A motion to dismiss brought under *Federal Rule of Civil Procedure 12(b)(6)* is designed to "test[] the legal sufficiency of a complaint." *Browning v. Clinton, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002)*. In evaluating such a motion, the Court "must first 'tak[e] note of the elements a plaintiff must plead to state [the] claim' to relief, and then determine whether the plaintiff has pleaded those elements with adequate factual support to 'state a claim to relief that is plausible on its face.'" *Blue v. District of Columbia, 811 F.3d 14, 20 (D.C. Cir. 2015)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 675, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))* (alterations in original) (internal citation omitted). Although "detailed factual allegations" are not necessary to withstand a *Rule 12(b)(6)* motion, *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, "a complaint must contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face,'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). A plaintiff may survive a *Rule 12(b)(6)* motion even if "recovery is very remote and unlikely," but the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555-56* (quotation marks omitted).

In those cases in which the Court concludes that the complaint--or a particular count in the complaint--fails to state a claim, [*14] it must then determine whether the complaint--or count-- should be dismissed with or without prejudice. Given the preference voiced in the Federal Rules of Civil Procedure for resolving disputes on their merits, "[d]ismissal with prejudice is the exception, not the rule, in federal practice." *Rudder v. Williams, 666 F.3d 790, 794, 399 U.S. App. D.C. 45 (D.C. Cir. 2012)*. "Accordingly, the 'standard for dismissing a complaint with prejudice is high: dismissal *with prejudice* is warranted only when . . . the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *Id.* (quoting *Belizan v. Hershon, 434 F.3d 579, 583, 369 U.S. App. D.C. 160 (D.C. Cir. 2006))* (alterations in original).

Finally, under *Federal Rule of Civil Procedure 12(f)*, the Court "may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." The "decision to grant or deny a motion to strike is vested in the trial judge's sound discretion," *Aftergood v. CIA, 355 F. Supp. 2d 557, 564 (D.D.C. 2005)*, but motions to strike "are not favored . . . and should usually be denied 'unless it is clear that the allegations in question can have no possible bearing on the subject matter of the litigation,'" *Cobell v. Norton, 224 F.R.D. 1, 2 (D.D.C. 2004)* (quoting *Ulla-Maija, Inc. v. Kivimaki, 2003 U.S. Dist. LEXIS 977, 2003 WL 169777, at *4 (S.D.N.Y. Jan. 23, 2003))*; *see also Aftergood, 355 F. Supp. 2d at 565* (noting that "absent a 'strong reason for so doing,' courts will generally 'not tamper with pleadings'" (quoting *Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976))*. Although federal courts retain the discretion to strike immaterial [*15] allegations even in the absence of prejudice to the moving party, in practice, "many courts will grant such a motion only if the portions sought to be stricken as immaterial are also prejudicial or scandalous." *Uzlyan v. Solis, 706 F. Supp. 2d*

44, 52 (D.D.C. 2010) (quotation marks omitted). But, if the challenged allegations are both "irrelevant and prejudicial to the defendant, a motion to strike will be granted." *Wiggins v. Philip Morris, Inc. 853 F. Supp. 457, 457 (D.D. C. 1994)*.

III. ANALYSIS

A. Fraud in the Inducement

To state a claim for fraudulent inducement, the complaint must allege that the defendant (1) made a false representation, (2) regarding a material fact, (3) with knowledge of the falsity of that representation, (4) and an intent to deceive, and that (5) the plaintiff acted in reliance on that false representation. *See McWilliams Ballard, Inc. v. Level 2 Dev., 697 F. Supp.2d 101, 108 (D.D.C. 2010)* (citing *In re McKenney, 953 A.2d 336, 342 (D.C. 2008))*. Moreover, "[a]t least in cases involving commercial contracts negotiated at arm's length, there is the further requirement (6) that the defrauded party's reliance be *reasonable*." *Hercules & Co. v. Shama Rest. Corp., 613 A.2d 916, 923 (D.C. 1992)*; *see also Regan v. Spicer HB, LLC, 134 F. Supp. 3d 21, 36 (D.D.C. 2015)*. As with other claims premised on allegations of fraud, a claim for fraudulent inducement "must be pled with particularity under *Rule 9(b) of the Federal Rules of Civil Procedure*." *Buy Back District of Columbia, LLC v. Home Depot USA, Inc., 2004 U.S. Dist. LEXIS 29829 2004 WL 4012265, at *1 (D.D.C. Dec. 14, 2004)*. That means, as the D.C. Circuit has explained, that the complaint must "'state the time, place and content of the false misrepresentations, the [*16] fact misrepresented and what was retained or given up as a consequence of the fraud'" and must "identify individuals allegedly involved in the fraud." *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1256, 363 U.S. App. D.C. 419* (quoting *Kowal v, MCI Commc'ns Corp., 16 F.3d 1271, 1278, 305 U.S. App. D.C. 60 (D.C. Cir. 1994))*. This more onerous pleading standard "serves to . . . safeguard[] potential defendants from frivolous accusations of moral turpitude" and "guarantee[s] all defendants sufficient information to allow for preparation of a response." *Intelsat USA Sales Corp. v. Juch-Tech, Inc., 935 F. Supp. 2d 101, 107 (D.D.C. 2013)* (internal quotation marks omitted).

Dentons US argues that Guinea's claim for fraud in the inducement falls short of these standards at three points, and the Third-Party Defendants join in these arguments. Dkt. 39 at 14-20; Dkt. 40 at 22. In particular, it contends that Guinea has not adequately alleged (1) that Guinea reasonably relied on the purported false representations; (2) that Dentons US (and, by extension, that the Third-Party Defendants) had knowledge of the purported falsity of these representations; or (3) that any allegedly false representation was made with an intent to deceive. *Id.* The Court will address each argument in turn.

As Dentons US acknowledges, its first argument turns on whether the Retainer Agreement was a "commercial contract" that was "negotiated at arm's length." Dkt. 39 at 15-18. [*17] If it was not, Guinea need not allege that its reliance on the asserted false representations was "reasonable." *Hercules & Co., 613 A.2d at 923*. According to Guinea, the negotiations were not at arm's length because it was in "urgent" need of representation, and, at the time the Retainer Agreement was negotiated, Dentons US and its affiliates had an existing attorney-client relationship with Guinea, giving rise to a fiduciary relationship. Dkt. 47 at 6, 9-10.

The Court agrees with Guinea that it cannot conclude on the pleadings, and drawing all inferences in favor of the nonmoving party, *see Am. Nat'l Ins., 642 F.3d at 1139*, that the Retainer Agreement was negotiated at arm's length. Dentons US is correct that this Court (Lamberth, J.) previously concluded that the parties engaged in "commercial activity" at the time they entered the Retainer Agreement. Dkt. 21 at 4-7. That conclusion, however, related solely to the availability of the "commercial activity" exception to the Foreign Sovereign Immunities Act and has little bearing on the present question. But, even if the Court were to conclude that the agreement was a "commercial contract" for purposes of tort law, a substantial question of fact would remain regarding whether the agreement was negotiated [*18] at arm's length or whether the parties had the type of "confidential relationship" that obviates the need to allege or prove reasonable reliance. *See Goldman v. Bequai, 19 F.3d 666, 674, 305 U.S. App. D.C. 227 (D.C. Cir. 1994)* ("Whether two parties are in a confidential relation is a fact-specific inquiry, but in general a confidential relationship arises when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party." (quotation marks omitted)). That factual question cannot be resolved on a motion to dismiss.

