UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **KELLEY DRYE & WARREN, LLP,** **Defendant.**	**ECF Case** **Civil Action No. 10-cv-0655(LTS)(MHD)** **FILED UNDER SEAL**

REPLY DECLARATION OF EUGENE T. D'ABLEMONT PURSUANT TO 28 U.S.C. §1746

Eugene T. D'Ablemont declares under penalty of perjury:

1. I am the Life Partner at Defendant Kelley Drye & Warren, LLP ("Kelley Drye") who filed the age discrimination and retaliation charge under the Age Discrimination in Employment Act ("ADEA") with the Equal Employment Opportunity Commission ("EEOC") on February 29, 2008.

NATURE OF THE ACTION

2. The EEOC initiated this action under the ADEA on January 28, 2010, seeking the dual remedies of public interest injunctive relief and victim specific damage relief for myself and similarly situated Life Partners of Defendant.

3. In initiating this action, the EEOC terminated my right and that of all other similarly situated Life Partners at Kelley Drye to bring an ADEA action or to intervene as a party in this action. 29 U.S.C. §626 (c) (1). I therefore am not a party to this action.

4. As a result, I may not participate in this action to assert affirmative defenses or counterclaims in response to the allegations Defendant asserts against me in its Thirteenth and Fifteenth Affirmative Defenses, which are the subject of EEOC's pending motion to strike. Those Affirmative Defenses serve as the springboard for the cash setoffs which Kelley Drye seeks to impose on me in its Nineteenth Affirmative Defense. The Thirteenth Affirmative Defense raises the issues of my alleged "acceptance of client development allowances" and my "acceptance of payments from third party income sources while also soliciting and receiving bonuses from the

Firm...." The Fifteenth Affirmative Defense alleges that I "demanded and received tens of thousands of dollars of free legal services from Firm attorneys" for myself and my relatives; that I "demanded and received" excessive client development allowances; that I improperly "received direct monetary payment from third parties"; and that I have "a history of objectionable behavior inconsistent with the expectations for a Kelley Dry Partner." The Nineteenth Affirmative Defense seeks "a setoff of, *inter alia*, the total amounts D'Ablemont has received from third parties for legal services he has provided to those third parties, as well as amounts D'Ablemont has received from the Firm, or owes the Firm, and all debts of D'Ablemont forgiven by the Firm."

5. It is the Nineteenth Affirmative Defense which the EEOC's pending motion for partial summary judgment asks the Court to dismiss because the setoffs Defendant asserts involve purely personal matters between Defendant and me. Those personal matters go back to 2000 in the case of client development allowances; to 2000 and 2001 in the case of the third party payments; to 2001 in the case of bonus payments from the Firm; and to 2006 and 2008 in the case of free legal services, all of which Defendant resurrected only after I had filed the charge with the EEOC on February 29, 2008. Those personal matters are totally unrelated to the systemic compensation discrimination and acts of retaliation that the EEOC brought this action to eliminate and which involve not only me, but a class of similarly situated Life Partners at Defendant Kelley Drye.

6. In support of its pending motion to dismiss, the EEOC asked me to provide a Declaration, under penalty of perjury, to put into context with supporting documents the allegations which Kelley Drye asserted in its Thirteenth and Fifteenth Affirmative Defenses. I provided that Declaration, executed on March 19, 2011, with Exhibits A-L ("Original Declaration).

7. Defendant has never raised the allegations it asserts in its Thirteenth, Fifteenth and Nineteenth Affirmative Defenses in any private suit against me in state or federal court. It has the right to do so now, subject to my right to interpose denials, affirmative defenses of statute of limitations, laches, accord and satisfaction, waiver, and estoppel, and counterclaims unrelated to the ADEA claims the EEOC asserts in this suit. Defendant may not circumvent my right to defend myself against these untrue allegations by asserting them as setoffs in a governmental action in which I am not a party and may not become one as a matter of law.

8. In its opposing papers to the EEOC's motion to dismiss, Defendant once again focuses principally on my purported objectionable and improper behavior, reciting again a litany of my alleged bad conduct and purported inconsistencies in representations I made in my Original Declaration from those I made at different times in different circumstances. But, that focus proves the basis for the EEOC's motion: those alleged bullying tactics on my part, when I was 70 to 80 years of age, which apparently so terrorized the Firm's Executive Committee that it was coerced into providing me free legal services, client development allowances far in excess of

what I was entitled to receive under the formula used for other Partners, and a Life Partner bonus notwithstanding my receipt of direct monetary payments from my clients [redacted] and [redacted] involved personal matters between the Firm and me. Those personal matters may not be asserted as setoffs against the non-party victim in an EEOC-initiated suit under the ADEA or a Secretary of Labor suit under the Fair Labor Standards Act, both sharing the same enforcement provisions. That should end Kelley Drye's Nineteenth Affirmative Defense as a matter of law.

9. Moreover, Defendant's three Declarations in opposition to the EEOC's motion not only wrongly attack my credibility, but in doing so Defendant misstates facts which Defendant's own documents contradict. As a result, the EEOC has permitted me to submit this Reply Declaration to defend my professional reputation.

BACKGROUND

10. I began my career with Kelley Drye as an associate in 1959 right out of law school. Not long thereafter, I began to specialize in representing management in labor law matters, including matters of employment discrimination. In 1969 I became an Equity Partner in the Firm. As with all Equity Partners, the Firm's Earnings Allocation Committee ("Points Committee") determined my annual compensation through the award to me of profit percentage points based principally on my contribution to the Firm in the prior calendar year.

11. In evaluating a Partner's contribution, the Points Committee relies on [redacted]

12. During the last three years that I was a full Equity partner, of the more than 130 Partners in Kelley Drye, Redaction [redacted] In good times and in bad, despite inducements to leave Kelley Drye I remained loyal to the Firm during my 30 years as an Equity Partner and 11 years as Life Partner.

