

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Teachers4Action et al,		X		
	Plaintiffs	:	:	CIVIL ACTION #
- vs -		:	:	08-CV-548 (VM)(AJP)
		:	:	
Michael Bloomberg, et al,	Defendants.	:	:	
		:	:	X

**DECLARATION IN SUPPORT OF PLAINTIFFS' REQUEST FOR
ADDITIONAL LIMITED DISCOVERY NEEDED
FOLLOWING MAY 22, 2008 DEPOSITION OF THERESA EUROPE**

Florian Lewenstein, hereby declares and says:

Introduction

1. I am a Plaintiff in the above referenced matter and I make this Declaration in support of Plaintiffs' request for additional limited discovery subsequent to the deposition of Theresa Europe ordered by the Court on May 1 and 8, 2008.
2. Plaintiffs respectfully request that Magistrate Judge Peck consider the relief requested in Plaintiffs' application for limited additional discovery, so that email records and fax logs critical to the instant federal action will be preserved and produced for Plaintiffs.
3. If relief is not granted, plaintiffs fear that these emails and fax records may be lost or destroyed.

Facts Related to this Declaration

4. I am familiar with the facts and causes of action in the original complaint filed on January 21, 2008 and the Amended Complaint filed on February 25, 2008.

5. I was present at the January 28, 2008 and February 8, 2008 conferences before Judge Peck.
6. I was present at a 3020-a hearing on April 7, 2008 (hereinafter "The April 7th Hearing") conducted by arbitrator Martin F. Scheinman (hereinafter "Scheinman") for former Plaintiff Sidney Rubinfeld (hereinafter "Rubinfeld").
7. I was present at the April 11, 2008 conference before Judge Peck.
8. I was present at the May 1, 2008 conference before Judge Peck.
9. I was also present at the May 22, 2008 deposition of Theresa Europe (hereinafter "Europe"), Deputy Counsel to the Chancellor of Defendant New York City Department of Education (hereinafter "DOE"), ordered by the Court on May 1, 2008.

April 7, 2008

10. At the April 7th Hearing, Europe introduced two emails that contained confidential strategy prepared by Plaintiffs (hereinafter "The Intercepted Emails") over the objections of Plaintiffs' counsel, Edward D. Fagan, Esq. (hereinafter "Fagan"). (See Exhibit 1)
11. Europe stated that she had received The Intercepted Emails via an anonymous fax (hereinafter "The Alleged Anonymous Fax.>").
12. Fagan repeated his objection to the arbitrator, but Scheinman ruled that The Intercepted Emails could be read into the record and marked as exhibits.
13. Scheinman commented: "this is the first I am hearing about these emails."
14. Europe stated that prior to The April 7th Hearing, she had discussed The Intercepted Emails with Blanche Greenfield Esq. (hereinafter "Greenfield"), Assistant Corporation

Counsel for Defendant New York City (hereinafter "NYC"), and that Greenfield had "cleared them for use" at the hearing (or words to that effect).¹

15. Fagan had a chance to examine The Intercepted Emails, which he also showed me.
16. I can state unequivocally, that The Intercepted Emails were not the originals I had sent to Plaintiffs' counsel and my fellow Plaintiffs on April 3, 2008. Information was obviously redacted that would have identified the person who had forwarded The Intercepted Emails had that information been available, and no fax legend markings of any kind were visible on The Intercepted Emails.
17. At the April 7th Hearing Fagan served a subpoena on Europe so that The Intercepted Emails and all related documents, including faxes, were to be preserved. *Note: As to their relevance in this action, plaintiffs submit that the source and recipients of emails and faxes (and discussions surrounding how to best use them against Plaintiffs) will support Plaintiffs claims that the DOE and UFT, and/or its representatives, and the arbitrators, were improperly collaborating in their efforts against Plaintiffs in the 3020-a hearings, and in furtherance of due process violations, harassment, retaliation, breach of fiduciary duties and other wrongful acts.*

April 10 - 11, 2008

18. On April 10, 2008, Greenfield wrote the Court and referred only to emails. *Note: As explained below this is significant because it does not comport with the tale that both Greenfield and Europe told in what we believe is an effort to cover up the truth, which is that there was no anonymous fax, which would explain why there was no mention of a fax*