Dentons US and the Third-Party Defendants fare better on their second argument--that Guinea has inadequately alleged that Dentons US or any of the Third-Party Defendants had knowledge of the purported falsity of the relevant representations. Paragraph 59 of Guinea's counterclaims and third-party complaint lists five purported misrepresentations. Countercl. ¶ 59(a)-(e). Most of these purported misrepresentations are at odds with the plain terms of the Retainer Agreement and, thus, as a matter of law cannot support a claim of fraud. Guinea alleges, for example, that Dentons US and its affiliates represented that "Guinea would not have to pay for services rendered by SNR Denton and its affiliates."

[*19] Countercl. ¶ 59(a). But that is not what the Retainer Agreement says. Rather, under the plain terms of the agreement, "costs and fees are due upon receipt of [the Firm's] invoice," although Guinea was allowed to "defer payment" while it made "good faith" efforts "to secure funding for [the] representation." Dkt. 1-4 at 4 (Compl. Ex. 4). Similarly, Guinea alleges that "SNR Denton falsely represented in the Retainer Agreement that its clients would be entitled to a dispute resolution process with respect to any fee disputes." Countercl. ¶ 59(e). But the Retainer Agreement merely provides that the Firm maintains a "complaints policy" and specifies particular "dispute resolution mechanisms" for particular practices, none of which are applicable here. *See* Dkt. 1-4 at 13-31 (Compl. Ex. 4). To the extent that Guinea relies on purported falsities contained in the Retainer Agreement, and those falsities are contradicted by the plain terms of that very agreement, its claim for fraudulent inducement fails as a matter of law. *See Kaempe, 367 F.3d at 963* (explaining that a court need not "accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint"). And, to the extent that [*20] Guinea intends to rely on purportedly false statements made outside the four corners of the Retainer Agreement, it has failed to comply with the requirement of *Rule 9(b)* that the operative pleading identify the specific representation at issue. *See Fed. R. Civ. P. 9(b).*

This, then, leaves Guinea's allegation that Dentons US and its affiliates represented in the Retainer Agreement that they would seek third-party funding, and that they "failed to make a good faith effort" to do so. Countercl. ¶ 59(c). Once again, however, that is not what the agreement actually says. Rather, it merely "*authorizes* the Firm to seek, with third parties, various options for the financing of its representation and to present th[o]se options in the form of a written proposal to the Ministry for its consideration." Dkt. 1-4 at 4 (Compl. Ex. 4) (emphasis added). But, even beyond that, there is a vast difference between the failure to satisfy a contractual requirement and entering into an agreement based on a knowing falsity. As Dentons US notes, the very next paragraph of Guinea's counterclaims and third-party complaint alleges that the representations contained in the Retainer Agreement "*proved* to be false." Countercl. ¶ 60 (emphasis added). [*21] That allegation is a far cry from an allegation that the Firm knew, at the time that it entered the Retainer Agreement, that it had no intention of seeking third-party funding.

For similar reasons, the Court also concludes that Guinea has failed to allege that Dentons US and its affiliates acted with an "intent to deceive." Although *Rule 9(b)* permits a plaintiff to allege "intent" and "knowledge" generally, *see Fed. R. Civ. P. 9(b),* Guinea has failed to meet even the traditional pleading requirements. Indeed, Guinea alleges no *facts* beyond reciting its view of what the Retainer Agreement required and asserting that Dentons US and its affiliates failed to satisfy their obligations. If merely adding the conclusory assertion that Dentons US and its affiliates acted with an intent to deceive were sufficient, virtually every claim for a breach of contract could also be pled as a fraud claim. Plainly, more is required.

To sidestep these deficiencies, Guinea attempts to recast its fraudulent inducement claim as a claim for constructive fraud. Dkt. 47 at 6-7. "Constructive fraud includes all the same elements as actual fraud except the intent to deceive," and, in place of requiring a showing of actual dishonesty, it "requires [*22] a plaintiff to demonstrate the existence of a confidential relationship between the plaintiff and defendant, 'by which the defendant [wa]s able to exercise extraordinary influence over plaintiff.'" *Cordoba Initiative Corp. v. Deak, 900 F. Supp. 2d 42, 50 (D.D.C. 2012)* (quoting *McWilliams Ballard, Inc. v. Broadway Mgmt. Co., 636 F. Supp. 2d 1, 7 n.7 (D.D.C. 2009)*; *see also Himmelstein v. Comcast of the Dist., LLC, 908 F. Supp.2d 49, 59 (D.D.C. 2012).* Because Dentons US allegedly had "a fiduciary . . . relation[ship] [with] Guinea" since initiating an attorney-client relationship in May of 2012, Guinea contends that Dentons US "had a higher responsibility to ensure that it did not mislead, misrepresent, or omit critical facts when . . . entering into agreements" with its client. Dkt. 47 at 7. That, however, is not the claim that Guinea brought, and Guinea cannot amend its counterclaims and third-party complaint by simple re-casting its claim in its opposition brief. *See, e.g., Arbitraje Case de Cambio, S.A. de C.V. v. United States Postal Serv., 297 F. Supp. 2d 165, 170 (D.D.C. 2003)* ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss" (quoting *Coleman v. Pension Benefit Guar. Corp., 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2013)).* As currently pled, Guinea's counterclaims and third-party complaint does not allege that Dentons US or its affiliates was able to "exercise extraordinary influence over [Guinea]," *Cordoba, 900 F. Supp. 2d at 50* (quoting *McWilliams Ballard, 636 F. Supp. 2d at 7 n.7*), and, although Guinea does allege a separate count for breach of fiduciary duty, that claim focuses on conduct post-dating entry of the Retainer Agreement, [*23] such as "overbill[ing]," pursuit of a self-serving litigation strategy, and failure to return client files, *see* Countercl. ¶ 52(a), (b) and (e).

In its current form, Guinea's counterclaims and third-party complaint thus fails to allege a claim of fraudulent inducement or constructive fraud. The Court will, accordingly, dismiss Count III without prejudice as against both Dentons US and the Third-Party Defendants.

B. Injunctive Relief

Dentons US also moves to dismiss Count IV of Guinea's counterclaims and third-party complaint, a cause of action Guinea styles as "injunctive relief," Dkt. 39 at 20-23, and the Third-Party Defendants join in that motion, Dkt. 40 at 22. In addition, the Dentons Verein moves to dismiss this count on the separate grounds that it is not engaged in the practice of law and thus could not have violated any duty related to the provision of legal services. *Id.* at 13-15.

As Dentons US correctly observes, *see* Dkt. 39 at 20-21, a "request for injunctive relief is a remedy and does not assert any separate cause of action," *Kemp v. Eiland, 139 F. Supp. 3d 329, 343 (D.D.C. 2015)* (internal quotation marks omitted). Guinea does not dispute this noncontroversial proposition, but argues that, despite the label used in the counterclaims and third-party complaint, [*24] Count IV alleges a claim for breach of contract--and not a stand-alone claim for an injunction. The Court agrees. Although mislabeled, in substance Court IV alleges that Dentons US and its affiliates agreed to defer efforts to collect payment on the Firm's invoices and to submit any dispute to an internal Dentons dispute resolution process before filing suit and that they breached these promises. Countercl. ¶¶ 66-75. Construing Count IV as a claim for breach of contract, it appears to allege two separate breaches: first, that Dentons US and its affiliates breached their contractual undertaking to defer collection efforts "until the appropriate financing [wa]s in place," Countercl. ¶¶ 67, 74 (quoting Dkt. 1-4 at 4 (Compl. Ex. 4)); and second, that they breached their agreement "to follow [their] own 'formal complaints procedure,'" Countercl. ¶ 71 (quoting Dkt. 1-4 at 5 (Compl. Ex. 4)). As explained below, the Court concludes that the first of these claims is sufficient to survive a motion to dismiss but that the second is not.

