IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF TRANSAMERICA AIRLINES, INC.	)	
HARRY A. AKANDE, Petitioner/Plaintiff,	)	
v.	)	Civil Action No. 1039-VCP
TRANSAMERICA AIRLINES, INC., a Delaware corporation, f/k/a, TRANS-INTERNATIONAL AIRLINES, INC., a Delaware corporation, BURTON E. BROOME, SHIRLEY H. BUCCIERI, EDGAR H. GRUBB, and TRANSAMERICA CORPORATION, a Delaware Corporation, Respondents/Defendants.	)	

MEMORANDUM OPINION

Submitted: January 8, 2008
Decided: February 25, 2008

James S. Green, Esquire, George H. Seitz, III, Esquire, Patricia P. McGonigle, Esquire, SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware, *Attorneys for Petitioner/Plaintiff*

David E. Wilks, Esquire, REED SMITH LLP, Wilmington, Delaware, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

This is an action by Plaintiff, Chief Harry A. Akande, against Defendants Transamerica Airlines, Inc., Trans-International Airlines, Inc. ("TIA"), Transamerica Corporation ("Transamerica"), and three directors and officers of TIA. On May 25, 2007, this Court granted in part and denied in part the parties' cross motions for summary judgment.[1] The Court recognized the Nigerian Judgment[2] obtained by Akande against TIA, among other defendants, and granted Akande's request for enforcement with respect to the portions of the Judgment relating to a breach of the Commission Agreement for 1976. The Court did not determine, however, the specific amount of damages awarded in the Judgment for breach of that agreement. The pending application stems from the parties' dispute as to that amount.

I. BACKGROUND

A. Factual Background[3]

This case centers on a contract between TIA and New Africa Technical and Electrical Company, Ltd. ("NAFTECH") to transport pilgrims between Kano, Nigeria and Jeddah, Saudi Arabia for the Hadji Movement. TIA retained NAFTECH as its agent for securing pilgrims for transport and, pursuant to their agreement (the "Commission

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1 *See Akande v. Transam. Airlines, Inc.*, 2007 Del. Ch. LEXIS 68 (May 25, 2007) (the "Opinion").

2 *Akande v. Omisade*, No. FHC/L/77/88, [1999] (Nigeria F.H.C.) (the "Nigerian Judgment"), *available* at Opening Br. in Supp. of Pl.'s Mot. for Summ. J. ("SJ POB") App. at A110-23.

3 Unless stated otherwise, the recited facts come from the Opinion.

Agreement"), in 1975 TIA paid NAFTECH a 5% commission for the services it rendered.

NAFTECH had two 50% shareholders, Akande and Michael A. Omisade. In 1976 Omisade falsely represented to TIA that NAFTECH was being dissolved, and contracted to have his newly formed company, New Africa Development Company ("NADCO"), perform the services NAFTECH had been performing for TIA. When confronted with Akande's allegations of deception by Omisade, TIA informed Akande that it would continue to use and pay commissions to Omisade and NADCO, and that Akande and Omisade would have to settle the dispute between themselves.

Twenty-three years of litigation later, in 1999 Akande obtained the Nigerian Judgment against Omisade, NADCO, TIA, and NAFTECH (as a nominal defendant). TIA failed to appear at the final hearing and the court essentially entered a default judgment against all of the defendants, including TIA. Eight years later, this Court held it would recognize and enforce "the portion of the Judgment pertaining to the breach of the Commission Agreement for 1976 . . . ."[4] This Court further held that Transamerica assumed TIA's liabilities under the Judgment.[5]

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[4] *Akande*, 2007 Del. Ch. LEXIS 68, at *70.

