excluding the forthcoming the intellectual property related to the forthcoming studio album that will be delivered to Sony in the near future. I am enclosing Leonard Cohen's declaration in the CAK litigation that ensued and IRS can review the CAK litigation documents that were filed in the Southern District of New York (Docket No. 1:00-cv-01068-CBM).

What concerns me about the letter Hochman Rettig wrote is this paragraph: The legal authority is derived from the Supreme Court decision in Commissioner v. Indianapolis Power & Light Co., 493 U-S. 203, I 10 S. Ct. 589 (1990). The Court created a distinction between the taxation of advance payments and the taxation of refundable deposits, although the Court confirmed that advance payments are generally taxable and defined "advance payment" as a non-refundable payment. The Court, however, held that deposits are not taxable. The Court defined "deposits" as refundable payments that are made to secure the payor's performance of its legal obligations under the contract. Please note that the Court also found that a deposit is not taxable even if the payor elects to apply the deposit against amounts owed to the payee. Thus, if the payor fulfills its obligations under the contract, the deposit is refunded. That is the exact scenario presented in this matter. This analysis is also consistent with the United States Tax Court's longstanding treatment of real estate lease deposits where the Court has distinguished between a sum designated as a prepayment of rent (taxable upon receipt) and a sum deposited to secure the tenant's performance of a lease agreement. J & E Enterprises, Inc, v. Commissioner."

The reason this paragraph concerns me is that Sony personally contacted me about pursuing the 2001 intellectual property deal with Leonard Cohen. Stuart Bondell, Sony Music Business Affairs, explained to me that Sony did not want Leonard Cohen pursuing a bond securitization deal. Evidently they had concerns about establishing artist precedent for these types of deal and were specifically concerned about not having the ability to pay artist record advances. As Stuart Bondell explained, advances are the currency of the music industry and permit Sony (and others) to encourage artists to submit their contractually obligated albums. I phoned Leonard Cohen and explained that Sony wanted to pursue the intellectual property deal with him. Cohen was somewhat worried that Sony was making an offer and could later change their minds. Therefore, he advised me that he would be willing to forfeit the CAK bond securitization deal if Sony paid him a substantial non-refundable prepayment against the $8 million deal price. The contractual details had to be resolved and negotiated. I phoned Stuart Bondell back and passed along Cohen's message and Sony agreed to pay the $1 million non-refundable prepayment Cohen requested. Therefore, from my perspective, Cohen received $1 million in income from Sony in 1999. However, the assets were owned by Blue Mist Touring Company, Inc. at the time. As of 2001, Richard Westin had formed Traditional Holdings, LLC who ultimately pursued the stock deal Leonard Cohen personally demanded.

Your October 8, 2002 letter to Richard Westin requests all documents related to the $1 million payment including correspondence, contracts, agreements, royalty obligations, loan documents, emails, letters, and checks. While I am enclosing a substantial amount of evidence, IRS would literally have to make arrangements to come into my management offices and go through the files. They are voluminous and include the corporate files and corporate books and records. While I am not involved with this IRS and/or Tax Court matter at all, I do believe that information is being concealed from the IRS and that makes me extremely uncomfortable.

It was my understanding that Richard Westin and Ken Cleveland, Cohen's accountant, decided to handle the $1 million as a loan on Cohen's personal tax return. I was not involved in that discussion but was on a conference call when they two of them confirmed this and asked me to call Leonard Cohen to see if he agreed. I then phoned Leonard Cohen personally; he confirmed that he wanted the $1 million handled as a loan; and I called Westin and Cleveland back and confirmed this with them.

This essentially sums up my concerns about the $1 million prepayment; $7 million inadvertent 1099s; and the fact that the assets are owned by Blue Mist Touring Company, Inc. Initially, after the non-revocable assignments were executed by Cohen and me, Richard Westin advised us to begin depositing all royalty income to Blue Mist Touring Company, Inc. At a later date, he advised me (and some of this is in writing) that those deposits should be explained as inadvertent. This situation also causes me concern because the income was deposited to Blue Mist Touring Company, Inc. and Westin determined that Leonard Cohen personally should issue the 1099s. Richard Westin also advised me to rip up the SOCAN and writer share assignments with respect to Blue Mist Touring Company, Inc. I took copies home and enclose copies herewith.