¹ As explained below, Europe claimed The Intercepted Emails were not relevant to the instant case. If that is so, then why does she claim to have scanned the emails and sent them to DOE counsel Greenfield in the Federal Action? And, why did she not scan and send The Alleged Anonymous Fax cover sheet? And, why did the Deputy Chief Counsel of the DOE and their lawyer in this case fail to preserve the original document(s)?

in Greenfield's April 10th letter, there were no efforts to preserve the original Alleged Anonymous Fax (which now cannot be located), which could also explain why the fax logs disappeared and which could explain why Defendant DOE has gone to such lengths to fail to preserve the email and fax evidence, which as of April 7th, they were on notice Plaintiffs demanded be preserved and produced.

19. At the April 11, 2008 Conference convened by Judge Peck, Greenfield told the Court about efforts she had made to recover the fax log or other information that might identify the sender of The Alleged Anonymous Fax via which The Intercepted Emails had allegedly been received by Europe.
20. At the same conference Europe produced a document that she stated was the cover sheet (hereinafter "The Alleged Cover Sheet") to The Alleged Anonymous Fax that transmitted The Intercepted Emails to Europe. As with the Intercepted Emails themselves, no fax legend markings of any kind were visible on The Alleged Cover Sheet. (See Exhibit 2)

April 11 - 30, 2008

21. Despite repeated requests, Europe and the DOE refused to cooperate with Fagan to try to preserve the evidence related to The Intercepted Emails.
22. It should be noted that Fagan, and Europe and/or Greenfield were together in related matters at hearings on April 14 & 15 and then again on April 24 and 28th. Fagan continued to press for the evidence and Europe and Greenfield ignored the requests.

May 1, 2008

23. At the May 1, 2008 Conference convened by Judge Peck, for the 1st time Greenfield informed the Court that various parties had come into possession of The Intercepted

Emails not by anonymous fax but by emails (hereinafter “The Krinsky Emails”)

forwarded by a third party not connected with the instant federal action.

24. At Judge Peck’s suggestion Greenfield allowed Fagan to see copies of The Krinsky

Emails and provided copies for Fagan which were marked on May 1st as DOE 001-009.

25. The Krinsky Emails revealed that:

a. On Friday, April 4, 2008 at 12:41 PM, Richard Krinsky (hereinafter “Krinsky”), a former teacher and an attorney in private practice who defends teachers in 3020-a hearings, forwarded The Intercepted Emails to a DOE lawyer on Europe’s staff, Nancy Ryan, and to an arbitrator, Eleanor Glanstein, who is conducting ongoing 3020-a hearings against several Teachers4Action Plaintiffs and other teachers; *(See Exhibit 3 – 1st page marked as DOE 001 produced at May 1st Hearing - highlighted);*

b. On Saturday, April 5, 2008, Krinsky forwarded The Intercepted Emails and other documents / information to more DOE attorneys, including Europe, prosecuting Plaintiff teachers at 3020-a hearings, and to more arbitrators currently conducting 3020-a hearings against Plaintiffs, to help them against Plaintiffs. *(See Exhibit 4 - highlighted)*

May 22nd Europe Deposition Raises More & Serious Discovery Problems

26. At the deposition Europe testified that she was in 3020-a hearings “all day” on Friday, April 4, 2008, and that she returned to her office at about 3:00 PM following the hearings.

27. Europe testified that she found The Alleged Anonymous Fax in a manila folder in her inbox.

28. Europe testified that there were two fax machines at which The Alleged Anonymous Fax could have been received and that she had no way of knowing on which machine it was allegedly received.
29. Europe testified that she did not actually know which of two fax machines in the common area of the office received The Alleged Anonymous Fax, she did not care and she never tried to find out on which machine it was allegedly received.
30. Europe testified that she did not know who had placed The Alleged Anonymous Fax in her inbox.
31. Europe testified that she had no idea what had happened to, and never made inquiry about what happened to, the original of The Alleged Anonymous Fax. It was not important to her and she deemed it irrelevant to the Federal Action.
32. Europe testified that on no occasion, even after receiving the Notice of Deposition, did she make any effort to determine which fax machine had received The Alleged Anonymous Fax, who had placed The Alleged Anonymous Fax in her inbox, what had become of the originals of The Alleged Anonymous Fax, what had become of the fax logs, and that she made no other inquiries that might have assisted Plaintiffs in conducting a fruitful deposition and possibly discovering meaningful information regarding The Anonymous Fax.
33. The Court should note that The Alleged Anonymous Fax has been altered and information was intentionally deleted, whited-out or obscured.