13. When I became a Life Partner in January 2000, I exercised my right under Section 501(a) of the Partnership Agreement to continue to remain active in the practice of the Partnership. Pursuant to my discussions with then Redaction [redacted]

[redacted] ("[redacted] and Executive Committee Member [redacted] ("[redacted] which began in December 1999, [redacted] confirmed in a draft Memorandum to me, dated January ___, 2000, the terms that I had discussed with [redacted] under which I would continue to remain active with the Firm as a Life Partner. (A copy of the Memorandum is attached hereto as Exhibit 1). In response, under cover of my Memorandum to [redacted] and [redacted] dated January 27, 2000, I submitted a Memorandum, dated January ___, 2000, which more accurately reflected what [redacted] and I had agreed to. (A copy of both such memoranda are attached hereto collectively as Exhibit 2). [redacted] and my Memorandum, each dated January ___, 2000, read essentially the same, Redaction [redacted]

[redacted] On February 22, 2000, Redaction [redacted] and [redacted] sent me a Memorandum which read in relevant part:

Redaction [redacted]

[redacted]

I certainly was in the Firm's good graces at that time, after having spent nine valued years as an Associate and thirty-one valued and loyal years as an Equity Partner. In the four years before I became a Life Partner, [redacted] So, I had obvious clout in the discussions with [redacted] and Redacti on.

15. Paragraph 6 of my Original Declaration iterated my written protests to that portion of the February 22, 2000 Memorandum which denied me the two conditions that I had made clear in my January 2000 discussions with [redacted] and [redacted] and in my proposed January __, 2000 Memorandum were essential to my continuing to remain active as a loyal and valued member of the Kelley Drye family: (1) a client development allowance based on the same formula as is applied to Partners, and (2) consideration by the Executive Committee each year to receive a Life Partner bonus,

notwithstanding my receipt of the monthly retainer payments from my clients [redacted] and [redacted][1]

16. I achieved both conditions: in April 2000 the increase in my client development allowance to $20,000; in March 2001 the right to be considered for an annual Life Partner bonus in addition to my continuing to retain each month my third party retainer payments from [redacted] and [redacted] which I had been receiving each month since February and March 2000. (Original Declaration at para. 6). As noted in paragraph 5 of my Original Declaration, those client development allowances and third party payment arrangements were identical in nature to those which Kelley Drye had agreed to in 1997 with Partner [redacted] in 1998 with Partner [redacted] in 1999 with life Partner [redacted] in 2000 with Partner [redacted] and in 2007 with Partner [redacted]

17. In document discovery, Kelley Drye admitted the Firm had received no written complaints about me and had not disciplined me in any way in my more than 50 years with the Firm. So the "objectionable behavior inconsistent with the expectations for a Kelley Drye Partner" claim, which Defendant alleged in its Fifteenth Affirmative Defense, is without merit and arose only after I filed my EEOC charge.

COMPARATORS/NO SETOFFS

18. In 1997, the Firm entered into an agreement with Partner [redacted] ("[redacted] which approved his retention as General Counsel of Firm client [redacted] ("[redacted] The agreement provided that: the compensation which [redacted] paid [redacted] would not be deemed partnership revenues; Kelley Drye would pay [redacted] $175,000 in 1997; and Kelley Drye would provide [redacted] with a client development allowance of [redacted] in 1997 (Exhibit D to my Original Declaration). *Kelley Drye did not offset the third party payments* [redacted] *received from* [redacted] *against the* [redacted] *Kelley Drye paid him.*

19. In 1998 Kelley Drye entered into a similar arrangement with Partner [redacted] ([redacted]) whereby he become an executive of [redacted] ("[redacted] spend one-half of his working time for [redacted] would record no Kelley Drye billable time for his work for [redacted] would retain free and clear of Kelley Drye the compensation [redacted] paid him for his services; and notwithstanding [redacted] half-time, part-time status as a Kelley Drye Partner beginning in 1998, Kelley Drye has paid [redacted] in compensation [redacted] and higher amounts each year to date; and each such year Insel has received from

[1] Redaction [redacted]. But, the concept of Kelley Drye paying a Life Partner additional compensation, despite his or her receipt as a Life Partner of third party payments, was not anathema to Kelley Drye.

Kelley Drye a client development allowance, calculated in the same way as other Partners, [redacted] and 2010. (Exhibit E to my Original Declaration). *Kelley Drye has not offset the third party payments [redacted] has been receiving from [redacted] each year since 1998 against the compensation Kelley Drye has paid [redacted] each year from 1998 through 2010.*

20. In 1999, the Firm entered into a similar arrangement with about to become Life Partner [redacted] whereby he would leave the Firm to become General Counsel of Firm client [redacted] receive from Kelley Drye his share of not yet collected monies involving a contingency suit against [redacted] and begin to receive monthly pension payments from Kelley Drye (Annual Life Partner Payments). (Exhibit F to my Original Declaration). *Kelley Drye did not offset the compensation [redacted] received from [redacted] against the [redacted] monies or his monthly pension payments Kelley Drye continues to pay [redacted] each month.*

21. In 2000, and again in 2007, the Firm entered into similar arrangements, respectively, with Partners [redacted] (" [redacted] and [redacted] (" [redacted] (Exhibits G and H to my Original Declaration). Here again, Kelley Drye did not offset the compensation [redacted] paid [redacted] for acting as [redacted] General Counsel three days a week at its headquarters in New Jersey against the compensation Kelley Drye paid [redacted] for the services he rendered the Firm during the same period which amounted to over [redacted] ([redacted] left Kelley Drye at the end of 2002 for another law firm); nor did Kelley Drye offset the annual compensation [redacted] paid [redacted] as its President in 2008 and continued to pay him each year thereafter to date against the compensation Kelley Drye paid [redacted] as a part-time Partner of [redacted]

22. Defendant has submitted three opposing Declarations in support of its contention that the Court should deny the EEOC's motion because "the parties dispute both the facts and the significance of those facts". *But, there is no dispute about the alleged facts which underlie the Nineteenth Affirmative Defense and which are set out in detail in Defendant's Thirteenth and Fifteenth Affirmative Defenses.* Even if those allegations were true, and they are not, as a matter of law they have no place in an EEOC initiated ADEA suit on behalf of a class of Defendant's Life Partners. Defendant's attempt to treat this case as though it were a private action which the EEOC has brought on my behalf is contrary to fact and meritless as a matter of law.