Another ongoing issue relates to where the offices for these entities are. There are no offices. I have continuously advised Richard Westin that my personal management offices are not the corporate entities' offices. These entities use my P.O. Box for their corporate office addresses. Traditional Holdings, LLC's corporate office is listed as Richard Westin's home address in Kentucky. Most of these entities are Delaware entities. I do not know why Leonard Cohen and his representatives decided to form Traditional Holdings, LLC in Kentucky. I am enclosing letters Richard Westin prepared for Leonard Cohen and me with respect to the initial proposals with respect to the use of an annuity. Leonard Cohen rejected the first proposal and did not want his adult children involved in any entity he has an ownership interest in.

Please see evidence enclosed.

Thank you for your attention to this matter and, if I uncover additional information, I will submit that to Internal Revenue Service as well.

Very truly yours,

/s/

Kelley Lynch

Exhibit H:
DiMascio & Berardo letter dated
October 27, 2004

DiMascio&Berardo
A Professional Corporation

1901 Avenue of the Stars
Suite 931
Los Angeles, CA 90067
Phone: (310) 282-0666
Facsimile: (310) 282-0688
Website: dimascioberardo.com

October 27, 2004

Via Facsimile Only (859) 268-8017

Richard A. Westin, Esq.
3141 Warrenwood Wynd
Lexington, KY 40502

Re: ***Kelley Lynch: Traditional Holdings, LLC; LC Investments, LLC; Leonard Cohen, et al.***

Dear Mr. Westin:

This law firm has been retained by Kelley Lynch to represent her interests in connection with various corporations, including but not limited to, Traditional Holdings, LLC and LC Investments, LLC. We will be working with Dale Burgess, Ms. Lynch's CPA, to reconcile and correct Ms. Lynch's status as a corporate owner with significant tax liability and to unwind Ms. Lynch's involvement in Mr. Cohen's businesses.

We note that you were the "architect" of Mr. Cohen's business structure and have had significant involvement with the above-referenced limited liability companies. It is our understanding that you will be in Los Angeles, California, the weekend of October 30 through October 31, 2004 and we would like to meet with you while you are in town to discuss the structure of the above-referenced companies, significant transactions and what we understand to be your position on Ms. Lynch's current tax liability. It would be appropriate to meet in our offices on Saturday, October 30, 2004 at 10:00 a.m. as we believe we have a good portion of the corporate documents in our offices. If you have any corporate documents that belong to either of the companies, we would appreciate it if you would bring these documents with you when you travel to Los Angeles this weekend. Please contact us immediately to discuss whether this is a convenient date and time to meet.

In addition, we have been advised that Mr. Cohen has issued numerous threats to Ms. Lynch and members of her family within the past 24 hours. We also understand that Mr. Cohen has tried to force himself into Ms. Lynch's office this morning, even though Ms. Lynch is not in her office. Although it would not be proper for you to represent Mr. Cohen in this matter, we would appreciate it if you would advise Mr. Cohen to immediately cease threatening Ms. Lynch and her family members and to either call this office or have his lawyer call this office if there are any personal items in Ms. Lynch's office that he would like to retrieve.

DiMascio&Berardo

Richard A. Westin, Esq.
October 27, 2004
Page Two

Please contact this office at your earliest convenience so that we can discuss the contents of this letter. We look forward to hearing from you.

Very truly yours,

DIMASCIO & BERARDO

David J. Berardo

DD:p
cc: Client
Dale Burgess

Exhibit I:
Robert Kory January 14, 2005 Memorandum

MEMORANDUM

To: Dianne DiMascio, Esq., David Berardo, Esq., and Dale Burgess, CPA

From: Robert Kory

CC: Ira Reiner, Esq., Kevin Prins, CPA

Re: Cohen v. Lynch, et al.
Open Accounting, Tax Issues, and Legal Issues

Date: January 14, 2005

Following is a summary of issues in anticipation of our conference call at 3PM today to discuss steps toward mediation of the above matter. Needless to say, the information in this memo is preliminary and provided in the context of settlement negotiations. It should not be construed as an admission as to any matter referenced herein. It shall also not be admissible at trial should a settlement not be forthcoming.