Europe's Failure to Review the Court's Order or Deposition Notice

34. Europe testified that she had not reviewed the May 5, 2008 Notice of Deposition.
35. Europe testified that she had not read the Court's May 8, 2008 Order.

36. Europe testified that she did not compile the documents that were to be produced to comply with the Court's May 8, 2008 Order.
37. Europe testified that at no time prior to, or after, May 8, 2008 did she ever cause a search to be made for The Alleged Anonymous Fax or the fax logs or any of the related documents.
38. Europe testified that Greenfield gathered whatever documents were brought to the deposition in response to Judge Peck's May 8, 2008 Order.

Europe's Position about Relevance of the Alleged Anonymous Fax to the Federal Action

39. Europe testified, and repeated several times, that "it was of no moment to her" who had sent The Alleged Anonymous Fax.
40. Europe testified that she did *not* consider The Alleged Anonymous Fax or its contents relevant to the instant federal action.
41. Europe testified that she did, however, consider The Alleged Anonymous Fax and its contents relevant to the 3020-a hearings being conducted against Teachers4Action Plaintiffs, even though she and her staff of DOE attorneys had "laughed" about The Alleged Anonymous Fax.
42. Europe testified that on Friday, April 4, 2008, "probably after 5:00 PM," she sent The Alleged Anonymous Fax *by email* to Greenfield.
43. Europe testified that she recognized The Krinsky Emails, and that her email address was on the distribution list amongst other DOE attorneys on her staff, such as Nancy Ryan, who had received The Krinsky Emails.
44. Europe testified that she recognized some of the arbitrators on the distribution list who had received The Krinsky Emails, and whose names were part of their email address.

45. Europe read into the record the arbitrators whose email addresses she recognized, because their names are part of their email addresses.
46. Europe identified Martin Scheinman as one of the recipients of The Krinsky Emails.
47. Scheinman is the arbitrator who conducted The April 7th Hearing, when he allowed The Intercepted Emails to be introduced and read into the record.
48. Scheinman's name is *not* a part of his email address, which is OfficeMFS@aol.com.
49. Europe read into the record the subject line from the first of The Krinsky Emails, which read "please keep the source anonymous." [emphasis added] (See Exhibit 3 --highlighted)
50. Europe read into the record her response to The Krinsky Emails: "richard, many thanks for the heads up." [emphasis added] – (See Exhibit 3 – 3rd page back marked as DOE 3 highlighted – page numbered DOE 003 – produced at May 1st Hearing)
51. Europe's response to The Krinsky Emails was dated April 7, 2008, at 9:06 AM, more than an hour before the start of the April 7th Hearing, when Scheinman allowed Europe to introduce The Intercepted Emails that she claimed to have received via The Alleged Anonymous Fax, and when Scheinman commented: "this is the first I am hearing about these emails." [emphasis added]

Original Purpose for the Europe Deposition

52. Plaintiffs' original purpose in requesting the Europe deposition was to
 - a. give Europe an opportunity to admit that there was no anonymous fax, and that she had in fact received The Intercepted Emails by forwarded email, or
 - b. give Europe an opportunity to perjure herself regarding the true source of The Intercepted Emails. Europe chose to perjure herself.

53. Plaintiffs believed that Europe was lying or misrepresenting the facts to keep something secret from Plaintiffs. However, it took the deposition to allow Plaintiffs to start to expose what is truly going on.

Discoveries Based on Europe Deposition

54. The facts that are now being discovered are disturbing.

55. To believe there was ever an anonymous fax, strains credulity.

56. And, if there ever was an Alleged Anonymous Fax, all authenticating and/or original documents, all records, all fax logs, all fax activity records and all back-ups that are kept in the ordinary course of business have been destroyed or allowed to be purged, despite the prompt notice that they be preserved.²

57. The credible evidence at this point, suggests that The Alleged Anonymous Fax was in fact a fiction created by DOE representative Europe, with the apparent knowledge or assent of its counsel, in a clumsy attempt to hide the identity of the party, Krinsky, who forwarded The Intercepted Emails, and who expressly requested: "please keep the source anonymous."