Although it is unclear how such a claim differs from Guinea's defense to Dentons US's claim for breach of contract, Guinea has alleged that Dentons US and its affiliates [*25] agreed not to seek "collection of [their] fees and expenses . . . until the appropriate financing [wa]s in place" and that they have breached that promise. Dkt. 1-4 at 4 (Compl. Ex. 4). The factual questions remain, of course, whether Guinea engaged in all "good faith . . . efforts necessary to secure funding for th[e] representation" and whether "appropriate financing" was in place. *Id.* Those factual questions, moreover, merge with the merits of Dentons US's claims. But, construing the complaint "liberally in the plaintiff['s] favor," and granting the plaintiff "the benefit of all inferences that can be derived from the facts alleged," *Kowal*, 16 F.3d at 1276; *see also Thomas v. Principi, 394 F.3d 970, 972, 364 U.S. App. D.C. 326 (D.C. Cir. 2005)*, the Court concludes that Count IV states a claim--at least with respect to whether the necessary conditions were satisfied before Dentons US sought to collect on its outstanding invoices.

To the extent Count IV alleges that Dentons US and its affiliates breached an obligation to provide Guinea with an alternative dispute resolution mechanism, however, that claim fails. The provisions of the Retainer Agreement upon which Guinea relies do not establish an alternative dispute resolution mechanism or an exhaustion requirement. *See* Dkt. 39 at 21. To the [*26] contrary, the Retainer Agreement merely states that Dentons US and its affiliates are "committed to resolving any issues" that might arise with Guinea; that the Firm has "a formal complaints procedure," which it promised to provide to Guinea "upon request"; and that individual Dentons Practices have "dispute resolution mechanisms," which are described in the Terms of Business. Dkt. 1-4 at 5, 13 (Compl. Ex. 4); Countercl. ¶¶ 69, 72. Read in context, however, the Firm's "commit[ment] to resolving any issues" applies only to "any concern about any aspect of [the Firm's] services" that the Firm's *client*--that is, Guinea--may have. Dkt. 1-4 at 5 (Compl. Ex. 4). Nothing in the Retainer Agreement even hints that this vague "commit[ment]" applies in cases in which it is the *Firm* that seeks redress. The same is true, moreover, with respect to the "formal complaints procedure." *Id.* As the Retainer Agreement makes clear, that policy--even if it were binding--applies in cases in which the *client* is "dissatisfied with the response" it receives from the *Firm*. *Id.* at 13.

Guinea's reliance on the Practice-specific dispute resolution policies fares no better. Guinea asserts Count IV against Dentons US, the Dentons Verein, Dentons Europe, and [*27] Dentons UKMEA. Countercl. ¶¶ 2-3, 9-12, 65-67. Although the Court will discuss these policies in greater detail below, for present purposes it is sufficient to note that only Dentons US has sued Guinea for failure to pay its invoices, and the counterclaims and third-party complaint do not identify any other collection effort that Guinea would have the Court enjoin in favor of some alternative dispute resolution mechanism. *See* Compl. ¶ 73; Countercl. ¶ 74. The Retainer Agreement, moreover, includes no special rules or dispute resolution mechanism for disputes between Guinea and Dentons US.

The Court will, accordingly, dismiss Count IV, except to the limited extent that it alleges that Dentons US and its affiliates breached the Retainer Agreement by seeking payment of the Firm's fees before "appropriate funding" was in place.

C. Motion to Strike

The Court turns next to Dentons US's motion to strike "all references to the Ebola epidemic" from Guinea's counterclaims and third-party complaint. Dkt. 39 at 23-25. The Ebola epidemic is mentioned three times in that pleading, most notably in connection with Guinea's breach of contract claim. *See* Countercl. ¶¶ 46-47 (alleging that the financial [*28] damages caused by Dentons US's breach of contract "occurred at a time when the country needed every available resource to address the Ebola epidemic that ravaged the country" leaving "Guinea in a much weaker position to address the health crisis that paralyzed the nation and its economy" and that "killed more than 11,000 people in Guinea"); *see also* Countercl. ¶ 75 (alleging that in "the absence of injunctive relief," Guinea will suffer financial harms when it "must muster all of its resources to recover from the Ebola epidemic").

Dentons US argues that these references to Ebola are "[i]rrelevant and [p]rejudicial" and should be eliminated from the pleading pursuant to *Federal Rule of Civil Procedure 12(f)*, which permits the Court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Dkt. 39 at 23. As Dentons US explains, because "the Ebola epidemic began long after Dentons US withdrew as [Guinea's] legal counsel," references to the epidemic "bear no rational connection to this dispute over legal fees." *Id.* Dentons US also posits that the references to Ebola are "highly prejudicial" because they attempt to "link the outbreak of a terrifying disease . . . to a law firm seeking payment of its legal fees." [*29] *Id.* at 24. Guinea responds that had Dentons US "not breached its agreement, Guinea would have had available to it [additional funds] to use for Ebola relief" and because "the existence of the Ebola crisis is relevant to damages, Guinea should not be made to sanitize the allegations contained in its Counterclaim to suit Dentons US." Dkt. 47 at 15.

The Court is far from convinced that the Ebola epidemic has any relevance to this case. Dentons US, however, faces a "high standard" in seeking to strike the arguably offending references. *Wiggins, 853 F. Supp. at 457*. In general, motions "under *Rule 12(f)* are viewed with disfavor . . . and are infrequently granted." 5C Wright & Miller et al., *Federal Practice and Procedure* § 1380 (3d ed. 2016); *see also Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty., Ltd., 647 F.2d 200, 201, 207 U.S. App. D.C. 375 (D.C. Cir. 1981)* (per curiam) (citing Wright & Miller for the proposition that "motions to strike, as a general rule, are disfavored"). Given the fact that the parties have yet to brief the range of issues posed by Guinea's contention that the Ebola epidemic has some bearing on damages--including, for example, questions of proximate cause, foreseeability, and speculativeness--the Court will not strike the references at this time. If Guinea elects to amend its counterclaims and third-party complaint, as this decision [*30] elsewhere permits, however, it should give due consideration to whether it has a good-faith basis for including such a contentious allegation.

D. The Third-Party Defendants' Motion to Dismiss

Finally, the Third-Party Defendants move to dismiss Guinea's claims against them for failure to state a claim under *Rule 12(b)(6)*. *See* Dkt. 40.