I. Accounting

A. Cash Flow Analysis - Cohen

- Need documentation re. 5 unidentified transactions re. Traditional Holdings totaling $464,000 from Greenberg.
- Need documentation re. 6 unidentified transactions re. The Cohen Family Trust totaling $245,000 from Greenberg.
- Royalty summary since 1997
- Publishing (sold through 1997)
- Writer's
- Artist record (sold through 2001)
- Has Cohen (and his entities) been paid all royalties due to him?
- 1996 and 1997 analysis of Cohen Family trust assets moved from Dean Witter to Greenberg.

B. Cash Flow Analysis – Lynch

- Information re. Lynch's bank accounts, brokerage accounts, investments, real property, etc. in order to determine what Lynch received from Cohen entities and how funds used.
- Bank statements
- Checks and wires
- Deposit records
- Telephone transfers

- Real property ownership
- What are management fees due from Traditional Holdings and how do those fees relate to the commission arrangement?
- Does Kelley Lynch have an "equity interest" in Leonard Cohen i.e., anything he has created? Is that "equity claim" continuing as to assets or rights sold after termination?
- Did Kelley Lynch have any rights to take funds from personal accounts? Cohen Family Trust investment accounts
- How do the parties reconcile their intentions as to Kelley Lynch compensation in light of the conflicting and incomplete documentation related to Traditional Holdings, LLC, Blue Mist Touring [Company], Inc. and LC Investments, LLC and aborted CAK bond financing transaction?
- Which company owns what assets?
- Were any asset transfers valid and enforceable under applicable corporate law? If so, which one(s)?
- How were assets sold by Traditional Holdings to Sony? Is Lynch asserting transaction invalid and should be rescinded?
- How to explain Cohen and Lynch participation in multiple conflicting asset transfers?
- What are Kelley Lynch compensation rights, if any, under LC Investments and ongoing writer's royalties? ETC.
- How to reconcile aborted bond financing involving CAK in 1999 and various entities?

C. Lynch compensation – rights under Traditional Holdings (Kory Doc labels this as "B" – Lynch has corrected lettering throughout document)

- How does Lynch right in 15% commission paid at closing reconcile with other rights to ongoing compensation?
- Sales price represents discounted value of royalty stream?
- Does payment of commission on closing satisfy 15% commission rights as to all revenues from those assets?
- What is Kelley Lynch due under the Management Agreement?
- Is the Management Agreement valid and enforceable.?
- Was Kelley Lynch authorized to make loans?
- To herself?
- To Leonard Cohen?

D. Lynch duties and obligations under Traditional Holdings. (Kory Doc labels this as "C" – Lynch has corrected.)

- What were and are Kelley Lynch's fiduciary duties to Leonard Cohen?

- Did she have a duty to convey Greenberg's letters warning about the dangers of overspending?
- Does she have a duty to document loans?
- Personal property that may have been purchased with Cohen's funds i.e. jewelry.
- Any loan agreements on behalf of Cohen at CNB or any other institution signed by Lynch and subsequent use of proceeds.
- Analysis of credit card charges made by Lynch to Cohen credit cards and paid by Cohen: Citibank 1, Citibank 2, and Amex.
- Assets owned or controlled by Lynch or Lynch's parent's which could form the basis of restitution fund.

C. Reconciliation of Cohen Accounts - Lynch Accounts

D. Tax

- Actual income received by entity compared with reported income reported on income tax returns, including analysis of sources of all income reported on returns: Cohen, Lynch, LCI, Traditional Holdings.
- Actual monies paid to Lynch compared with reported monies paid and taken as business expenses on tax returns
- Actual tax payments v. required payments (all entities).
- Impact to the Cohen entities and to Lynch if Cohen agrees to "forgive" the debt, if any, owed by Lynch to Cohen or Cohen entities.
- Impact of phantom income to Lynch from profit allocations without distributions from Traditional Holdings
- Impact, if any, the distributions and "loans" from the trusts have on tax free/tax deferred status of the trusts.
- Potential tax liability to Lynch for failing to report all of the monies received from Cohen entities (**assuming she failed to report all the income**).
- Impact on all parties of Traditional Holdings failure to report sale to Sony, or manner in which sale treated (delta of $5 million basis and $8 million sale price may be consumed in fees paid to third parties).