58. The stories of an Alleged Anonymous Fax on April 4th and a Cover Sheet that suddenly and quite conveniently appeared on April 11th (at the Court Conference and after they

² There is an ever evolving story that is designed to keep Plaintiffs from the truth. The Court will recall Greenfield's explanation at the April 11, 2008 hearing convened by Judge Peck that the reason the fax logs could not be located is because the brother fax machine only keeps the records related to the last 200 faxes and by the time she inquired about the logs, they were gone – "through no fault of her own or her clients". That is a lie. The alleged anonymous fax only came in on Friday April 4th and Greenfield was allegedly informed about it that afternoon or early evening. There was an intervening weekend from April 5 – 6, 2008. Then, by 10:30 am on Monday April 7, 2008, Plaintiffs had served a Subpoena demanding production of unredacted copies of The Alleged Anonymous Fax and all relevant documents, including faxes. It strains credulity to think that between Friday April 4th and 10:30 am the next business day, April 7th, Defendant DOE got more than 200 faxes such that the logs were deleted by the machine itself. Clearly, Europe and Greenfield did not think far enough ahead so that their convenient – yet totally unbelievable stories – could be supported by the evidence that continues to be discovered by Plaintiffs. Based on Europe's testimony, her email transmissions of these now missing documents to Greenfield should be produced.

believed their actions and evidence could not be traced) appear to be fictions, created by lawyers to hide what is / was really going on.

59. Following the April 7th Hearing Fagan and I discussed our conclusions that Europe's statement about having received The Intercepted Emails via The Alleged Anonymous Fax was unlikely, to the point of being absurd on its face.

60. It is well known that it is virtually impossible to receive a fax with absolutely no fax legend markings.

61. Even when the sending machine is not programmed with the sender's name and telephone number, some information, such as date/time and page number, is always transmitted and printed by the receiving machine. *(See Exhibit 5 – excerpts from limited exemplars provided per Court's May 8, 2008 Order related to fax logs provided by Europe at deposition).*

62. Fagan and I concluded that if Europe had in fact received The Intercepted Emails via The Alleged Anonymous Fax, as she persists in claiming, any information that might identify the sender had been redacted and that the fax as originally received was in fact not "anonymous." The originals and the fax logs are highly relevant, yet they are all missing.

63. Therefore, Fagan and I concluded that it was more likely that The Alleged Anonymous Fax never existed and that Europe had received The Intercepted Emails via forwarded email and invented the story.

64. The most logical explanation – based on the credible evidence - is that the party who sent The Intercepted Emails to Europe had received them by email as did Europe.

Note: Europe testified that she emailed The Intercepted Emails to Greenfield.

That would be the logical, and easier, method to send The Intercepted Emails if

they were received by email, rather than scan The Alleged Anonymous Fax and then email it to Greenfield. If Europe had received The Intercepted Emails via The Alleged Anonymous Fax, as claimed, it would have been more logical, and easier, to simply fax The Intercepted Emails to Greenfield, rather than go to the additional effort of scanning and emailing them.

65. If Europe believed that The Intercepted Emails came to her in an Anonymous Fax on Friday, April 4, 2008, why did she respond to Krinsky's forwarding of emails by stating: "richard, many thanks for the heads up?"
66. If Europe believed that The Intercepted Emails were not relevant to the instant federal action, why forward The Intercepted Emails to Greenfield, Defendant NYC's counsel, purportedly to discuss whether she could use them in the 3020-a hearings, rather than discuss that issue with her superiors in Defendant DOE's Office of Counsel?
67. Europe's testimony in the deposition confirms not only that there never was an Anonymous Fax, but that there is a collusion between Defendant DOE and the arbitrators and others who sought to corrupt the 3020-a hearings against Plaintiffs teachers who are being unfairly prosecuted, with severe and wholly unjust results.
68. Europe testified she was aware that many of the arbitrators, including Scheinman, were on the distribution list of The Krinsky Emails (which are the genuine Intercepted Emails, rather than the emails allegedly received via the fictional Alleged Anonymous Fax).
69. Europe and Scheinman put on a show at the April 7th Hearing, with Europe claiming to have received The Intercepted Emails via The Alleged Anonymous Fax and the arbitrator stating: "this is the first I am hearing about these emails." [emphasis added]

70. At subsequent 3020-a hearings against Plaintiffs, Europe repeatedly introduced The Intercepted Emails into the record to prejudice Plaintiffs. And, at no time from April 7 to mid May 2008 did the Arbitrators voluntarily disclose their receipt of the ex-parte communications.

