

PAUL WEISS, RIFKIND, WHARTON & GARRISON LLP
Windsor v. The United States Of America

1285 AVENUE OF THE AMERICAS
 NEW YORK, NEW YORK 10019-6064

TELEPHONE (212) 375-3000

LLOYD K. GARRISON (1946-1991)
 RANDOLPH E. PAUL (1946-1996)
 SIMON H. RIFKIND (1930-1993)
 LOUIS S. WEISS (1927-1990)
 JOHN F. WHARTON (1927-1977)

WRITER'S DIRECT DIAL NUMBER

(212) 373-3086

WRITER'S DIRECT FACSIMILE

(212) 373-2818

WRITER'S DIRECT E-MAIL ADDRESS

rkaplan@paulweiss.com

UNIT 3601, FORTUNE PLAZA OFFICE TOWER A
 NO. 7 DONG SANMUAN ZHONGLU
 CHAO YANG DISTRICT
 BEIJING 100020
 PEOPLE'S REPUBLIC OF CHINA
 TELEPHONE (86-10) 5828-8300

12TH FLOOR, HONG KONG CLUB BUILDING
 3A CHATER ROAD, CENTRAL
 HONG KONG
 TELEPHONE (852) 2448-0300

ALDER CASTLE
 10 NOBLE STREET
 LONDON EC2V 7JU, U.K.
 TELEPHONE (44 20) 7367 1000

FUKOKU SEIMEI BUILDING
 2-2 UCHISAIWAICHO 2-CHOME
 CHiyoda-KU, TOKYO 100-0011, JAPAN
 TELEPHONE (81-3) 5577-8101

TORONTO-DOMINION CENTRE
 77 KING STREET WEST, SUITE 3100
 PO. BOX 226
 TORONTO, ONTARIO M5K 1J8
 TELEPHONE (416) 504-0520

2001 K STREET, NW
 WASHINGTON, DC 20006-1047
 TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
 PORT OFFICE BOX 32
 WILMINGTON, DE 19899-0032
 TELEPHONE (302) 655-4410

MATTHEW W. ABBOTT
 ALLAN J. ARFA
 ROBERT A. ATKINS
 DAVID J. BAILEY
 JOHN F. BAUGHMAN
 LYNN B. BAYARD
 DANIEL J. BELL
 CRAIG A. BENSON
 MITCHELL L. BERG
 MARK S. BERGMAN
 BRUCE BIRENBOIM
 W. CHRISTOPHER BOEHNING
 ANGELA BONVINO
 HENRY BRANN
 JAMES L. BROCHIN
 RICHARD J. BRONSTEIN
 DAVID W. BROWN
 SUSANNA M. BURGEL
 PATRICK B. CAMPBELL
 JEANETTE K. CHAN
 YVONNE T. F. CHAN
 LEWIS R. CLAYTON
 JAY COHEN
 KELLY A. CORNISH
 CHRISTOPHER J. CUMMINGS
 CHARLES E. DAVIDOW
 CHARLES E. DAVIS
 THOMAS V. DE LA BASTIDE III
 ARIEL J. DECKELBAUM
 JAMES M. DUBIN
 ALICE ERLISLE EATON
 ANDREW J. EHRLICH
 GREGORY A. EZRING
 LESLIE GORDON FAGREN
 MARC FALCONE
 ANDREW C. FINCH
 BRAD J. FINKELSTEIN
 ROBERTO FINZI
 PETER E. FISCH
 ROBERT C. FLEDER
 MARTIN FLUMENBAUM
 ANDREW J. FOLY
 HARRIS R. FRIDUS
 MANUEL B. FREY
 MICHAEL A. GALLO
 MICHAEL K. GERTZMAN
 PAUL D. GINSBERG
 ADAM M. GIVERT
 ROBERT D. GOLDBAUM
 NEIL GOLDMAN
 ERIC S. GOLDSTEIN
 ERIC GOODSON
 CHARLES H. GOODE, JR.
 ANDREW G. GORDON
 NICHOLAS GROOMBRIDGE
 BRUCE A. GUYENPLAN
 GAINES GWATHMEY, III
 ALLAN B. HALPERIN
 CLAUDIA HAMMERMAN
 GERRARD E. HARPER
 BRIAN S. HERMANN
 ROBERT M. HIRSH
 MICHELE HIRSHMAN
 JOYCE S. HUANG
 DAVID S. HUNTINGTON
 MEREDITH J. KANE
 ROBERTA A. KAPLAN
 BRAD S. KARP
 JOHN C. KENNEDY