II. Legal

- Lynch compensation – Intention of parties.
- What is the compensation arrangement between Cohen and Lynch for Kelley Lynch's services?
- What is the commission arrangement?
- Did she have a duty to discuss ambiguities in Management Contract with Leonard or his representatives?
- What is Kelley Lynch's obligation as to annuity? Did she have a duty to preserve assets in order to pay annuity? Does dissipation of assets constitute anticipatory breach?

D. Greenberg duties and potential liability

- Duty of Greenberg to safeguard funds. Did he know or should he have known about improper dissipation of Cohen's assets? In Cohen Family Trust? Traditional Holdings?
- Impact of Greenberg not maintain records expected to be maintained in the ordinary course of business (i.e. loan documentation including notes and loan agreements, wire instructions).
- Impacting of Greenberg not accurately reporting "true" condition of the trusts.
- Loans were apparently treated as unimpaired assets.
- Ongoing and even recent Greenberg emails to Cohen showing $5 million value in TH.
- Failure by Greenberg to make sure that Cohen was aware of two cautionary letters about spending, particularly in view of monthly positive emails directly to Cohen and failure to mention in phone calls.

E. Westin duties and potential liability

- Duty of Westin to set up Traditional Holdings in manner that includes elementary mechanisms to safeguard funds? Did he know or should he have known about improper dissipation of Cohen's assets?
- Impact of Grubman firm's notes about dangers of Kelley Lynch theft. **Stuart Fried, <u>Grubman firm confirmed that they wrote no such letter/notes</u>.**
- Significance of role as ongoing tax preparer (i.e. knowledge, duty to assure loan documentation in place, entity not impaired, etc.)
- Did he know about loans, and failure as to preparation of loan documentation by Greenberg?
- Liability for Management Agreement that is manifestly filled with errors.
- Liability for attack on Cleveland when Cleveland attempted to raise issues as to inadequacy of records

J. Other Issues

- Claim by Cohen of fraud in the inducement against Greenberg, Westin, Grubman, McBowman, and Lynch for failure to advise Cohen that discounting royalties for sale was ill advised and would serve only to create transaction fees.
- Impact of Cohen selling his royalty rights (because he thought he was out of money) as compared to had he maintained those streams of income.
- Damage for lost profits, transaction fees, theft losses, negative tax consequences.
- Liability for advisors who failed to show Cohen his income stream of $600,000 annually.

- Lynch's unwillingness to live on $90,000 (15% of $600,000).
- Advisors cooperation with Lynch and apparent lack of consultation with Cohen.

III. Procedural (III on Kory doc, page 5)

- Agreement to mediate – Cohen and Lynch
- What form of agreement?
- How to address issues raised in this memo and other issues to be identified?
- How to exchange information? **Lynch gave everything to IRS. Anyone interested in the evidence should contact IRS Commissioner's Staff in Washington, DC.**
- How to reach consensus as to facts?
- Selection of mediator.
- Other issues.

Articles of Organization (Traditional Holdings) – State of Kentucky Website.

http://apps.sos.ky.gov/ImageWebViewer/(S(mlksut2epdqcii45fdk0ko45))/OBDBDisplayImage.aspx?id=1208329

L. Agreement to mediate – Greenberg Westin, Others (Kory doc, III B, C, & D)

- When and how to provide notice of claims?
- What form of agreement?
- Schedule:
- Meditation agreement by January 21
- Meeting at D&B – January 21 with Cohen and Lynch present to endorse final agreement and secure full cooperation.
- Preliminary and verbal notice to Greenberg and Westin by January 19.
- Formal written notice to Greenberg and Westin by January 24.
- Mediation target date – 90 days or less from date of mediation agreement.