71. Indeed, Europe and the arbitrators concealed from Plaintiffs the fact that they had prior knowledge of The Intercepted Emails.

72. However, the objective evidence shows something completely different.

Spoliation and Other Wrongful Acts

73. Plaintiffs submit that Europe's and Defendant DOE's actions since April 4th have been a deliberate attempt:

- a. to interfere in the instant federal action,
- b. to retaliate, harass and intimidate plaintiffs,
- c. to further violate their due process rights and
- d. most importantly as it relates to the discoveries now confirmed by the Europe Deposition that defendant DOE and its Deputy Chief counsel and others, perhaps even their outside counsel Greenfield³, sought to frustrate and/or interfere with discovery.

74. As a result of the Europe Deposition, Plaintiffs submit that they have confirmed evidence of spoliation. The only issue remaining is, who else was involved in the spoliation and what adverse inferences can be drawn and how the Court wishes to address these issues.

³ Plaintiffs submit that at a minimum, Greenfield acted in bad faith when she reported to the Court on April 11th, that she had made good faith efforts to retrieve fax logs or other records that might have identified the sender of The Alleged Anonymous Fax allegedly received by Europe on April 4, 2008 but that they could not be found. By Europe's testimony, that evidence should have been immediately secured on April 4th, after Europe and Greenfield communicated (via phone and email) about The Intercepted Emails and The Alleged Anonymous Fax.

Conclusion

75. Plaintiffs submit that the evidence shows that whatever evidence remains, the closest thing to the “original” Alleged Anonymous Fax is the email that Europe testified she sent to Greenfield on Friday, April 4th. Therefore, the emails between Europe and Greenfield from April 4th to April 11th related to the Alleged Anonymous Fax and the alleged efforts to locate and preserve the fax logs should be produced.
76. Plaintiffs submit that Greenfield’s emails will demonstrate conclusively:
- a. That there was no Alleged Anonymous Fax;
 - b. That The Intercepted Emails are one and the same with the Krinsky Emails;
 - c. That Europe lied to the Court during the hearing convened by Judge Peck on April 11, 2008, when she produced the fabricated Cover Sheet;
 - d. That Europe lied under oath during her deposition;
 - e. That Greenfield acted in bad faith when she described her efforts to ascertain the origin of The Alleged Anonymous Fax; and
 - f. That as of April 4, 2008, Greenfield had an independent obligation as Defendants’ counsel and an officer of the Court, to preserve the documents, including the alleged fax logs that have now been destroyed, and which related to The Alleged Anonymous Fax.
77. Given the history in this case as it relates to The Alleged Anonymous Fax, the missing or unaccounted for original of the Alleged Anonymous Fax, the now destroyed fax activity

logs from both fax machines, Plaintiffs believe that the Greenfield emails may also be altered, destroyed and / or lost.

78. Finally, Plaintiffs will rely upon Mr. Fagan to provide a brief report about the Europe deposition, which will include the few additional discovery requests that Plaintiffs submit should be considered in light of the May 22, 2008 Europe deposition. The only real new additional request (other than related to the inspection of the Brother Fax Machine) is a request for permission to enter upon Defendants' premises to inspect, photograph and document the conditions in the Rubber Rooms before the end of the school year on June 26, 2008. This inspection can be done without burden or interference with Defendants conduct of business and is appropriate to document the conditions of "confinement" under which Plaintiffs suffer and have been confined in these Rubber Rooms.
79. In view of the foregoing, I pray the Court will grant the limited additional discovery that is now necessary and which resulted from the Europe May 22, 2008 deposition .

Dated: May 29, 2008



Florian Lewenstein

DECLARATION UNDER 28 USC § 1746

I declare, verify, certify and state under the penalty of perjury that the facts and statements contained above are true and accurate to the best of my knowledge information and belief.

Dated: May 29, 2008



Florian Lewenstein