THE CARTY DECLARATION

The Check Opening

23. Mr. Carty ("Carty") is the Firm's Executive Director, to whom the Finance Department reports. In Exhibit K to my Original Declaration (my Memorandum dated October 28, 2008 to Managing Partner [redacted] (" [redacted] I related at page 13, item (4), the circumstances leading to [redacted] opening up in July 2008 an envelope containing my monthly retainer check payment from [redacted] which arrived at Kelley Drye's offices in an envelope with the [redacted] logo addressed to me,

care of Kelley Drye. The envelope was an open-faced window-pane type envelope which, to an observer, clearly contained a check made payable to me, care of Kelley Drye. For 99 prior months I had been receiving at Kelley Drye offices each month, unopened and undisturbed, two retainer check payments, one from [redacted] and the other from [redacted] both of which arrived in the same window-pane type envelope as in July 2008, albeit with separate logos on the outside. Yet, four months after I had filed my charge with the EEOC, Kelley Drye opened up the envelope containing my July 2008 [redacted] check.

24. Carty's Declaration explains that the opening of my check was pursuant to the Accounting Department's normal procedures:

> "Because the envelope appeared to contain a check, the accounting staff followed its normal procedures, opening the envelope and removing the check and related correspondence. The normal procedure when a check made out to an individual Partner is received by the Accounting Department is to forward the check to the Partner and ask him or her to endorse it for deposit into the Firm's bank account, because payments by Firm clients for services rendered by the Firm's attorneys are the property of Kelley Drye under the Firm's Partnership Agreement unless the Firm agrees otherwise."

25. Were this true, each of the 198 monthly checks which [redacted] and [redacted] mailed me at Kelley Drye starting in February and March 2000 would have been opened and forwarded to me. None was. The check in question was not initially forwarded to me. It came into the hand of [redacted] Carty's [redacted]. Ms. [redacted] has given no Declaration to support Carty. Indeed, Item 4 of Kelley Drye's Privilege Log reads:

> "Handwritten and typed notes, prepared at request of counsel, of discussions between Tom Carty and [redacted] regarding [redacted] check to Eugene D'Ablemont received at KDW." (Exhibit 4, attached hereto).

The Client Development Allowance

26. Here, Carty's representations are directly contradicted by the clear and unambiguous terms of the Client Development Allowances policy which appear in the Firm's Benefits Handbook. A copy of the 2009 written policy is attached hereto as Exhibit 5. The wording of the policy has remained the same in all the key elements each year during the period 1999-2010.

27. To justify his claim that I have received client development allowances from Kelley Drye far beyond that to which I was entitled "under the formula used for other Partners", Carty uses the terminology "participation credit". But, those terms nowhere appear in the policy and have never been applied to me by the Firm either for calculating my client development allowance or in considering me for an annual year-end Life Partner bonus. Carty does not define the terms "participation credit". In relying on those undefined terms, he arrives at inexplicable conclusions that are directly contradicted by Kelley Drye documents and the consistent application of those documents to me. Nor does he claim or use documentary evidence to establish that the term participation credit has been applied to any Partner, Life Partner, or Of Counsel to calculate his or her client development allowance under the policy.

28. The client development allowance is arrived at through a simple mathematical calculation. It is the dollar equivalent of Redac of the "actual fees collected" by a Partner, Life Partner, or Of Counsel for the prior year, Redaction [redacted].

29. In 1999, the year before I became a Life Partner, the actual fees that I collected and credited to me by the Firm were Redaction. That should have merited me a client development allowance of Redactio in 2000. By Memorandum, dated February 22, 2000, Callagy and Redac awarded me Redacti. (Exhibit 3, supra, attached hereto). I protested. On April 4, 2000, Reda increased my 2000 client development allowance to Redacti. (See Exhibit 6, attached hereto, Redacti copy of my March 10, 2000 memorandum on which he had written on the top of the first page in his own handwriting: "OK Reda 4/4/00").

30. Each year after 2000, I submitted to the Accounting Department my list of clients and the actual fees I collected for each client in the prior calendar year in support of my request for a client development allowance. It was the Firm's Finance Department which prepared for me the list of my clients and the fees I actually collected. It was that list which I submitted to the Firm's Accounting Department. Attached hereto collectively as Exhibit 7 are examples of my annual requests, and Kelley Drye's response each such year. Each such year, Kelley Drye applied the Redacti to the list of my actual fees collected - a list that the Accounting Department, under Carty's supervision, prepared for me.

31. Thus, in 2007 the fees I collected were Redaction – My 2008 client development allowance was Redacti; in 2008, the fees, I collected were Redaction – my 2009 client development allowance was Redacti; in 2009 the fees I collected were Red million – my 2010 client development allowance was Redacti; in 2010 the fees I collected were Redaction – my 2011 client development allowance is Redacti. Attached hereto as Exhibit 8 are copies of the Firm's 2008, 2009, and 2010 client development awards pursuant to the above-noted formula, reflecting my client

development awards for those years and for other Partners, Life Partners and Of Counsel.

32. Further, the dollar amounts the Firm awards each year to Partners, Life Partners, and Of Counsel as client development allowances are not wages or compensation under Federal or State tax laws and are not reflected in the K-1s which Kelley Drye has prepared each year for Partners, Life Partners, and Of Counsel, except only that beginning in 2009 the payment of club dues needed to be reported on the K-1s.