[5] *See id.*

B. The Nigerian Judgment

1. Enforceability under Delaware's Uniform Foreign Money-Judgments Recognition Act

Delaware's Uniform Foreign Money-Judgments Recognition Act ("UFMJRA" or the "Act") provides for the recognition of "foreign judgments," meaning judgments granting or denying recovery of a sum of money rendered in a jurisdiction outside the United States and its territories.[6] The Act "applies to any foreign judgment that is final and conclusive and enforceable where rendered . . . ."[7] "A judgment is conclusive under the UFMJRA 'to the extent that it grants or denies recovery of a sum of money.'"[8] "The Act does not apply to a judgment to the extent that it grants undetermined costs or damages."[9]

2. How much is owed?

The parties dispute the amount of money owed by Transamerica to Akande (or NAFTECH) under the portion of the Nigerian Judgment relating to the breach of the Commission Agreement for 1976. The Nigerian Federal High Court held in pertinent part:

> The ultimate issues for consideration are the reliefs sought by [Akande] . . . . I . . . grant[Akande] the declaration sought in paragraph 33(i) of the Amended Statement of Claim in addition to all the reliefs contained in subparagraphs (ii), (iii),

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6 *See* 10 *Del. C.* § 4801.

7 *Id.* § 4802.

8 *Akande*, 2007 Del. Ch. LEXIS 68, at *67 (quoting 10 *Del. C.* § 4803).

9 *Id.*

> (iv) and (v). Similarly the relief contained in subparagraph (vi) is also granted subject to the qualification that the rate of interest shall be 5% with effect from the date of this judgment. . . . Furthermore, the prayers in subparagraphs (vii) and (viii) are hereby granted and a sum of eight million naira . . . apiece is awarded as claimed in subparagraphs (ix), (x), and (xii) while the relief sought in subparagraph (xi) ought to be and is hereby refused . . . .[10]

Interpreting the Nigerian Judgment presents some difficulties, however, as summarized below.

Paragraph 33(i) of Akande's Amended Statement of Claim ("Statement of Claim") requests a declaration that money paid by TIA to Omisade, NADCO, or Lawrence A. Okunola (an employee and nonfinancial director of NAFTECH) belonged to NAFTECH under the 1976 Commission Agreement.[11] Subparagraphs (ii)-(iv) seek further information to determine how much is properly owed to NAFTECH, including sums under the Commission Agreement for the relevant time period after 1976. Subparagraph (v) seeks payment of such sums to NAFTECH. The Judgment does not state an amount due Akande under subparagraph (v).

There is room for argument, however, as to what the Nigerian court determined to be the commissions properly owed to NAFTECH based on the Commission Agreement for 1976. In the Nigerian court's discussion of the requested relief under subparagraph (ix), which asked for N12 million (twelve million naira) in damages for breach of

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10 Nig. J. at 14.

11 Statement of Cl. ¶ 33(i) (Oct. 25, 1989), *available* at SJ POB App. at A97; *see also* Nig. J. at 2-3 (quoting the relevant portions of the Statement of Claim).

contract, it found, seemingly as to the 1976 Commission Agreement, the "damage suffered by [NAFTECH] is the commission of USD $255,580 . . . ."[12] The $255,580 in lost commission discussed in relation to subparagraph (ix) may relate to the relief sought under subparagraph (v), which also seems to request damages for breach of the same contract. The relationship between the relief sought in subparagraphs (ix) and (v) is not addressed explicitly in the Statement of Claim. Nor does the Nigerian Judgment discuss the relationship, if any, between the relief the court granted under those subparagraphs.

Further, in granting relief under subparagraph (ix), the Nigerian court neither awarded damages of $255,580 nor the N12 million Akande requested; instead, the court awarded Akande N8 million. It is unclear what relationship, if any, the N8 million award has to the court's estimate of damages. Furthermore, the Nigerian Judgment does not state why the court reduced the N12 million in relief that Akande sought in 1989 to N8 million ten years later in 1999.[13]

In addition, the parenthetical preceding Paragraphs 33(x)-(xii) in the Judgment, "(And As Against [Omisade and NADCO])," suggests the subsequent claims for relief do not apply to TIA.[14] Yet, Akande evidently disputes this interpretation.

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12 Nig. J. at 10. The Nigerian court referred to agreements reflected in Exhibits E and F, which it earlier described as relating to 1976. *See id.* at 5.