ALAN W. KORNGERG
 DANIEL J. KRAMER
 DAVID K. LAKHDHAR
 STEPHEN F. LAMB
 JOHN E. LANGE
 DANIEL J. LEFFELL
 ZHENYI GREG LIU
 JEFFREY D. MARELL
 MARCO V. MASOTTI
 EDWIN S. MAYNARD
 DAVID W. MAYO
 ELIZABETH R. MCCOIM
 MARK F. MENDEL SOHN
 TOBY S. MYERSON
 JOHN E. NATHAN
 CATHERINE NYARADY
 JOHN J. O'NEIL
 ALEX YOUNG K. OH
 BRAD R. OKUN
 KALEY D. PARKER
 ROBERT T. PARKER
 MARC E. PERLMUTTER
 MARK F. POMERANTZ
 VALERIE S. RADWANER
 CARL L. REISNER
 WALTER G. RIGGIARDI
 WALTER RIEMAN
 RICHARD A. ROSEN
 ANDREW N. ROSENBERG
 PETER J. ROTHENBERG
 JACQUELINE F. RUBIN
 RAPHAEL M. RUBBO
 JEFFREY D. SAFERS
 JEFFREY S. SAMUELS
 DALE M. SARRO
 TERRY E. SCHIMEK
 KENNETH M. SCHNEIDER
 ROBERT S. SCHWAB
 JAMES M. SCHWAB
 JOHN M. SCOTT
 STEPHEN J. SHIMSHAK
 DAVID R. SIGULAR
 MOSES SILVERMAN
 SEYMOUR SIMKIN
 JOSEPH J. SIMONS
 MARILYN SOREL
 AUDRA J. SOLWAY
 TARUN M. STEWART
 ERIC ALAN STONE
 ALBAN SYNNOTT
 ROBYN F. TARNOFSKY
 MONICA K. THURMOVD
 DANIEL J. TOAL
 MARY A. UNDERBERG
 LIZA M. VELAZQUEZ
 MARIA T. VULLO
 LAWRENCE G. WEE
 THEODORE V. WELLS, JR.
 BETH A. WILKINSON
 STEVEN J. WILLIAMS
 LAWRENCE I. WITCZKIC
 MARK B. WLAZLO
 JULIA T.W. WOOD
 JORDAN E. YARETT
 KAYE N. YOSHINO
 TONG YU
 TRACEY A. ZACCONE
 Y. ROBERT ZACHOWSKI, JR.

Doc. 118

August 12, 2011

*NOT ADMITTED TO THE NEW YORK BAR

BY FACSIMILE

Judge Barbara S. Jones
 United States District Court
 Southern District of New York
 500 Pearl Street
 New York, NY 10007

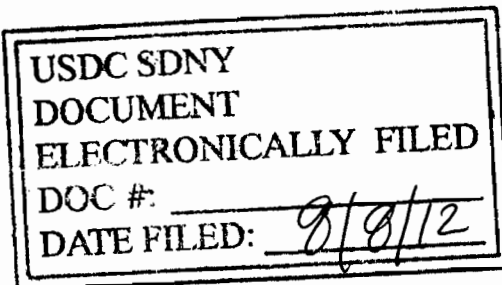
Magistrate Judge James C. Francis
 United States District Court
 Southern District of New York
 500 Pearl Street
 New York, NY 10007

Windsor v. United States, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones and Judge Francis:

While we, too, regret having to burden the Court with further correspondence, defendant-intervenor raises for the first time in his letter in sur-reply the issue of constitutional facts. The finding of constitutional facts is not so simple an issue that it can be summed up in a brief letter, but suffice it to say that BLAG's attempt to do so is inaccurate. As the Second Circuit has explained, in response to a dissenter making much the same argument BLAG makes here,

The dissent's extensive discussion of the significance of the distinction between adjudicative and legislative facts seems to us tangential and unhelpful. The fact that this Court may ultimately undertake *de novo*



PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Judge Barbara S. Jones
Magistrate Judge James C. Francis

2

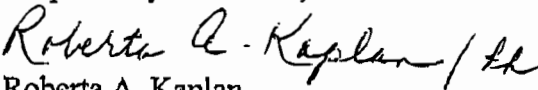
review of any legislative facts found by the District Court on remand or that appellate courts take judicial notice of legislative facts under appropriate circumstances . . . does not mean that we must resolve disputed legislative facts-particularly facts that are dispositive of the case before us-on an insufficiently developed record. Nor should we . . . the types of "legislative facts" that have been addressed most recently in our caselaw deal with much more straightforward questions, e.g., geography and jurisdiction or the fact that cocaine is derived from coca leaves.

Landell v. Sorrell, 382 F.3d 91, n.24 (2d Cir. 2004), *overruled on other grounds by Randall v. Sorrell*, 548 U.S. 230 (2006) (holding statute unconstitutional without need for remand); *accord Ashcroft v. ACLU*, 542 U.S. 656 (2004) (remanding to trial court for fact finding on constitutional fact of whether law was least restrictive alternative under the First Amendment, noting "[b]y remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so"); *see also Perry v. Schwarzenegger*, Transcript of Oral Argument at 81, 704 F. Supp. 2d 921 (No. 09-Civ-2292) (Oct. 14, 2009) ("embedded within such a legislative fact are certain assumptions about human behavior and relationships [. . . a]nd the presentation of evidence, I believe, is essential to the resolution of the issues insofar as they bear on that legal question.").

Moreover, not one of the cases cited by BLAG stands for the radical proposition, apparently advanced by BLAG, that a trial court, when finding any type of fact (whether "adjudicative," "legislative," or "constitutional"), is supposed to engage in a veritable "free for all" -- with hearsay admitted for the truth of the matters asserted, with lay witnesses testifying as to matters that are clearly only within the realm of expert testimony, and with declarants "testifying" without there being any opportunity to test their credibility, bias, or competency. We respectfully submit that trial and summary adjudications in our system do not get conducted in this manner and for good reason -- because doing so would render fundamental principles of fairness and due process that are inherent in our court system a farce.

As noted in my prior letter, should the Court believe it advisable, we are available for a conference with the Court at the Court's convenience. Our goal is to resolve these procedural issues raised by plaintiff's motion to strike in a way that is fair and efficient for the parties and the Court.

Respectfully submitted,


Roberta A. Kaplan

cc: James D. Esseks, Esq.
H. Christopher Bartolomucci, Esq.
Jean Lin, Esq.