33. Thus, Carty's Declaration about my demanding and receiving excessive client development allowances is untrue and contradicted by the Finance Department's own records. His explanation for why those under him opened up my Redaction check enveloped on July 28, 2008 is beyond belief.

THE CALLAGY DECLARATION

The Voluntary Relinquishment

34. Firm Chairman Callagy first contends that I relinquished my equity interest (and attendant compensation and voting rights) voluntarily by my voluntarily entering into the Partnership Agreement. I entered into it in 1969 when I was 39. Since I became a Life Partner in 2000, I have brought to the Firm through 2010 in excess of Redaction in fee receipts that I billed and collected at 100% realization or very to it (i.e., no write offs of billable time or of uncollected billed time). For that effort over a period of eleven years, the Firm has paid me a total bonus compensation of Redaction. Had I not been forced to give up my Equity Partner status in 2000, based on what the Points Committee has awarded Equity Partners during the span of years for contributions to the Firm comparable to mine, Kelley Drye would have paid me approximately Redaction. Thus, the bonus compensation Kelley Drye paid me of Redaction represents an undercompensation of approximately Redaction, solely caused by my having to become a Life Partner in 2000 purely because of my age. Other Life Partners have also incurred significant undercompensation.

35. I did not voluntarily enter Life Partner status at age 70. The Partnership Agreement mandated my loss of Equity Partner status at age 70.

Active Life Partners

36. Callagy rails against my use of the term "Active Life Partner" on the basis it does not appear in the Partnership Agreement and that my use of the term, and its use by the EEOC, creates the false impression that an Active Life Partner is entitled to "compensation and other benefits additional to that of other Life Partners." But, that is precisely what the Partnership Agreement intended.

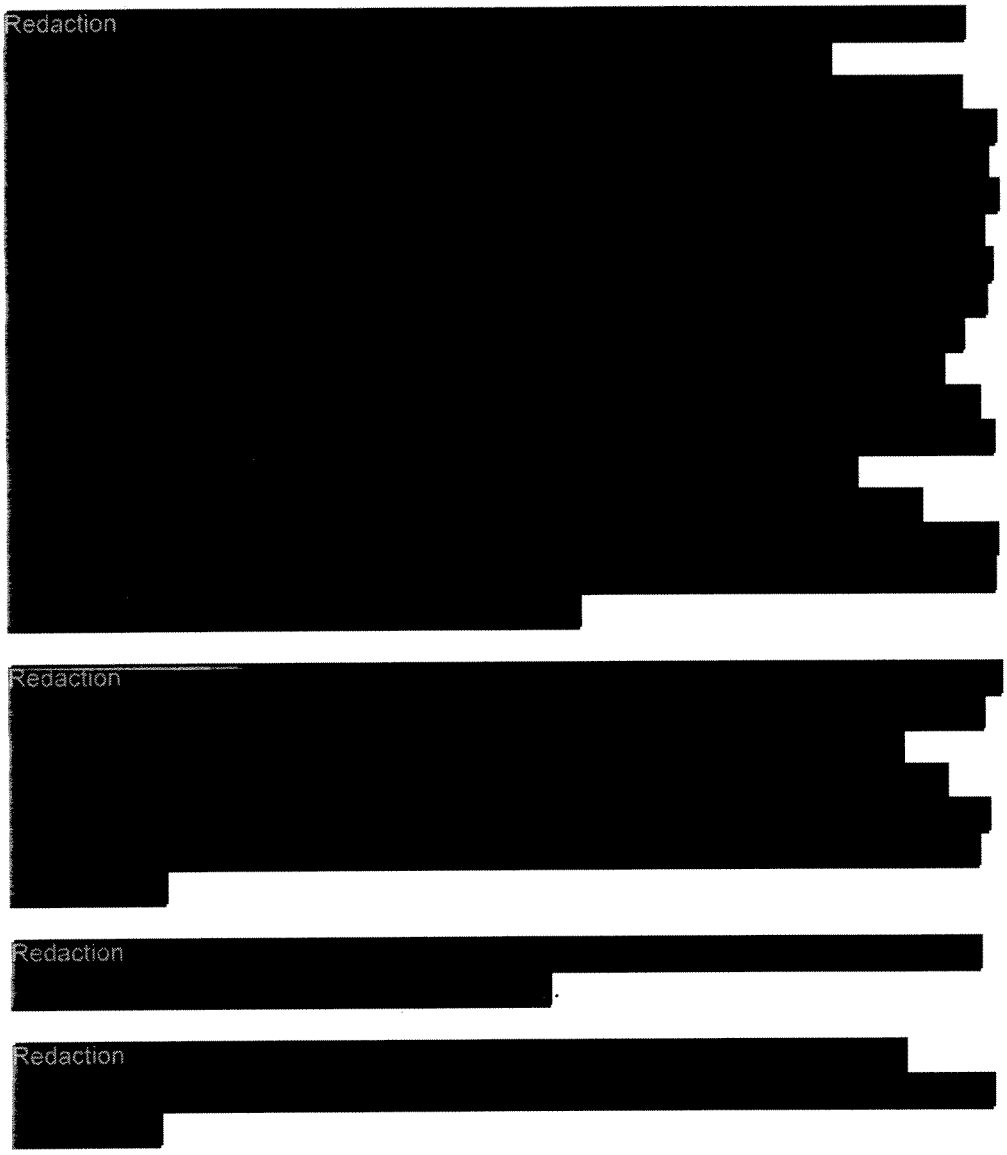
37. Section 501(a) of the Partnership Agreement provided at all relevant times in relevant part that [redacted] That is where the terminology "Active Life Partner" originated: to differentiate between those Partners who made the election to remain active and those who did not, choosing instead, for various reasons, to retire, otherwise become inactive, or continue to practice law, as [redacted] did, outside of Kelley Drye in a corporate setting or in another law firm. The Partnership Agreement permits the Executive Committee in its sole discretion to award a bonus to a Life Partner who has made a significant contribution to the Firm. It is difficult for a retired Life Partner, an inactive Life Partner, or a Life Partner who elects to continue his or her practice outside Kelley Drye, to be considered for a Life Partner bonus from Kelley Drye.