13 One possibility is the N8 million represents an additional award (*e.g.*, for attorney's fees or punitive damages) above and beyond NAFTECH's lost commission. Another is that N8 million represents the court's estimation of what $255,580 in 1976 would have been worth in naira in 1999.

14 Nig. J. at 3 (quoting Statement of Cl. ¶ 33, but omitting the Statement of Claim's reference to Okunola).

3. How should interest be calculated?

Another issue the parties dispute, aside from the actual amount of damages, is what pre- and post-judgment interest, if any, the Nigerian Court awarded. Akande, in Paragraph 33(vi) of his Statement of Claim, asked for 18% interest on any sums found under subparagraph (v) from 1976 until payment. The court granted Akande's request for interest, but made the following qualification, "the rate of interest shall be 5% with effect from the date of this judgment."[15] In the proceedings since this Court's Opinion on the cross motions for summary judgment, the parties have disputed whether: (1) the Nigerian Judgment awarded pre-judgment interest of 18% per annum, with post-judgment interest at the rate of 5%, or rejected Akande's claim for pre-judgment interest altogether; (2) the Judgment awarded compound or simple interest; and (3) there is any applicable interest on any damages other than what was awarded under subparagraph (v).

A further complication involves determining the applicable currency for the Nigerian Judgment. It is unclear if the 1999 Nigerian Judgment makes awards in naira or dollars, or both. Given the naira's substantial decline vis-à-vis the dollar since the Judgment was entered, a related question is which party should bear the risk of currency fluctuations.

Another issue is what percentage of any damages awarded under the Judgment were to be paid to Akande. To the extent Akande brought his claim on behalf of

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[15] *Id.* at 14.

NAFTECH, the breach of contract claims may properly belong to NAFTECH, of which Akande owns only 50%.

C. Recent Procedural History

This Court issued its summary judgment opinion on May 25, 2007. The Opinion noted Akande claimed $16,727,072.30 for the breach of the Commission Agreement for 1976, and Defendants had not contested Akande's assertion.[16] In the Opinion, the Court further directed Akande to file an appropriate form of judgment after notice and consultation with opposing counsel.

The parties were unable to agree on a proposed form of judgment, with Plaintiffs requesting $17.4 million in damages and Defendants asking for further investigation on many of the issues discussed above relating to the Nigerian Judgment.[17] I entertained

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[16] The Opinion stated:

> Akande asserts that the sum due under the Judgment for TIA's breach of the Commission Agreement for 1976 was $16,727,072.30 as of July 22, 2006. In connection with the pending cross-motions for summary judgment, Defendants have not questioned whether this number accurately reflects the specific sum of damages awarded in the Judgment. Whatever the correct number is at this time, the only award of damages under the Nigerian Judgment that this Court recognizes is the amount for the breach of the Commission Agreement for 1976.

Akande v. Transam. Airlines, Inc., 2007 Del. Ch. LEXIS 68, at *69-70 (May 25, 2007).

[17] *See* Letter from George H. Seitz, counsel to Akande, to the Ct. (June 15, 2007). In one post-Opinion submission, Defendants argued the final award should be eight million naira, with 5% simple interest per annum from the date of the Judgment. *See* Letter from David E. Wilks, counsel to Defendants, to the Ct. at 5 (Oct. 4,

further discussion with counsel in an office conference on September 21, 2007, but disputes remained. At that time I expressed certain preliminary views on the open issues and denied Defendants request for discovery on those issues.

On November 26, 2007, Akande notified this Court and Defendants of an application before the Nigerian court for an "enrolled order" to obtain clarification of the Nigerian Judgment. The application took the form of an ex parte motion, dated November 21, 2007, to the Federal High Court, holden at Lagos, Nigeria. Akande attached to his ex parte motion an affidavit by Justice Tajudeen A. Odunowo (retired), the presiding Justice who entered the Nigerian Judgment, providing his interpretation of the Judgment.[18] Notably, Justice Odunowo stated in his affidavit that any of the parties could have obtained the type of order sought by Akande at any time after the Nigerian Judgment.[19] On November 27, Akande submitted to this Court an order from the Nigerian Federal High Court dated November 23, 2007 (the "Enrolled Order") largely adopting Akande's interpretation of the Judgment.[20]

2007). Using reported exchange rates, Defendants' proposed final award could be in the range of $120,000, or even less.