1. *The Dentons Verein*

The Dentons Verein argues that Guinea's third-party complaint--which "depend[s] on the allegation that [the Third-Party Defendants] practice law"--"do[es] not state a facially plausible cause of action against the Dentons Verein itself because . . . the Dentons Verein does *not* practice law." Dkt. 40 at 13-14 (emphasis in original). The Dentons Verein asserts, for example, that because it does not practice law it could not "enter[] into an agreement to provide legal services," Countercl. ¶ 39 (Count I); could not "assume[] the role of a fiduciary . . . in agreeing to serve as counsel," Countercl. ¶ 50 (Count II); would not make false representations to induce Guinea to contract for legal services that it could not provide, Countercl. ¶ 59 (Count III); and could not offer internal mediation over unpaid legal bills that it could not generate, Countercl. ¶ 66 (Count IV); [*31] *see also* Dkt. 40 at 14-15. Guinea responds that the Dentons Verein was "one of the affiliates within Dentons US who entered into the Retainer Agreement to provide legal services" and that, as the Dentons Verein represented itself as a "global law firm" which was a collection of geographic "offices holding membership in a central entity," there is "no reason to excuse the ringleader umbrella organization from the law suit where the allegations of concerted activity are properly alleged." Dkt. 48 at 4-9.

Although Swiss vereins do not have "an exact legal counterpart in the United States," they are "somewhat akin to an incorporated membership association" that is "legally distinct from its members." *Jeffries v. Deloitte Touche Tohmatsu Int'l, 893 F. Supp. 455, 457 n.1 (E.D. Pa. 1995)*; *see also In re Project Orange Assocs., LLC, 431 B.R. 363, 368 n.2 (Bankr. S.D.N.Y. 2010)*. "[O]ffices of the 'firm' are linked via an association but are separate legal entities with separate revenue pools." *In re GSC Group, Inc., 502 B.R. 673, 735 n.227 (Bankr. S.D.N.Y. 2013)*. "Several courts have declined to treat" structures like vereins as "a single entity . . . jointly and severally liable" for the acts of its component firms "simply because they share[] an associational name and/or collaborate[] on certain aspects of the relevant transaction." *In re Lernout & Hauspie Sec. Lit., 230 F. Supp. 2d 152, 170*

(D. Mass. 2002). But, at least at the motion dismiss stage, it is sufficient for a plaintiff to make "specific [*32] factual allegations of agency" or to allege that the verein directly intervened in the conduct at issue. *See In re Parmalat Sec. Lit., 377 F. Supp. 2d 390, 405 (S.D.N.Y. 2005)*. Applying these concepts here, the Court concludes that some of Guinea's claims may proceed against the Dentons Verein, while others must be dismissed.

As to Count I, the Court is unpersuaded by the Dentons Verein's contention that Guinea's claim fails as a matter of law. The Dentons Verein starts by pointing to the Terms of Business, which states that "the Dentons Verein (a Swiss Verein) does not itself provide legal or other client services." Dkt. 40 at 14 (quoting Dkt. 1-4 at 8 (Compl. Ex. 4)). It then argues that "an entity that does not provide legal services would not have plausibly 'entered into an agreement to provide legal services.'" *Id.* (quoting Countercl. ¶ 39). But that is not self-evident. Guinea alleges that the Dentons Verein "is comprised of several affiliated firms [that] form a global legal practice . . . through its member firms and affiliates, . . . each of which is a separate business entity and each of which conducts its own legal practice." Countercl. ¶ 2. Although conceding that the Dentons Verein does not itself provide the underlying legal services, [*33] this allegation is consistent with Guinea's contention that the Dentons Verein, in essence, acted as the umbrella organization that facilitated the delivery of legal services by the "separate business entit[ies]," who are the members of the verein. The Dentons Verein, moreover, fails to identify any legal authority for the proposition that an entity that does not itself provide legal services cannot enter a contract pursuant to which its members provide those services. Nor has it shown, at least at this stage of the proceeding, that the Retainer Agreement unambiguously bound only Dentons US. To the contrary, the Engagement Letter was arguably entered into on behalf of Dentons US "*and its affiliates*," Dkt. 1-4 at 1 (Compl. Ex. 4) (emphasis added), and the Terms of Business, which is on the same "SNR DENTON" letterhead as the Engagement Letter, explains that "SNR Denton is the collective trade name for an international legal practice including" the Dentons Verein, Dentons US, and Dentons UKMEA, *id.* at 1, 8. At least for purposes of a motion to dismiss, these allegations are sufficient.[1]

> 1 Under the "general rule," the "obligation created by the promise of several persons is joint unless the contrary is made [*34] evident." *Welch v. Sherwin, 300 F.2d 716, 718, 112 U.S. App. D.C. 124 (D.C. Cir. 1962)* (quotation marks omitted); *see also Bender v. Jordan, 570 F. Supp. 2d 37, 47 & n.9 (D.D.C. 2008)* (same). The parties have yet to address whether and how this rule might apply in the present context.

As to Count II, however, the Court is convinced that Guinea's claim against the Dentons Verein fails as a matter of law. That count asserts a claim for breach of fiduciary duty based on the attorney-client relationship that existed between Guinea and its counsel. *See* Countercl. ¶¶ 51-55. The Terms of Business, however, clearly states that the Dentons Verein "does not itself provide legal or other client services," Dkt. 1-4 at 8 (Compl. Ex. 4), and Guinea does not allege that the Dentons Verein, in fact, acted as its lawyer. Because the attorney-client relationship is a necessary element of this claim, and because there is no basis for inferring that the Dentons Verein acted as Guinea's counsel, the Court will dismiss Count II as against the Dentons Verein.

Because the Court has already concluded that Count III fails to state a claim and that most of Count IV fails as a matter of law, *see supra* 10-18, this then leaves only the portion of Count IV that alleges that Dentons US and the Third-Party Defendants breached the Retainer Agreement when Dentons [*35] US brought suit seeking to collect its fees. For the same reasons that the Court concludes that Count I states a claim against the Dentons Verein, it concludes that this remaining portion of Count IV also survives as against the Dentons Verein.

2. *Dentons Europe and Dentons UKMEA*

Finally, Dentons Europe and Dentons UKMEA argue that Guinea has "waived any right to bring suit" against them "in a United States court by agreeing to forum-selection clauses that unambiguously provide for exclusive jurisdiction in foreign courts." Dkt. 40 at 7. In support of this defense, they point to the "Location Terms of Business" contained in the Retainer Agreement and argue that Guinea agreed to "the exclusive jurisdiction of the French courts" for all disputes "aris[ing] out of or in connection with" Dentons Europe's representations of Guinea,[2] Dkt. 1-4 at 18 (Compl. Ex. 4), and "the exclusive jurisdiction of the English courts" for all disputes "aris[ing] out of or in connection with" Dentons UKMEA's representation of Guinea, *id.* at 29. Alternatively, they argue that, because they were not "parties to the contract," Guinea's breach of contract claim (Count I) "must be dismissed." Dkt. 40 at 19-22.

> 2 That same provision also provides [*36] that "disputes relating to the amount and payment of [the Firm's] fees shall be submitted to arbitration." Dkt. 1-4 at 18 (Compl. Ex. 4).

Guinea responds that Dentons Europe and Dentons UKMEA should not be permitted simultaneously to "fall back upon the protections in the Retainer Agreement's Terms of Business," while "maintain[ing] at the same time that they are not parties to the Retainer Agreement or Terms of Business." Dkt. 48 at 10. That contention,

however, is unpersuasive. Guinea has alleged that Dentons Europe and Dentons UKMEA were parties to the Retainer Agreement, and the adequacy of the counterclaims and third-party complaint must be assessed in light of Guinea's allegations. *See Iqbal, 556 U.S. at 678* ("[A] court must accept as true all of the allegations contained in a complaint[.]").