38. Only three current Life Partners, including me, elected to continue to remain active as a Life Partner at Kelley Drye, coming to the office every day, servicing and holding onto our clients, billing and collecting fees and disbursements from those clients, assisting in transitioning to younger Partners to the extent feasible the business of the Life Partner's clients, training younger Partners and Associates, presenting CLE lectures to Partners and Associates, and performing whatever client development activities were needed to retain existing clients, obtain new clients, and expand the business of existing clients. The Firm has consistently awarded an annual Life Partner bonus only to those three because only they have continued to remain active in the Firm's practice. Having accepted the activities of those three Active Life Partners, as a matter of law the Firm would be obligated to pay each compensation based on quantum merit, or unjust enrichment, or the implied covenant of good faith and fair dealing.

The [redacted] and [redacted] Retainer Payments

39. In the Firm's January ___, 2000 proposed agreement to me setting forth the terms under which I would continue as an Active Life Partner (Exhibit 1, attached hereto), paragraph 4 of the proposed agreement made clear that I would be permitted to retain my third party payments from [redacted] and [redacted] to the same extent as the Firm had permitted [redacted] and [redacted] to retain third party payments from their clients. (Exhibit D, E, F, and G to my Original Declaration). The only open issues in 2000 between the Firm and me were my continued entitlement to a client development allowance and my being eligible for consideration for a Life Partner bonus, in addition to my retention of my retainer payments from [redacted] and [redacted]

40. On February 1, 2000 [redacted] had sent me the terms of the retainer agreement. Its purpose was to provide me monetary motivation to remain active as its "counsel" upon [redacted] President learning that I was being forced to become a Life Partner with no assurance that Kelley Drye would pay me any compensation for remaining active on [redacted] and [redacted] matters. The [redacted] retainer agreement (Exhibit B to my Original Declaration) is signed by [redacted] President and reads as follows:



On February 9, 2000, I sent then Redaction and Executive Committee Member [redacted] the retainer agreement as an attachment to my Memorandum of the date, noting that I had agreed to the terms. (A true and correct copy of this Memorandum is attached hereto as Exhibit 9).

41. In his Declaration, Callagy claims that such third party payments constitute "ancillary income" under the Partnership Agreement and therefore are "Partnership Revenues" which I could not keep, unless the Firm has specifically authorized me to do so (it had: in paragraph 4 of the Firm's January ___, 2000 Memorandum); that the retainer agreement did not specify the length of the engagement (it did: "we will review and continue this arrangement so long as it continues to be beneficial to both parties, i.e., terminable at will be either as in any attorney /client relationship"); the amount to be

paid (neither do the Kelley Drye approved third party payment agreements with Redac, Red, Redacti, Redacti, and Reda); or the nature of the work to be performed (it did: "I envision your continuing to act as you do now in representing us and supervising the other Kelley Drye partners, notably Redaction and Redaction, who you choose to assist in working our account"); that the Firm has not approved the retainer agreement payments because both Reda and he had explicitly advised me in a February 22, 2000 memorandum that I could either retain the direct payments from Redactio and Red or be considered for an annual bonus by the Firm's Executive Committee, but that I could not have both (Exhibit 3 supra, attached hereto); and that in soliciting and receiving bonuses from the Firm in 2001 and each subsequent year, I did not make any mention of my "continuing " receipts of payments directly from Redactio of Reda.

42. But, Callagy's Declaration specifically avoids mentioning, let alone denying the time-line of events that followed his and Redacti February 22, 2000 memorandum to me. Those events are described in detail in paragraph 6 of my March 2011 Original Declaration. In paragraph 6, served on Defendant more than a month before Callagy's response Declaration of April 27, 2011, I acknowledged the following:

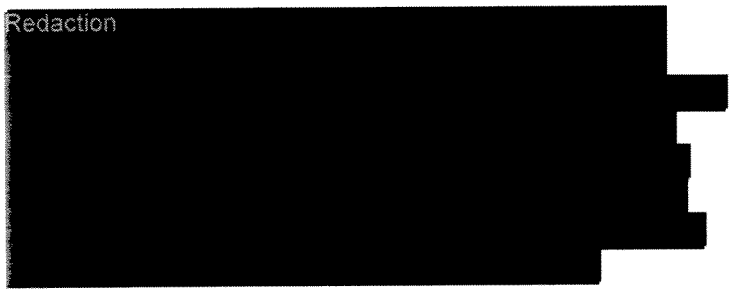
(i) the "either – or" nature of the retainer or bonus, but not both, in the February 22, 2000 memorandum;

(ii) the award to me in the February 22 memorandum of a client development allowance of Redacti;

and noted the following:

(iii) my March 10, 2000 memorandum to Redacti and Reda asking that my client development allowance be raised to Redacti, approved by Reda (See Exhibit 6, with Redacti handwriting "OK Reda 4/4/00").

(iv) attached to my March 12, 2001 memorandum to Redacti and Reda, asking that I be eligible to receive both the retainer payments and be eligible for consideration to receive a Life Partner bonus, is my handwritten note date March 14, 2001:



Following that note, Exhibit J to my Original Declaration shows a copy of the Redacti bonus check I received on April 10, 2001.