18 *See* Aff. of J. T. A. Odunowo (ret.) in lieu of Enrolled Order in Respect of J. on Suit No. FHC/L/77/88 Delivered on the 20th of Oct. 1999, *available* at Letter from George H. Seitz, counsel to Akande, to the Ct., Ex. at 7-8 (Nov. 26, 2007).

19 *See id.* ¶¶ 4-5, 8.

20 *See* Order, F.H.C. holden at Lagos, Nig., Suit No. FHC/L/77/88 (Nov. 23, 2007), *available* at Letter from George H. Seitz, counsel to Akande, to the Ct., Ex. (Nov. 27, 2007).

On November 30, 2007, Defendants moved under Ct. Ch. R. 12(f) to strike both of Akande's submissions relating to his procurement of the Enrolled Order as an improper attempt to introduce new evidence. On December 12, Akande moved to supplement the record with the opinion of its expert, Justice E.O. Sanyaolu (retired), concerning the Nigerian procedures relating to the Enrolled Order.

After briefing on both motions, this Court heard argument on them on January 8, 2008. I then determined further proceedings are warranted on the narrow issue of the proper construction of the Nigerian Judgment in terms of the money judgment entered in connection with the breach of the Commission Agreement for 1976. To focus those proceedings, I directed the parties to devise a list of mutually agreed upon questions for submittal to their respective experts, who ultimately will be subject to cross-examination before the Court. The parties failed to agree on those questions, and submitted separate letters setting forth their respective lists.

Against this background, I first address the parties' pending motions. Then, based on the parties' submissions, I identify the issues as to which I believe additional evidence would be helpful.

II. AKANDE'S MOTION TO SUPPLEMENT THE RECORD

Akande moved this Court to supplement the record through the admission of Sanyaolu's opinion concerning the procedures employed under Nigerian law to obtain the Enrolled Order dated November 23, 2007.[21] Separately, Akande asked this Court to

[21] *See* Pl.'s Mot. to Supplement the R. to Consider Op. of Nig. Counsel ("Pl.'s Mot.") at 1.

enforce the Enrolled Order, without including it as part of his motion to supplement.[22] Normally, I would not consider a document such as the Enrolled Order at this stage of the litigation absent a motion by Akande to supplement the record. Nevertheless, because courts generally prefer to resolve disputes on substantive grounds rather than avoid them based on procedural defects, and because the Enrolled Order itself is *implicitly* contained within Sanyaolu's opinion, I will deem Akande's motion to supplement as including the Enrolled Order.

Sanyaolu's opinion discusses three issues: (1) whether the Enrolled Order was a judgment; (2) whether the procedure Akande used to obtain it violated due process under Nigerian law; and (3) the applicability of Nigeria's Sheriffs and Civil Process Act to the current action.[23] Defendants object to the admission of Sanyaolu's opinion, contending the proceedings whereby the Enrolled Order was obtained were ex parte and without notice, and that Sanyaolu's further explication of the Enrolled Order is "entirely tangential to the substantive issues before this Court."[24]

A motion to supplement the record is addressed to the discretion of the trial court.[25] Relevant factors for admitting new evidence include: (1) whether it has come to the moving party's knowledge since the trial; (2) whether reasonable diligence would

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22 *See* Pl.'s Mem. in Resp. to Defs.' Mot. to Strike and in Supp. of His Mot. to Supplement the R. to Consider Op. of Nig. Counsel ("POB") at 2.

23 *See* Sanyaolu Op. at 2-3, *available* at Pl.'s Mot. Ex. A.