More substantively, Guinea also argues that "there is nothing in the Retainer Agreement or [in] the Terms of Business that addresses the situation of jurisdiction against multiple" offices or that requires a claim to be "fractured among multiple jurisdictions." Dkt. 48 at 11. Although that is correct as far as it goes, the text of the Location Terms of Business is sweeping and, on its face, includes the present circumstances. [*37] It provides: "*[A]ny* claim, dispute or difference *of any kind whatsoever* aris[ing] out of or in connection with" any "agreements [or] arrangements between you and us relating to our services" is subject "to the exclusive jurisdiction of the French courts" or is subject to arbitration by "the Paris Bar Association" (Dentons Europe), Dkt. 1-4 at 18 (Compl. Ex. 4) (emphasis added), and "*any* claim, dispute or difference *of any kind whatsoever* . . . aris[ing] out of or in connection with" "all the agreements [or] arrangements between you and us relating to our services" is subject "to the exclusive jurisdiction of the English courts" (Dentons UKMEA), *id.* at 23 (emphasis added).

Given the clarity and breadth of this language, Guinea's argument appears to boil down to one of fairness: If Dentons US is able to litigate against Guinea in U.S. court, Guinea should be able to litigate against Dentons Europe and Dentons UKMEA in U.S. court as well and should not be forced to wage three separate legal battles across two continents. It is unclear from the current record whether Guinea would, in fact, lose anything by limiting its claims to Dentons US. But, even assuming that it would, and recognizing the burden of being required [*38] to litigate a proceeding in three different fora, the Court must enforce the forum selection clauses agreed to by the parties "unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)*; *see also Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.p.A., 867 F.2d 697, 700, 276 U.S. App. D.C. 81 (D.C. Cir. 1989)* (explaining that there is "a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*)). "Unreasonable" forum-selection clauses include those "induced by fraud or overreaching," those where the "contractually selected forum is so unfair and inconvenient as, for all practical purposes[,] to deprive the plaintiff of a remedy or of its day in court," and those where "enforcement would contravene a strong public policy of the [forum] where the action is filed." *Water & Sand Int'l Capital, Ltd. v. Capacitive Deionization Tech. Sys., Inc., 563 F. Supp. 2d 278, 283 (D.D.C. 2008)* (quotation marks omitted) (second alteration in original).

Here, the Court cannot conclude that enforcement of the forum selection clauses would be "unreasonable." Guinea acknowledges that each of the entities it seeks to sue constitutes "a separate business entity." Countercl. ¶ 2. And, although it may be inconvenient for Guinea to proceed in three separate fora, it entered a Retainer Agreement that granted Dentons Europe and Dentons UKMEA [*39] the right to litigate in their domestic fora. Requiring that those entities litigate in the United States would, in turn, impose additional burdens on them--even if those burdens may be less substantial than the burdens Guinea could face if required to pursue a "fractured" litigation in "multiple jurisdictions." Dkt. 48 at 11. Under these circumstances, the Court must enforce the agreement of the parties.

The Court will, accordingly, grant the motion of Dentons Europe and Dentons UKMEA to dismiss.

CONCLUSION

For the reasons discussed above, Count III of Guinea's counterclaims and third-party complaint is dismissed without prejudice and Count IV is dismissed in part. Dentons US's motion to strike is denied, also without prejudice. The Dentons Verein's motion to dismiss is granted, except with respect to Count I and the above-identified portion of Count IV. Dentons Europe's and Dentons UKMEA's motion to dismiss is granted.

SO ORDERED.

/s/ Randolph D. Moss

RANDOLPH D. MOSS

United States District Judge

Date: September 25, 2016

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DENTONS US LLP, Plaintiff, v. THE REPUBLIC OF GUINEA, and THE MINISTRY OF MINES AND GEOLOGY, Defendants.

Case No 1:14-cv-01312-RDM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

134 F. Supp. 3d 5*; *2015 U.S. Dist. LEXIS 126661

September 22, 2015, Decided
September 22, 2015, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part, Motion denied by, Dismissed by, in part, Dismissed without prejudice by, in part *DENTONS US LLP v. Republic of Guinea, 2016 U.S. Dist. LEXIS 130866 (D.D.C., Sept. 25, 2016)*

COUNSEL: [**1] For DENTONS US LLP, A Delaware limited liability partnership, formerly known as SNR DENTON US LLP, Plaintiff: Ana C. Reyes, Michael Shobe Sundermeyer , LEAD ATTORNEYS, Leslie Cooper Mahaffey, WILLIAMS & CONNOLLY LLP, Washington, DC.

For REPUBLIC OF GUINEA, A Foreign State, MINISTRY OF MINES AND GEOLOGY, The Republic of Guinea, Defendants: David Harold Dickieson, David Schertler, LEAD ATTORNEYS, Danny C. Onorato, SCHERTLER & ONORATO LLP, Washington, DC.

JUDGES: Royce C. Lamberth, Judge.

OPINION BY: Royce C. Lamberth

OPINION

[*6] **MEMORANDUM OPINION**

On August 1, 2014, plaintiff Dentons US LLP (f/k/a SNR Denton US LLP) ("plaintiff") filed a complaint against defendants The Republic of Guinea and The Ministry of Mines and Geology, The Republic of Guinea ("defendants") alleging jurisdiction pursuant to *28 U.S.C. §§ 1330(a)* and *§ 1605(a)(2)* and damages of $10,214,458.48 under alternative theories of [*7] breach of contract, quantum meruit, unjust enrichment, and account stated damages as well as pre-and post-judgment interest, fees and expenses for legal services provided to defendants in 2012-2013. Compl., ECF No. 1. Defendants entered a special appearance to file a Motion to Dismiss. ECF No. 15. Plaintiff entered a Memorandum in Opposition and defendant filed a [**2] reply. ECF Nos. 18 and 20. The court will DENY defendants' motion to dismiss.

I. BACKGROUND

Defendants entered into an agreement with plaintiff for legal services in connection with a large-scale mining and infrastructure project ("the Simandou Project"). Compl., ECF No. 1. The agreement appears to have been initiated in August, 2012 and a retainer agreement, dated December 24, 2012 appears to have been reached by the parties. *Id.* In connection with the Simandou Project, plaintiff submitted invoices to defendants totaling $12,214,458.48. *Id. at 15*. Defendants made a partial payment of $2,000,000.00 on or about April 1, 2013. *Id. at 12*. Plaintiff alleges defendants made representations that it agreed with and would pay the invoiced amount up until September 2013. *Id. at 14*.

II. ANALYSIS

Now before the Court is defendants' motion to dismiss for lack of jurisdiction, as well as the grounds of *forum non coveniens*, and allege that plaintiff waived its right to its claims in the retainer agreement between the parties. Mot. Dismiss, ECF No. 15. Plaintiff counters that "[t]his is a straightforward breach of a commercial contract, for which defendants . . . are liable because they failed to pay $10,214,458.48 in legal fees and costs."