43. Significantly, although both my March 12, 2001 memorandum and my March 14, 2001 handwritten note were before Callagy and [redacted] as Exhibit H to my Original Declaration, in his response Declaration [redacted] did not deny the veracity of that March 14, 2001 handwritten note, nor did [redacted] submit a Declaration of denial.[2]

44. After March 14, 2001 I continued to receive the [redacted] and [redacted] retainer check payments each month at Kelley Drye in window-page type envelopes clearly containing a check payable to me care of Kelley Drye; pursuant to terms of the retainer agreement, I continue to put in no billable time for [redacted] or [redacted] on any of my daysheets, an absence which continued *each day* beginning in January 2000 to date, as contrasted to my pre-2000 daysheets when I likely had billable time for [redacted] and [redacted] each such day in each year during the prior ten years; I continued to have Kelley Drye prepare my tax return which in some years lists as the "preparer" on the second page of the returns [redacted]; the K-1 to my 2000 tax return shows the [redacted] and [redacted] retainer payments, as does the K-1 to each tax return each year thereafter, and the K-1 to the 2001 tax return also shown the Kelley Drye Life Partner bonus, as does the K-1 each tax return each year thereunder; I continued to send out each month four to six separate bills to [redacted] and [redacted] the covering letters to each then and now read in the last paragraph: "Pursuant to the agreed-to retainer agreement, not charge has been made for my time".

45. In that background, no reasonable juror could conclude that Kelley Drye did not know or had no way to know that I was receiving both the two retainer payment checks each month and soliciting a one time annual bonus from [redacted] in an exchange of memoranda with him. It is inconceivable that in approving the request for a bonus each year, [redacted] would not have asked me whether I was continuing to receive my [redacted] and [redacted] retainer payments. And in the earlier years he did ask, as I related in my October 28, 2008 Memorandum to Managing Partner [redacted] with

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[2] In our meeting on March 14, 2001, Callagy knew that I was then receiving the [redacted] and [redacted] retainer checks. That was made clear to him throughout my December 14, 2000 and March 12, 2001 Memoranda to him and [redacted]

[redacted]

In his Declaration, Callagy does not deny that the meeting took place nor does he claim that in granting me the [redacted] bonus he told me that I could no longer receive the [redacted] and [redacted] retainer payments.

copy to Redacti and the rest of the Executive Committee (Exhibit K to my Original Declaration). There, on page 13, I wrote:

46. Redacti had a copy of that Memorandum back in October 2008. At no time did he deny the veracity of that recitation. More up to date, Redacti had a copy of that Memorandum as Exhibit K to my March 2011 Original Declaration. In submitting his response Declaration on April 27, 2011 consisting of seven typewritten pages, Redacti did not deny that the recitation of facts in my October 28, 2008 Memorandum was truthful.

47. The final piece to this saga is that after the Firm opened up the envelope containing my July 28 Reda retainer payment check, Managing Partner Red initiated an inquiry which resulted in an exchange of memoranda with me beginning in August 2008 and ending in my October 28, 2008 Memorandum to him, with copy to Redacti and the rest of the Executive Committee Following their receipt of that Memorandum, Kelley Drye continued to pay me the highest bonus awarded to a Life Partner in 2008, 2009, 2010, and 2011, with unquestioned knowledge that I had been receiving and continued to receive each month both my Redacti p and Red retainer payments and each year the Life Partner bonus. Notwithstanding that knowledge, Kelley Drye applied no offsets in 2008, 2009, 2010, or 2011, or retrospectively to any prior year, against the bonus compensation the Firm had paid me and was continuing to pay me, by the dollar amount of the retainer payments that Redactio and Reda had paid me and were continuing to pay me. In addition, nor did Kelley Drye require that I start recording as Kelley Drye billable time the time I was continuing to spend as Redaction and Redact lead counsel.

48. Finally, Callagy asserts that the retainer payments which Redactio and Red paid me constituted "Auxiliary Income" under the Partnership Agreement and, as such, belong to the Firm as Partnership Revenue "unless the Firm has specifically authorized [me] to do so." But, for the reasons stated above and the documents and actions of the Firm supporting those reasons, no reasonable juror could conclude that the Firm Redactio and Reda initially, and Red and the Executive Committee subsequently) had not consented to my retention of those retainer payments.

49. Further, Ancillary Income has no application to a Life Partner (Exhibit A to Callagy Declaration). The definition in the Partnership Agreement is clear and unambiguous:

> "It means compensation paid to or respect to a Partner or a Former Partner for legally related services rendered by the Partner or the Former Partner while a Partner which does not involve the rendering of legal services or advice as such...

50. The Term "Partner", "Former Partner", and "Life Partner" are separated and distinct defined terms on page 3 of the Partnership Agreement (Exhibit A to the Callagy Declaration). But, the retainer payments which [redacted] and [redacted] paid me began only when I became a Life Partner and only for services I rendered them when I became a Life Partner. Therefore, despite Callagy's Declaration, Ancillary Income has no application to a Life Partner.

Free Legal Services/Real Estate Matter and Litigation

51. My son and I were involved in a real estate matter and litigation ensured over fees owed to a law firm that had represented my son and myself. Despite Callagy's denial, this case began as a real estate matter and remained a real estate matter through the trial which involved a dispute over exorbitant legal fees that I was charge for poor work by the Landlord/Tenant law firm Kelley Drye had recommended I use.

52. The case began in 2001 in Housing Court when Lenox Hill Hospital sought to evict tenants in townhouses the Hospital owned so that the Hospital could destroy the townhouses and erect a new building. The case continued as a real estate matter through the trial in April and May 2006 in Supreme Court Westchester County. The trial concerned itself solely with the Landlord/Tenant law firm's counterclaims seeking over $300,000 in legal fees to collect $35,000 in legal fees for services rendered in 2001 and 2002.