Exhibit J:
Steven Machat email to Kelley Lynch

From: <smachat@gmail.com>
Date: Wed, Feb 8, 2012 at 9:26 PM
Subject: Hi
To: Kelley Lynch <kelley.lynch.2010@gmail.com>

I need the stranger papers as I am about to sue those 2 evil liars. Cohen and his Satin, Kory.

Please get it to me tomorrow.

I can not keep waiting.

Thanks and be safe.
Sent from my Verizon Wireless BlackBerry

Exhibit K:
Leonard Cohen CAK Declaration

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

00 Civ. 1068 (DAB)

UCC LENDING CORP. and C.A.K. UNIVERSAL CREDIT CORPORATION,

Plaintiffs,

-against-

LEONARD COHEN,

Defendant.
---X

DECLARATION OF LEONARD COHEN

How much did LC pay in settlement

I, Leonard Cohen, being duly sworn, do depose and state as follows:

1. I am the defendant in this action. I submit this affidavit in support of my opposition to the plaintiffs' motion for an order of attachment. The averments set forth herein are based upon my personal knowledge of the events recited, except where stated upon my understanding, in which event I believe the same, in good faith, to be true.

2. I have been a resident of the state of California for nearly ten years. I have owned a home in California for more than 25 years.

3. I am a poet and a composer of musical compositions, which I perform both at live concerts and on recordings. During the course of my career, which has spanned nearly 40 years, I have authored hundreds of compositions and recorded in excess of a dozen albums. Certain of my compositions appear on my own albums, and, as well, many of my compositions have been recorded by hundreds of other artists. I receive what I view to be substantial royalties, on a regular basis, from sales of my albums and uses of my compositions.

4. In early 1999, certain of my representatives engaged in discussions with plaintiffs concerning the possibility of their making a loan to an entity that I was to establish for that purpose. The contemplated loan was to be secured by a security interest in my rights in, among other things, my compositions (the "Rights") and the royalty income generated therefrom.

5. Following further discussions between the parties, on or about May 10, 1999, UCC Lending Corp. ("UCC") and I signed a document entitled "Proposed Royalty Income Loan for Leonard Cohen - Summary of Terms and Conditions" (the "Term Sheet"). A copy of the Term Sheet is attached hereto as Exhibit A.

6. Following the execution of the Term Sheet, I paid plaintiffs $75,000, which, as I understood it, was to be applied against out-of-pocket expenses incurred by UCC in connection with processing and evaluating my loan application.

7 My representatives subsequently engaged in discussions with plaintiffs in an effort to agree upon a mutually acceptable amount of the loan. On June 24, 1999, my transactional counsel advised plaintiffs, in writing, as follows:

> As we discussed earlier today, due to the significant change in expectations concerning the possible loan amount, our client Leonard Cohen and his manager Kelley Lynch have decided to terminate the previous engagement letter with C.A.K. Universal Credit Corporation and to pursue another opportunity.

A copy of my counsel's June 24, 1999 letter is attached hereto as Exhibit B.

8. To the best of my knowledge, plaintiffs never took issue with or otherwise challenged the termination of their engagement or my intent to explore a possible transaction with another party

9. My representatives subsequently discussed with Sony Music ("Sony") the possibility of Sony's acquisition of the Rights During this period of time, my representatives

also communicated with plaintiffs in respect of a possible loan transaction. Ultimately, plaintiffs offered to advance $5.8 million as part of a proposed loan transaction.

10. It is my understanding that in November of 1999, my representatives informed plaintiffs that I was seriously considering selling the Rights to Sony, if acceptable financial and related terms could be reached. In response, on or about November 8, 1999, plaintiffs wrote to my personal manager and advised her that "In light of the recent events regarding Sony and their potential offer to purchase Leonard Cohen's assets, we offer an alternative to the proposed Loan structure." A copy of plaintiffs' November 8, 1999 letter is attached hereto as Exhibit C.