Mem. Opp'n. [**3] Mot. Dismiss, ECF No. 18 at 5. After carefully considering each of defendants' claims, defendants' motion to dismiss is DENIED.

a. Standards of Review

Federal Rule of Civil Procedure 12(b)(1) delineates the defense of lack of subject-matter jurisdiction. Further, "it is a well-established principle that jurisdiction of the subject matter is an absolute prerequisite for the continuance of an action in the District Court and in the absence of the same the Court must dismiss the action." *Trinanes v. Schulte, 311 F. Supp. 812 (S.D.N.Y. 1970)* citing *Amundson v. United States, 279 F. Supp. 779 (S.D.N.Y. 1967)*; *Fed. R. Civ. P. 12(h)(3)*. Moreover, "[t]he standard of review for a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdiction depends upon the purpose of the motion." *Pitney Bowes, Inc. v. US. Postal Service, 27 F. Supp. 2d 15, 19 (D.D.C. 1998)* (citing *Freiburger v. Emery Air Charter, Inc., 795 F.Supp. 253, 256* (N.D. Ill. 1992; 5A Wright & Miller, Federal Practice & Procedure: Civil 2d § 1361 at 456 (2d ed. 1990). As defendants note, "[w]here the motion to dismiss is based on a claim of foreign sovereign immunity . . . the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case . . ." Mot. Dismiss, ECF No. 15-1 citing *Burnett v. Al Baraka Inv. & Dev. Corp., 292 F. Supp. 2d 9, 14 (D.D.C. 2003)* (citations omitted). Thus, the Court examines subject matter jurisdiction with more scrutiny than in non-*FSIA* cases.

b. Whether Defendants [**4] **Enjoy Immunity from Suit under the *Foreign Sovereign Immunities Act***

First, defendants argue that they are entitled to immunity under the *Foreign Sovereign Immunities Act ("FSIA), 28 U.S.C. §§ 1602-1611*. Defendants argue that "the scope of the [plaintiff]'s work [*8] was to counsel a foreign sovereign about the financing and development of sovereign assets and national infrastructure located entirely within the boundaries of the foreign country." Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 2. Pursuant to the *FSIA*, "a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies . . ." *Saudi Arabia v. Nelson, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)* citing *Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)*[1]. As the parties agree that defendant Guinea is a foreign state and that defendant Ministry is a political subdivision thereof, the Court finds that defendants are a "foreign state" as defined under *FSIA*. Compl., ECF No. 1; Mem. Supp. Mot. Dismiss, ECF No. 15-1; Mem. Opp'n. Mot. Dismiss, ECF No. 18; *28 U.S.C. § 1603 (2005)*. As such, defendants are entitled immunity under *FSIA* unless an exception applies. The Court now turns to that analysis, noting that there are two possible exceptions that may apply herein; waiver under *§ 1605(a)(1)* or that related to commercial activity under *§ 1605(a)(2)*.

1 The Court [**5] examines whether such an exception applies below.

c. Waiver of Immunity Under *§ 1605(a)(1)*

The *FSIA* provides that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication . . ." *§§ 1605(a)-(a)(1)*. Defendants allege that there was no such explicit waiver and as such, this exception to immunity does not apply. Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 5. To support this proposition, defendant alleges that plaintiff agreed to secure funding if defendant was unable, that the parties contemplated an out of court dispute resolution process, that the Retainer Agreement failed to designate law to govern any disputes, and that plaintiff's terms of business[2] generally avoid jurisdiction in U.S. Courts. Mem. Supp. Mot. Dismiss, ECF No 15-1 at 6-9. The Court addresses relevant portions of these arguments more specifically below, but notes that none of these arguments address explicitly the presence or absence of waiver. Defendants further suggest that plaintiff conflates "'waiver' and 'commercial activity'" under the *FSIA*. ECF No. 15-1 at 10. The Court sees no evidence of an [**6] explicit or implied waiver of sovereign immunity under *§ 1605(a)(1)* and turns to the "commercial activity" exception under *§ 1605(a)(2)*.

2 Attached to the Retainer Agreement and incorporated by reference. Exhibit 4 of ECF No. 1.

d. The Commercial Activity Exception to Immunity Under *§ 1605(a)(2)*

Plaintiff cogently argues that there is an exception to immunity based upon defendants' commercial activities. Compl., ECF No. 1. *Section 1605(a)(2) of the FSIA* provides that:

> a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity

> of the foreign state elsewhere and that act causes a direct effect in the United States . . .

[*9] Further, "commercial activity" is defined in *§ 1603(d)* and *(e)* as:

> (d) . . . either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course [**7] of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

The Supreme Court has explained the required analysis, stating:

> . . . the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and commerce,' Black's Law Dictionary 270 (6th Ed. 1990) . . .

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992) (citations omitted). Whether the activities at issue in this case should be considered commercial activity depends upon how to fundamentally characterize the transactions. If, as defendants argue, the activity can be characterized as "[t]he core of the representation was thus to advise a foreign government on how to exercise its sovereign authority over national assets," which is of a nature that cannot be undertaken by private parties, then defendants must prevail [**8] and this exception cannot apply. Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 12. If, conversely, the Court characterizes such activity as an entity (defendants) contracting for legal services related to a development, infrastructure and construction project, and thus as a commercial activity in which private parties regularly engage, the exception applies and defendants' motion must be denied. Defendants argue that the Simandou Project involves "three classic functions of government -- (i) international diplomacy, (ii) infrastructure development, and (iii) raising revenue for government operations." *Id. at 13*. The Court is not satisfied, however, with such characterization of the activities at issue. As noted by plaintiff, defendants stand on shaky ground in so asserting. Specifically, defendants point to *Best Medical Belgium, Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230 (E.D. Va. 2012)* for the proposition that "promoting commerce and awarding government subsidies 'are not . . . commercial activit[ies] available to private parties.'" Mot. Dismiss, ECF No. 15-1 at 12. By simply inserting some form of the word government throughout its argument, defendants hope to obfuscate the Weltover analysis and convince the court that the object of the agreement between the parties was explicitly [**9] governmental. Mot. Dismiss, ECF No. 15-1 at 13. The Court does not agree with defendants' analysis. Private parties are certainly free to contract for legal services in support of funding and developing a mine, even if such funding and development specifically contemplates the possibility of international financing. Rather, plaintiff asserts, and the Court agrees, that "contract for the provision of legal services constitutes 'commercial activity' under *section 1605(a)(2)*," *Lanny J. Davis & Assocs. LLC v. Republic of Equatorial Guinea, 962 F. Supp. 2d 152, 159 (D.D.C. 2013)* (citations omitted); Mem. Opp'n. Mot. Dismiss, ECF No 18 at 11. The Court ultimately sees nothing in the nature of the Simandou Project that is other than of "the *type* of actions by which a private party engages in 'trade and commerce,' Black's [*10] Law Dictionary 270 (6th Ed. 1990) . . ." *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)* (citations omitted).