24 Defs.' Answering Mem. in Opp'n to Pl.'s Mot. to Supplement the R. at 2.

25 *See Carlson v. Hallinan*, 925 A.2d 506, 519 (Del. Ch. 2006) (citing *Daniel D. Rappa, Inc. v. Hanson*, 209 A.2d 163, 166 (Del. 1965)).

have caused its discovery for use at trial; (3) whether it will likely change the outcome; (4) whether the evidence is material (*i.e.*, not merely cumulative); (5) the timeliness of the motion; (6) undue prejudice to the nonmoving party; and (7) judicial economy.[26] "Ultimately, a motion to reopen turns on the interests of fairness and justice."[27]

I find Akande's motion to supplement the record as to the Enrolled Order and supporting papers unpersuasive, and therefore deny it. The Enrolled Order is not material to the issues presently before the Court, could have been obtained and presented before or at the trial, and resulted from an ex parte proceeding. Such proceedings are afforded less deference under the UFMJRA.[28] Although the Enrolled Order arguably might constitute probative evidence as to the meaning of the Judgment, I conclude that admitting it would undermine the integrity of this proceeding and set a dubious precedent inconsistent, in my opinion, with the intent of the UFMJRA. As noted in the Opinion, the purpose of the UFMJRA is "to make it more likely that judgments rendered in a state that adopted the Act will be recognized abroad," by fostering reciprocity with foreign countries in terms of recognition of judgments.[29] In that regard, it would be counterproductive for this

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26 *See id.* at 519-20 (extensive citations omitted).

27 *Id.* at 520 (citing *Kahn v. Tremont Corp.*, 1997 Del. Ch. LEXIS 150, at *17 (Oct. 27, 1997)).

28 The Act provides that Delaware courts need not recognize a foreign judgment if the "defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the defendant to defend." 10 *Del. C.* § 4804(b)(1).

29 *Akande v. Transam. Airlines, Inc.*, 2007 Del. Ch. LEXIS 68, at *17 (May 25, 2007).

Court to entertain affidavits or similar documents from sitting or retired judges from other jurisdictions explaining the meaning of judgments they entered years earlier. Even more disturbing is the specter of subjecting such jurists to depositions or other forms of discovery related to those topics for purposes of an enforcement proceeding in a foreign jurisdiction.[30]

Similarly, I consider Sanyaolu's opinion concerning the Enrolled Order immaterial to the explication of the Nigerian Judgment because it relates only to the process by which Akande obtained the Enrolled Order, and not to the terms of the Judgment. Sanyaolu contends the ambiguity in the Judgment "could not have arisen if an enrolled order were drawn up by the [Nigerian court]. The Enrolled Order of 23rd November 2007 seeks only to do that."[31] While Sanyaolu may be correct, the fact remains that, upon an application by Akande and after extensive pretrial proceedings, this Court previously recognized the Nigerian Judgment as a final judgment.[32] For purposes of enforcing the Judgment, the subsequently obtained Enrolled Order does not supersede or supplement

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30 Akande argues the Enrolled Order is admissible under Ct. Ch. R. 44 and 44.1. *See* POB at 3. For the reasons discussed herein, I reject Akande's belated attempt to substitute the Enrolled Order for the Nigerian Judgment as the judgment he seeks to enforce in this proceeding. Furthermore, insofar as the Enrolled Order may be admissible to help interpret the Nigerian Judgment under Nigerian law, I exercise the discretion granted under Rule 44.1 to deny its admissibility for that purpose.

31 Sanyaolu Op. at 5.

32 *See Akande*, 2007 Del. Ch. LEXIS 68, at *15 (noting that "none of the parties in this action disputes that the Nigerian Judgment is final and grants a recovery of a sum of money, at least for the commissions that were due under the Commission Agreement for 1976.").

the Nigerian Judgment. Moreover, nothing in the record suggests the Enrolled Order, and Sanyaolu's opinion regarding it, could not have been obtained before trial.

Contrary to the approach reflected in Akande's efforts to submit the Enrolled Order and Sanyaolu's opinion as evidence, I view the Nigerian Judgment as a legal document that must be construed objectively as it would be understood by a reasonable person. The new evidence Akande seeks to introduce would not materially assist the Court in that endeavor. For all of these reasons, I deny Akande's motion to supplement.