11 I later learned that, without prior notice to me or my representatives, on or about November 11, 1999, plaintiffs sent a so-called "commitment letter" to me, in care of my manager's office During the entirety of the parties' relationship in this matter, plaintiffs consistently had communicated with my transactional counsel. In this instance, however, plaintiffs did not, as I understand it, send this supposed "commitment letter" to my attorney or even provide a copy of the letter to him A copy of plaintiffs' November 11, 1999 letter is attached hereto as Exhibit D.

12. This supposed "commitment letter" requested that I confirm my agreement thereto by signing the letter and returning a fully executed copy to plaintiffs by 5:00 pm on November 19, 1999. I refused to sign the "commitment letter."

13. It is my understanding that, in mid-November of 1999, my representatives discussed with plaintiffs the possibility that I might still enter into a loan transaction with plaintiffs. It is my further understanding that, on or about November 16, 1999, plaintiffs sent revised drafts of loan documents to my counsel.

14. I ultimately decided not to proceed with the loan and my representatives so advised plaintiffs. Plaintiffs responded by making demand for payment of a $290,000 Origination Fee and for reimbursement of expenses (in addition to those covered by my initial $75,000 deposit) in an amount of nearly $75,000. As I do not believe I am liable for those amounts, I refused to accede to plaintiffs' demands.

15. I have not reached an agreement with Sony (or any other party) regarding a sale or other transaction involving the Rights. While my discussions with Sony continue, it is certainly not clear at this juncture whether we ultimately will reach an accord regarding such a sale.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 30, 2000

Leonard Cohen

Exhibit O:
Kelley Lynch Fax to
Daniel Bergman dated April 13, 2010

TO: Daniel A. Bergman
Fax No. 818-999-9184

FROM: Kelley Lynch

DATE: 13 April 2010

RE: Ray Charles Lindsey

TOTAL PAGES: 2

Daniel Bergman,

The court ordered you to speak with me. The court ordered Steven Clark Lindsey to have Ray call me every other night. Your client remains in contempt of court and my son is not calling me. I have emailed you my new number. I can be reached in the evenings at 310-424-9935.

Stephen Gianelli, a lawyer who contacted you about me (although I am an absolute stranger to this man), has informed me that he has heard from Ray Charles Lindsey approximately three times. My Mother and I view the cyber-terrorists on the internet who have targeted me, Rutger, Ray, Karen and David McCourt, Douglas Penick, The Scientist, and others, as dangerously unstable. Various individuals (Susanne Walsh, Sydney-Linda Motley, and possibly Kelly Green) have attempted to lure Ray, a minor, into communicating with them privately. That seems extremely dangerous and, as you probably know, sexual predators lurk on the internet and attempt to lure minors into communicating with them. I have no idea who these people are. I am aware that Gianelli targeted me after hearing from Leonard Cohen's legal representatives. He has also heard from Alan Jackson, Phil Spector's prosecutor. I spoke to Investigator William Frayeh who advised me that he talked to Gianelli and thought he was a shady character. Why would Lindsey want his minor son communicating with a shady character? Investigator Frayeh also advised me that Investigator John Thompson is continuing an investigation into matters involving me. I have asked Gianelli to CEASE and DESIST and plan to file a defamation suit by June 1, 2010. I am responding a Motion to Vacate Leonard Cohen's lawsuit against me. It is entirely fraudulent and the perjury is excessive. I have asked the IRS Commissioner's Staff for an Opinion on the Complaint, lawsuit, problematic default, fraud, etc.

Jim Goudarzi contacted you and asked if you would speak with him on my behalf. He is my investigator and a part owner of a security and investigation firm. Please call Jim Goudarzi at REDACTED. I am reviewing all legal issues, etc., and compiling evidence for Mr. REDACTED LAWYER'S NAME to review. He will call you when he decides to do so. Jim Goudarzi has also spoken with him. Gianelli is lying on the internet that I do not have legal representation. I also have a civil litigator.