Defendants further argue that actions by defendant must have a "significant direct effect in the United States," for the commercial activity exception to apply. Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 14. Plaintiff stipulates that this is the standard as the commercial activity at issue herein falls into the third category of possible acts under *§ 1605(a)(2)*. Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 14; Mem. Opp'n. [**10] Mot. Dismiss, ECF No. 18 at 10. Plaintiff argues that "[f]ollowing *Welt over*, the DC. Circuit's direct effect cases involving alleged breaches of contract have turned on whether the contract in question established the United States as a place of performance." Mem. Opp'n. Mot. Dismiss, ECF No. 18 at 17. Applying this precedent, the Court finds that the activities involved in the instant case include performance of services in the district as well as payment to be made to plaintiff sU.S. bank, therefore establishing sufficient direct effect to maintain jurisdiction.

e. Structure of Fees and Funding

Defendants further assert that plaintiff undertook representation "knowing that the Ministry and Guinea lacked the funds to pay for the Firm's legal services and with the express intention of seeking compensation from other parties . . ." Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 16. Defendants make much of their claim that plaintiff agreed to secure funding for plaintiff s services. This claim is both inconsistent with the language of the Retainer Agreement on its face and illogical in the context of the instant case. The language of the retainer agreement between the parties appears clear as to payment [**11] of fees in that defendants "will implement in good faith all efforts necessary to secure funding for this representation . . ." Ex. 4 of Compl., ECF No. 1 at 4. Defendants further point to provisions regarding deferral of collection and allowing plaintiff to affirmatively seek alternate funding to bolster their claim that no fees or costs are owed. Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 17. The Court finds it cannot interpret such language to indicate that the parties agreed for defendants to pay plaintiff if convenient, but otherwise expect plaintiff to pay themselves, as defendants suggest. Such argument is squarely rejected.

f. *forum non conveniens*

Next, defendants argue that the Court should decline jurisdiction on the grounds of *forum non conveniens*. Mem. Supp. Mot. Dismiss, ECF No. 15-1 at 18. In support of this contention, defendants argue that "it would be presumptuous to have a U.S. court dictate terms to a foreign sovereign in a circumstance where the foreign sovereign has not agreed to the jurisdiction of the U.S. court . . ." *Id. at 19*. The Court disagrees that whether defendants agree to the jurisdiction of the Court has any relevance, and the court declines to exercise its [**12] discretion to grant such relief.

g. Plaintiff is a United States Entity

Defendants argue, at length throughout their motion, that plaintiff is an international organization, which should deprive the court of jurisdiction. Mem. Supp. Mot. Dismiss, ECF No. 15-1. Conversely, plaintiff describes itself as a "distinct U.S. legal entity." Mem. Opp'n. Mot. Dismiss, ECF No. 18. Defendants have offered no sufficient or competent evidence to rebut plaintiffs assertion, therefore the Court finds no relief appropriate on these grounds, nor does the court further analyze defendants' claims contingent upon its assertion that plaintiff is an international [*11] law firm. In fact, the retainer agreement letter itself states that it "confirms the agreement of the Minister of Mines and Geology of the Republic of Guinea (the "Ministry" or "Client") to engage the firm SNR Denton US LLP and its affiliates (the "firm") to provide services . . ." Exhibit 4 of Compl., ECF No 1-4 at 1.

III. CONCLUSION

In light of the Court's analysis, defendants' motion to dismiss will be DENIED in a separate Order issued this date.

Signed by Royce C. Lamberth, Judge, on September 22, 2015.

ORDER

On August 1, 2014, plaintiff Dentons US [**13] LLP (f/k/a SNR Denton US LLP) ("plaintiff") filed complaint against defendants The Republic of Guinea and The Ministry of Mines and Geology, The Republic of Guinea ("defendants") alleging jurisdiction pursuant to *28 U.S.C. § 1330(a)* and *§ 1605(a)(2)* and damages of $10,214,458.48 under alternative theories of breach of contract, quantum meruit, unjust enrichment, and account stated damages as well as pre- and post-judgment interest, fees and expenses for legal services provided to defendants in 2012-2013. Compl., ECF No. 1. Defendants entered special appearance to file a Motion to Dismiss. ECF No. 15. Plaintiff filed a Memorandum in Opposition and defendant filed a reply. ECF Nos. 18, 20.

Upon consideration of the above referenced filings and for reasons given in the memorandum opinion issued this date, it is hereby:

ORDERED that defendants' motion is DENIED;

SO ORDERED.

Signed by Royce C. Lamberth, Judge, on September 22, 2015.

Dentons US LLP v. Republic of Guinea, 134 F. Supp. 3d 5, 2015 U.S. Dist. LEXIS 126661 (D.D.C. 2015)

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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary
No negative subsequent appellate history.
Citing References: None

PRIOR HISTORY (0 citing references)

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SUBSEQUENT APPELLATE HISTORY (1 citing reference)

1. **Motion granted by, in part, Motion denied by, in part, Motion denied by, Dismissed by, in part, Dismissed without prejudice by, in part:**
DENTONS US LLP v. Republic of Guinea, 2016 U.S. Dist. LEXIS 130866 (D.D.C. Sept. 25, 2016)

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Ethics & Professional Liability: Current Issues

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Practical Issues for Quality Control in Global Firms

Some frequently occurring differences affecting quality control, from an ethics perspective:

- Authority and competence to practice in jurisdictions where client needs assistance
- Conflicts of interest
- Attorney-client privilege
- Defining client expectations
- Different lawyer approaches to practice

Authority and competence to practice in jurisdictions where client needs assistance

- In U.S. each state licenses lawyers separately. Make sure you have counsel in states needed.
- Note that other jurisdictions may have fewer limits on unauthorized practice.
- Competence may be ethically required. In Washington:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *(Rule 1.1)*

Authority and competence to practice in jurisdictions where client needs assistance - Tips

- Consider at outset and during engagement – join global firm or develop list of go-to firms
- Seek information from client regarding attorneys they work with to assess their availability and competence
- Develop in-house competence
- Admission of “foreign” lawyers (including from another state) is possible for limited purposes – “pro hac vice”
- Make sure you have verified competence – may not be ethically or legally required.
- Join the Section!

Conflicts of interest

- ABA Model Rules 1.7 – 1.9. Different rules for existing and former clients. Washington standard for existing clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

NOTE: This can be a direct conflict or a material limitation

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures). (*Rule 1.7*)

Conflicts of interest

- Washington Standard for former clients:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. (*Rule 1.9*)

Conflicts of interest - Tips

- Make sure you understand conflicts of interest rules in jurisdictions involved.
- For firms in jurisdictions without standards, ask them to abide by standard client expects and make sure staff of that foreign firm are warned too.

Attorney-client privilege/Confidentiality obligations

- Two concepts in U.S. that generally protect client obligations beyond ethical rules:
  - Attorney-client privilege
  - Attorney work-product privilege
- Ethical rules have separate standard. In Washington:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Paragraph (b) includes many limited permissive disclosures, covering such instance as to prevent the commission of a crime or substantial financial harm to another and only one mandatory disclosure: A lawyer "shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm". *(Rule 1.6)*

Attorney-client privilege/Confidentiality obligations - Tips

- Evaluate applicable attorney-client privilege and confidentiality obligation rules
- Develop strategy to maximize protection of attorney-client communications.
- Educate clients re importance
- May need to include outside counsel more than originally contemplated

Differing client expectations - Tips

- Understand traditional use of attorneys in jurisdiction
- Explain role in your own jurisdiction
- Reaffirm expectations, from time to time

Different lawyer approaches to practice - Tips

- Seek to understand extent of cross-border experience of lawyers in your own jurisdiction
- Educate rest of team on differences and impact on client expectations
- Help client modify expectations, by understanding differences

Questions?

ETHICAL ISSUES FOR BUSINESS AND LAWYERS UNDER THE UNGP

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What are the UN Guiding Principles on Business and Human Rights?