III. DEFENDANTS' MOTION TO STRIKE

Defendants moved to strike Akande's submissions of November 26 and 27, 2007 (matters concerning the Enrolled Order) because the submissions were "immaterial and impertinent."[33] Akande responds that "[m]otions to strike under Rule 12(f) are directed to 'pleadings' only. Such motions are technically not available to strike material contained in motions, briefs, memorandum or affidavits."[34]

Because I have denied Akande's motion to supplement the record with the Enrolled Order and Sanyaolu Opinion, Defendants have achieved most, if not all, of the relief sought by their motion. Accordingly, I deny Defendants' motion to strike as moot.

IV. THE SCOPE OF FURTHER PROCEEDINGS

At the January 8, 2008 argument on the motions just discussed, I reconsidered my previous denial of Defendants' request for further proceedings related to the determination of the amount of damages properly owed to Akande under the Nigerian

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[33] Defs.' Mot. to Strike ¶ 1.

[34] POB at 2.

Judgment and my Opinion. Because an ambiguity appears to exist in the Nigerian Judgment on that question, I authorized the parties to submit additional information from experts in Nigerian law regarding it. I also asked counsel to confer and attempt to identify an agreed set of questions on which their experts could provide additional information.[35] In the end, the parties failed to reach such an agreement. Having reviewed their respective submissions, I have determined to limit the scope of any supplemental expert evidence to the following questions:

1. Under the portion of the Nigerian Judgment pertaining to the breach of the Commission Agreement for 1976, what monetary compensation is awarded to Akande?
    a. Are there multiple monetary awards?
        i. If so, what are they and what are their purposes?
        ii. If so, to whom are they awarded?
    b. In what currency was the award(s) made?
    c. What, if any, relationship is there between the award for lost commission granted with reference to Paragraphs 33(i) and (v) of the Amended Statement of Claim and the N8,000,000 award granted with reference to Paragraph 33(ix)?
        i. Is there a connection between the Nigerian court's determination that the "damage suffered by [NAFTECH] is

[35] *See* Tr. of argument held on Jan. 8, 2008 at 38-42.

the commission of USD $255,580,"[36] and the relief granted as to Paragraphs 33(i) and (v)?

d. What relationship is there between the "eight million naira . . . apiece" award under Paragraphs 33(ix), (x), and (xii) and the Statement of Claim's request for N12,000,000 under the same Paragraphs.

e. To what extent does the relief granted with reference to Paragraphs 33(ix), (x), and (xii) pertain to the Commission Agreement for 1976?

f. To what extent, if any, does the monetary award to Akande pertaining to the breach of the Commission Agreement for 1976 differ by defendant under the Nigerian Judgment?

2. Did the Nigerian court award pre-judgment interest on the damages awarded in the Nigerian Judgment?

   a. If so, at what rate?

   b. If so, on what principal amount would the rate be calculated, and in what currency?

   c. If so, would the pre-judgment interest be simple or compound interest? If compound, how would the interest be compounded?

3. Did the Nigerian court award post-judgment interest on the damages awarded in the Nigerian Judgment?

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[36] Nig. J. at 10.

a. If so, at what rate?

b. If so, on what principal amount would the rate be calculated, and in what currency?

c. If so, would the post-judgment interest be simple or compound interest? If compound, how would the interest be compounded?

In connection with responding to questions 2 and 3 above, the experts in Nigerian law also may answer the following questions proposed by Defendants:

4. Did then existing Nigerian law and rules of procedure authorize an award of pre-judgment interest on the damages awarded in the Nigerian Judgment and, if so, at what rate?

5. At what rate did Nigerian law and rules of procedure allow for post-judgment interest on the Nigerian Judgment?

V. CONCLUSION

For the reasons stated, Akande's motion to supplement the record is denied, Defendants' motion to strike is denied, and the parties are authorized to conduct further proceedings to develop a supplementary record on the questions stated in Part IV of this memorandum opinion. In addition, counsel for the parties shall confer and submit, on or before March 3, 2008, a proposed schedule for the completion of all further proceedings in this Court regarding Akande's claims.

IT IS SO ORDERED.