Kelley Lynch

cc: IRS, DOJ, FBI, Treasury, and Dennis Riordan, Esquire

Exhibit P:
Judge Lewis Babcock Order
dated December 4, 2006

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Civil Case No. 05-cv-01233-LTB-MJW

NATURAL WEALTH REAL ESTATE, INC., d/b/a Agile Advisors, Inc. a Colorado corporation,
TACTICAL ALLOCATION SERVICES, LLC, d/b/a Agile Allocation Services, LLC, a Colorado limited liability company,
AGILE GROUP, LLC, a Delaware limited liability company,
GREENBERG & ASSOCIATES SECURITIES, INC., d/b/a Agile Group, a Colorado corporation, and
NEAL R. GREENBERG, a Colorado resident,

Plaintiffs and Counterclaim Defendants,

v.

LEONARD COHEN, a Canadian citizen residing in California,

Defendant and Counterclaim Plaintiff, and

KELLEY LYNCH, a United States citizen residing in California, and
JOHN DOE, Numbers 1-25,

Defendants,

v.

TIMOTHY BARNETT, a Colorado citizen,

Counterclaim Defendant.

ORDER

The defendant, Leonard Cohen, moves for partial dismissal of the Second Amended Complaint of the plaintiffs. This motion is the latest of a plethora filed in this case during its nascency. Though the ink is barely dry on the plaintiffs' reply to Mr. Cohen's counterclaims, this Court has previously disposed of a motion to compel arbitration, a motion to dismiss, a motion

for attorney fees, and a motion for leave to file a second amended complaint. The pending motion is adequately briefed and oral argument will not materially aid its resolution.

The attorneys, apparently unable to agree on anything, also dispute the propriety of a certificate of review, which Mr. Cohen proffers pursuant to Colo. Rev. Stat. § 13-20-602. Mr. Cohen has filed a motion for leave to file the certificate. The plaintiffs and Timothy Barnett move for judgment on the pleadings dismissing several of Mr. Cohen's counterclaims in part on the ground that a certificate is lacking. Briefing of these motions is not yet complete and this latest demonstration of fractiousness must be addressed in yet another, subsequent order.

I. Plaintiffs' allegations

The allegations of the Second Amended Complaint, stripped of extraneous and salacious content, are substantially the following. In 1996, Mr. Cohen, a resident of California, retained the plaintiff Tactical Allocation Services, LLC ("Tactical"), directed by the plaintiff Neal Greenberg and headquartered in Boulder, Colorado, to invest for him the assets placed into three charitable trusts. The assets derived from sales of Mr. Cohen's intellectual property and were intended to provide long-term financial support for him. However, Mr. Cohen allegedly drew extravagant sums from the trusts, depleting the principal amounts and impeding the plaintiffs' efforts successfully to invest the funds in profitable ventures.

The defendant Kelley Lynch, Mr. Cohen's manager, oversaw and had power of attorney over all of Mr. Cohen's financial dealings. Mr. Greenberg allegedly warned Ms. Lynch and Mr. Cohen on occasions that Mr. Cohen was spending too much and, absent a change of habit, would become destitute. Ms. Lynch and Mr. Cohen dismissed Mr. Greenberg's forecasts.

In April, 2001, Mr. Cohen sold additional intellectual property. Upon the advice of a tax

attorney, Richard Westin, who is not a party to this case, Mr. Cohen conveyed the intellectual property to an entity of his creation, called Traditional Holdings LLC, in which he held a one percent interest. Ms. Lynch controlled Traditional Holdings with a 99% ownership interest. Traditional Holdings sold the intellectual property to Sony Music International and received from Sony the proceeds. It then served as an annuity for Mr. Cohen, under Ms. Lynch's management. This arrangement enabled Mr. Cohen to benefit financially from the sale without suffering adverse tax consequences. Mr. Westin advised Mr. Cohen that Ms. Lynch's controlling interest, though favorable for tax purposes, gave her considerable discretion over Mr. Cohen's affairs. Mr. Cohen allegedly indicated that he trusted Ms. Lynch. None of the plaintiffs were involved in the creation or management of Traditional Holdings.