53. From August 2001, when the eviction proceedings began in Housing Court, through November 30, 2005, a Kelley Drye Real Estate Partner and various litigation Partners assisted me in the case, *without charge*, consistent with Kelley Drye standard practice. This included Litigation Partner [redacted] who later acted as my trial Counsel. It was only on November 25, 2005, when the Landlord/Tenant law firm served a subpoena on Kelley Drye seeking Kelley Drye's time records in the case, of which there were none, returnable on November 30, 2005, that [redacted] ordered [redacted] to start to put in daysheets. He did so starting on November 30, 2005. The trial ended on May 2, 2006. Kelley Drye did not bill me or my son for [redacted] time as trial counsel consistent with Kelley Drye's standard practice. It was only after I had raised the Life Partner age discrimination issue with [redacted] in an exchange of memoranda in January and February 2007, that [redacted] notified me in a meeting in my office on April 19, 2007 [redacted]

[redacted]. When I protested the loss of future bonuses, [redacted] put a hold on my [redacted] bonus and the write-offs. I then relayed this turn of events to [redacted] in an email, dated May 4, 2007, a copy of which is attached hereto as Exhibit 10. That May 4, 2007 email points out that I had never been billed for [redacted] time which took place for the most part in April and May 2006 and that [redacted] had raised the issue only after I had raised the age discrimination issue with Callagy in January and February 2007

54. Attached to my May 4, 2007 e-mail to [redacted] was the Supreme Court's decision in the case (Justice J. Emmett Murphy). The Decision After Trial, in sustaining my position, reads in relevant part:

> The Court largely credits the testimony of Eugene T. D'Ablemont as to the events which occurred in the course of defendant's representation of plaintiffs in the summary proceeding. His recall of conversations and events was well organized, remarkably detailed convincing.
>
> The Court concludes that defendants over billed plaintiffs from the first bill they submitted, and continued to do so through these proceedings. Plaintiff complained immediately and persistently, and defendants failed or refused to adjust the bills or even correct obvious mistakes in them, such as billing an associate at partner rates.

55. By email dated June 27, 2007, from [redacted] to Carty, subject ETD, [redacted] wrote: "Bob [redacted] spoke to him and you can go ahead with the check and writing off the AR". A copy of the email is attached hereto as Exhibit 11.

56. The report to the Firm for the month ended June 30, 2007, shows on page 2 in the section headed "WIP Wrote-Off Analysis Year-To-Date as of June 30, 2007" the write-off of [redacted] for "client" [redacted]. That is the only write-off for me. [redacted].

57. In paragraph 11 of his Declaration, Callagy also relates testimony that I gave under oath that I know "it is false to state in his declaration that it was 'pursuant to standard practice' that Kelley Drye did not charge him or his son for these extensive litigation services because, *inter alia*, he testified under oath in an effort to support the merits of his son's case that, 'I do know that I will, my son and I, will be billed for Mr. [redacted] time as co-trial counsel ....(Trial transcript of April 2006, at p. 85).

58. But, here again Callagy took that testimony out of context. He overlooks my prior testimony:

"THE COURT: What was your answer to did younger associates do work at Kelley Drye & Warren?
THE WITNESS: On this matter?
THE COURT: Yes.
THE WITNESS: I don't recall, but it well may have been that we had some young associate off the meter look at things for us and that is a permissible activity for a member of the immediate family of a partner. We do these things." (Trial Transcript of April 2006, at p.54, attached hereto as Exhibit 12).

and again:

"Q Does Kelley, Drye & Warren have any criteria or a requirement before an attorney is allowed to do work for a client without charging them on a bill?

A Any criteria other than I know of no criteria other than we do work off the meter, whether it be real estate work or estate planning or drafting wills for partners and their immediate families.

Q But for clients that are not immediate families of partners, are you required to bill for all work?

A We do pro bono work, that become clients of the firm. We do a substantial amount of pro bono work where associates and partners spend considerable time for which we do no billing." (Trial Transcript of April 2006 at p. 56, attached hereto as Exhibit 13).

and again:

"Q When attorneys at Kelley, Drye & Warren do work without charging for families of partners of the firm, are they required to record their time in some way?

A No." (Trial Transcript of April 2006 at p. 57, attached hereto as Exhibit 14).

and again:
"VOIR DIRE EXAMINATION BY MS. EPHRON MANDEL:

Q Mr. D'Ablemont, when you were involved in the Lenox Hill matter, were you acting on behalf of Kelley, Drye & Warren LLP or on your own behalf?

A I was acting on behalf of my son. Kelley, Drye & Warren was assisting me as we do for partners without charge. I think you will notice that on the answer to the – Verified Answer, Kelley, Drye is listed of counsel." (Trial Transcript of April 2006 at p. 71, attached hereto as Exhibit 15)

59. The reason I testified that I did know that I would be billed for [redacted] time as trial counsel was because [redacted] told me so in November 2005 when the Landlord/Tenant law firm served a subpoena on Kelley Drye and [redacted] began putting in daysheets in November 2005. Up to that time in the case, he had been assisting me, without charge, in pre-trial matters and attending pre-trial conferences before Justice Murphy and the Trial Calendar Judge. I thought then and I later expressed in my May 4, 2007 email to Executive Committee member [redacted] that it was wrong for the Firm to have threatened to bill me, an opinion I had expressed when [redacted] notified me.

60. The fact remains that, although the trial ended on May 2, 2006, and preparation of post-trial memorandum ended on May 9, 2006, Kelley Drye never did bill me in 2006 or in 2007 and the matter arose again in April 17, 2007 when [redacted] raised it after I had raised the Life Partner age discrimination with Callagy in 2007.

61. The fact also remains that Kelley Drye wrote off the charge in June 2007 after [redacted] read my May 4, 2007 email to him. Kelley Drye raised it again only after I had filed my charge with the EEOC on February 29, 2008, by Kelley Drye's including it in its Fifteenth Affirmative Defense.

The Patent Application

62. 

63. Based on the foregoing, the matter was not "reluctantly" written off. It was done so pursuant to a July 18, 2008 Memorandum, a copy of which is attached as Exhibit L to Callagy's Declaration.