- Endorsed by United Nations Human Rights Council in June 2011
- Purpose is to identify standards and principles to be applied by business community in relation to human rights considerations
- Considered “soft law” and can have broader, and legal, impact, if adopted by contract or treaty
- Meant to implement UN “protect, respect and remedy” framework

The Principles

- 31 principles, plus commentary, to implement the three pillars of protect, respect, remedy
- Under “Protect,” principles begin with foundational, and proceed to more specifics:
- Foundational principles state that states (1) must protect against human rights abuses within their territory or jurisdiction by third parties, including businesses and (2) set out clear expectations as to such.

Operational Principles

- States should: (3) enforce relevant laws and policies that respect human rights, provide guidance, and seek business feedback as to compliance; (4) take additional steps regarding state-owned businesses to ensure compliance; (5) exercise adequate oversight; and (6) set examples through own transactions

Supporting Business Respect for Human Rights in Conflict-Affected Areas

- States should: (7) engage with business early on to help business identify, prevent and mitigate human rights issue, provide adequate assistance, deny public support to abusive companies and ensure efficient enforcement mechanisms

Ensuring Policy Coherence

States should (8) ensure awareness through government agencies; (9) maintain adequate domestic policy space to meet objectives; (10) when in multilateral institutions, seek to ensure institutional compliance

The “Respect” Principles

- Foundational principles under this pillar mandate that businesses (11) respect human rights; (12) understand what human rights are fundamental; (13) avoid causing or contributing to human rights impacts and seek to prevent or mitigate same; (14) recognize the application of these principles regardless of company size, operational context, ownership and structure; and (15) establish procedures relevant to those factors to enable implementation.

Further Principles re Respect

- As an operational principle, businesses should (16) issue a statement of policy.
- As a principle of human rights due diligence, businesses should (17)carry out due diligence assessments re current the business's activities; (18) identify actual and potential risks and engage in meaningful consultation; (19) prevent and mitigate abuses by integrating measures across the components of the business enterprise; (20) verify and track effectiveness; (21) prepare external communiques.

Further “Respect” Principles

- By way of remediation, business should (22) identify adverse impacts by them.
- By way of context, businesses should (23) comply with applicable law and respect international human rights and seek ways to honor them; and (24) where necessary, seek prevention and mitigation to prevent irremediable situations.

Access to Remedy Pillar

- Foundation principle here mandated that states (25) ensure through judicial, administrative, legislative or other means, there is access to remedy
- Operational principles mandate that states ensure (26) state-based effective and appropriate domestic judicial mechanisms; (27) state-based effective and appropriate non-judicial grievance mechanisms; (28) non-state based grievance mechanisms; (29) internal business grievance mechanisms; and (30) industry wide collaborative efforts to implement.

Remedy Pillar Effectiveness Criteria

- Both state-based and non-state-based non-judicial grievance procedures (31) should have criteria that are legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.
- Operational-level mechanisms should be based on engagement and dialog.

Where Will This Go?

- Other international institutions might require compliance as condition for financial assistance
- Businesses might require as condition in supply chain contracting
- What are the implications for lawyers? Ethical issues? Confidentiality, e.g.?

American Bar Association

- December 2, 2010, Rev. 17: Final ABA SEER Sustainability Framework for Law Organizations
- 2. Social responsibility: respect for people
  - a. Respect for Employees.
  - b. Diversity, Fair Hiring Practices.
  - c. Responsible Governance; Professional Courtesy.
  - d. Dealing With Clients.
  - e. Awareness and Advice.
  - f. Well-being of Stakeholders.

2016 IBA Practical Guide

- Purpose:
- ‘set out in detail the core content of the UNGPs, how they can be relevant to the advice provided to clients by individual lawyers subject to their unique professional standards and rules (whether they are in-house or external counsel acting in their individual capacity or as members of a law firm) and their potential implications for law firms as business enterprises with a responsibility to respect human rights themselves.’

Identified Implications for Lawyers?

- Guiding Principle 14 and global responsibility of international companies regardless of size:

- IBA Guide notes that: “However, since law firms are unique professional organisations whose lawyers render legal services, care must be taken not to inhibit the exercise of their professional responsibilities. Whether they work in law firms, corporate law departments, or elsewhere, lawyers have specific and legally binding professional responsibilities and obligations, including the duty of independence. The UNGPs do not abridge this duty, which includes the duty to decide, within the limits of the law, how to act in their client’s best interests, independently of expectations and pressures that are external to the lawyer–client relationship, subject of course to adherence by the lawyers with their professional and legal responsibilities.”

Consequently:

- Subject to a lawyer's professional and
- legal responsibilities, nothing in the UNGPs or in
- this Practical Guide should be read to restrict:
- (1) effective access by clients to legal services provided by independent lawyers;
- (2) lawyers' obligation to provide independent services and remain unidentified with the client, its causes, or its activities (notwithstanding Principle 18 (identifying risks)
- (3) representation of unpopular clients
- (4) clients' right to "robust defence"
- (5) rights of clients to seek, and lawyers provide independent legal advice regarding human rights issues
- (6) ability of lawyers to utilize all factors ncesseary to independent judgment and representation of client.

What Opportunities for Lawyers?

IBA Guide notes the following opportunities:

- In house counsel's increased importance on corporate practice
- Outside counsel to increase identification of risks
- But the risks to law firms are that they become more insulated to human rights issues, and the structure of the law firm may preclude shared lessons

What Law Firms and Lawyers Should Consider

- Guide provides principle by principle set of considerations.
- E.g., regarding the UNGP expectation of human rights policy commitment, lawyer should consider “bigger picture” in giving advice, increase consultative process including across practice groups, and exercise certain pro bono opportunities, among others.

Liability Insurance

- “neither the UNGPs nor this Practical Guide are intended to alter the legal obligations or liabilities of companies or of the lawyers who advise them. However, providing incorrect legal advice or services to clients may result in claims by clients against their lawyers. This could encompass claims arising from advice or services regarding UNGPs or their implementation. In certain insurance markets, claims arising from advice on such matters may not be covered. Therefore, before advising on the UNGPs, the lawyer should ascertain whether such legal advice – because of their nature as soft law – is covered by the firm’s professional liability insurance.”

IBA Conclusion

- “Compliance with the law is a bedrock requirement of the corporate responsibility to respect human rights under the UNGPs, but it applies even where the law is absent, unenforced, or in tension with internationally recognised human rights. Even though the UNGPs themselves do not and cannot impose legal responsibilities on business, the UNGPs are relevant to many legal practice areas. The UNGPs stress that business should respect internationally recognised human rights even when national laws do not adequately protect them.”

Ethical Issues

- ABA Model Rule 1.1: Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Model Rule 1.4: Communications: Reasonably consult with client about means to achieve client objectives

Ethical Issues (cont'd)

- ABA Model Rule 1.6: Confidentiality of Information. Not reveal information relating to representation unless to prevent "certain death or substantial bodily harm," or client from "committing a crime or fraud" reasonably certain to cause another financial injury

Ethical Issues (Cont'd)

- ABA Model Rule 2.1: Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Ethical Issues (cont'd)

- ABA Model Rule 4.4: Respect for rights of third persons.
- "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person"

Ethical Issues (cont'd)

- ABA Model Rule 6.4: Law Reform Activities Affecting Client Interests
- "A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client."

Ethical Issues (cont'd)

- ABA Model Rule 8.4: Misconduct
- It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
  - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice;
  - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
  - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
  - (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Final Comments

- While non-binding, are part of the social fabric and new business environment.
- May be tied to company's own policies or contractual obligations.
- Lawyers' professional rules and obligations remain, but UNGP cannot be dismissed.