DECLARATION OF JOSEPH O'KEEFE

64. In paragraphs 2 and 3 of the Declaration of Joseph O'Keefe, Senior Counsel of the Firm representing Defendant in this case, he argues that if I had recorded as Kelley Drye billable hours the time I spent as [redacted] and [redacted] lead counsel during the period I was a Kelley Drye Life Partner, Kelley Drye "would have billed" [redacted] and [redacted] well over [redacted] and far beyond that, based on the personal time logs I kept of that time. This is contrary to fact, and is premised on three errors, the first of which is that Kelley Drye did not approve the [redacted] and [redacted] retainer agreements. But, paragraphs 39 through 50 above belie that contention.

65. The second error flows from the first. It is premised on the proposition that, notwithstanding Kelley Drye's having accepted the fruits of that retainer agreement -- over $5 million in cash receipts at 100 percent realization that the Firm would not have received from [redacted] and [redacted] had Kelley Drye not approved the retainer agreements, which it did - - Kelley Drye can somehow now claim that it lost hundreds of thousands of dollars in billings and collections it would have received from [redacted] and [redacted], on top of the [redacted], but for my not recording as Kelley Drye billable time the time I spent as [redacted] and [redacted] lead counsel.

66. But, [redacted], [redacted], [redacted], and members of the Executive Committee had the [redacted] retainer agreement in hand in early February 2000. They had the [redacted] retainer agreement in hand in early March 2000. Both retainer agreements make crystal clear that because the Firm was no longer obligated to pay me, as a Life Partner, any compensation for continuing to perform as their "lead counsel", [redacted] and [redacted] would motivate me to continue to perform by paying me directly a retainer payment and in return they would pay Kelley Drye for everyone's time, but mine. In fact, in none of my annual requests to Kelley Drye since I became a Life Partner for compensation for my contributions to the Firm did I ever seek or receive compensation for my work under these retainer agreements. Both retainer agreements further make crystal clear that I was the key to [redacted] and [redacted] continuing to use Kelley Drye's services and that if I could not work the retainer agreement arrangement out "with your partners" [redacted] and [redacted] would leave Kelley Drye and have [redacted] law firm of record, [redacted], perform their legal services. That I was the sine qua non to [redacted] and [redacted] staying at Kelley Drye - - and no other Kelley Drye Partner - - is seen in the retainer agreements' provision:

[redacted]

[redacted]

Redaction [redacted]

[redacted] Further, Kelley Drye's records will reflect that Kelley Drye lost no cash receipts by the absence of my billable time. I was able to work younger Partners into performing services for [redacted] and [redacted] which I personally had performed before I became a Life Partner. Those records should establish that I spent more time on [redacted] and [redacted] matters during the eleven years before I became a Life Partner, than the time I have spent on their matters during the retainer agreement period. Likewise, those records should also establish that the $5 million plus in cash receipts Kelley Drye has received from [redacted] and [redacted] during the retainer period are more than the cash receipts Kelley Drye received from them for a comparable period before I became a Life Partner.

68. The third error is that my retainer agreements with [redacted] and [redacted] were somehow different from the third party payment agreements which the Firm had previously approved with [redacted] and [redacted] and would later approve with [redacted] But, paragraphs 17 through 20 above notes that the essence of each of those arrangements was the same as that of the [redacted] and [redacted] retainer agreements: (a) [redacted] and [redacted] would enter no Kelley Drye billable time for the hours they spent performing services, respectively, for [redacted] and [redacted] (b) the payments each received from those Kelley Drye clients would not be deemed Partnership Revenues; and (c) Kelley Drye would not, and did not offset against the compensation Kelley Drye paid each, the amount of the third party payments each received directly from those Kelley Drye clients. Kelley Drye's actions in applying those same three standards to the [redacted] retainer arrangements are seen not only in 2000 and every subsequent year with Kelley Drye's knowledge and consent, but again after its August 2008 through October 28, 2008 three month investigation into the same claims that Kelley Drye raises now – the propriety of the retainer payments I had been receiving from [redacted] and [redacted] as set forth in paragraph 47 of this Declaration above.

69. Finally, paragraph 4 of the O'Keefe Declaration takes a snippet out of a 2002 letter I wrote to [redacted] President [redacted] to address his concerns over the amount of legal fees Kelley Drye had charged [redacted] on a particular matter during the period October 2001 through August 31, 2002. He believed the fees on the matter would be lower due to the non-billing of my time under the retainer agreement. The lead line in my letter tells the story:

> "You have asked me the total dollar amount we charge [redacted] for the [redacted] and [redacted] lawsuit, which gives me the opportunity to launch into a commercial".

In the course of addressing the retainer in the letter, and extolling its benefits for all concerned, I noted that *during the first six months of 2002*, Kelley Drye's legal fees had been significantly reduced from what they had been in prior years. The

commercial part of the letter was that the retainer agreement had been a win, win situation for [redacted] and me, as it was intended to be. It was even more of a win, win situation for Kelley Drye which thus far has received from [redacted] and [redacted] over [redacted] in cash receipts that it would not have received but for the retainer agreement.

70. Further, as noted above, Kelley Drye's records should establish that the legal fees which Kelley Drye has collected from [redacted] and [redacted] under the retainer agreement, without the inclusion of any billable time for me, are likely not only not "significantly reduced" but higher than the legal fees which Kelley Drye collected from [redacted] and [redacted] for a comparable period prior to the beginning of the retainer period in 2000 when I was submitting billable hours for the time I worked on [redacted] and [redacted] matters.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge and/or based upon my review of applicable documents.

Executed on May 18, 2011

Eugene T. D'Ablemont

Exhibit 1

REDACTED

Exhibit 2

REDACTED

Exhibit 3

REDACTED

Exhibit 4

REDACTED

Exhibit 5

REDACTED

Exhibit 6

REDACTED

Exhibit 7

REDACTED

Exhibit 8

REDACTED

REDACTED

Exhibit 9

REDACTED

Exhibit 10

REDACTED

Exhibit 11

REDACTED

Exhibit 12

REDACTED

Exhibit 13

REDACTED

Exhibit 14

REDACTED

Exhibit 15

REDACTED

Exhibit 16

REDACTED