Traditional Holdings hired the plaintiffs to invest its assets, an amount approaching five million dollars. The plaintiff Agile Group LLC was commissioned to perform the service. It allegedly kept Mr. Cohen and Ms. Lynch apprised of its efforts by means of monthly statements and other communications. Similarly, Tactical communicated monthly with Mr. Cohen concerning the assets under its management. Mr. Cohen instructed the plaintiffs to follow Ms. Lynch's directions concerning management of Traditional Holdings' assets. Purportedly at Mr. Cohen's direction and on his behalf, Ms. Lynch continued to make unsustainable withdrawals from the trusts and from Traditional Holdings.

By January 16, 2004, Ms. Lynch had reduced Traditional Holdings' assets to $2.1 million. Mr. Greenberg admonished Mr. Cohen, by letter of that date, to slow his diminution of the funds, to no avail. By June 25, 2004, Mr. Cohen had withdrawn an additional $1,170,000 from Traditional Holdings.

In October, 2004, Mr. Cohen and Ms. Lynch allegedly parted ways and began to issue competing directives to the plaintiffs. Each blamed the other for Mr. Cohen's financial distress. Mr. Cohen claimed that Ms. Lynch had deprived him of substantial sums of money. Thereafter, apprising as slim their chances of recovering money from Ms. Lynch, Mr. Cohen and his personal attorney, Robert Kory (previously dismissed from this case for lack of personal jurisdiction), allegedly conspired with two other persons, Steve Lindsay and Betsy Superfon, to extort the lost sums from the plaintiffs. This they attempted by asserting spurious claims and demanding that the plaintiffs elicit a settlement from their insurance carrier or submit to private mediation. They tried to compel Ms. Lynch to participate in their project by, among other tactics, having her arrested on false pretenses and paying paroled convicts to make false accusations against her son. However, rather than cooperating with Messrs. Cohen and Kory, Ms. Lynch informed the plaintiffs of the scheme and documented for them Mr. Cohen's chicanery. The plaintiffs then filed their complaint in this case.

Mr. Kory, acting on Mr. Cohen's behalf, sent a demand letter to Mr. Greenberg's attorney, wrongly accusing the plaintiffs of fraud and various breaches of fiduciary duty. After the plaintiffs filed this lawsuit, Messrs. Cohen and Kory allegedly used Mr. Cohen's fame as a prominent recording artist to publish defamatory statements about the plaintiffs. They posted their calumnies on Mr. Cohen's web site and submitted them to the press, blaming the plaintiffs for the loss of the monies.

The Second Amended Complaint delineates ten claims. These are defamation; commercial disparagement; interference with prospective business advantage; unjust enrichment; civil extortion; civil conspiracy; violation of the Colorado Organized Crime Control Act, Colo. Rev.

Stat. § 18-17-101 *et seq.* ("COCCA"); injunctive relief; declaratory judgment; and interpleader, against Ms. Lynch and Mr. Cohen, to determine rightful ownership of the remaining Traditional Holdings funds.

II. Discussion

Mr. Cohen moves for dismissal of all but the plaintiffs' defamation, commercial disparagement, unjust enrichment and interpleader claims. I must first determine whether California or Colorado law governs the challenged claims.

A. Choice of law

A federal court sitting in diversity must apply the choice-of-law provisions of the forum state. *Shearson Lehman Bros., Inc. v. M & L Investments*, 10 F.3d 1510, 1514 (10th Cir. 1993). Colorado has adopted the "most significant relationship test" of Restatement (Second) Conflicts of Laws (1971) for tort actions. *Hawks v. Agri Sales, Inc.*, 60 P.3d 714, 715 (Colo. Ct. App. 2001). The Restatement generally provides,

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflicts of Laws § 145 (1971).

Reference to the factors identified in Section 145(2) alone does not dispose of the

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question. The plaintiffs suffered alleged injury predominantly in Colorado, where they reside. Mr. Cohen engaged in the allegedly tortious conduct in California, where he resides. Mr. Cohen and Traditional Holdings engaged the plaintiffs in Colorado to manage Mr. Cohen's assets for his benefit in California.

The comments to Section 145 provide additional guidance. Comment c states, *inter alia,*

> [T]he interest of a state in having its tort rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties. If the primary purpose of the tort rule involved is to deter or punish misconduct, as may be true of rules permitting the recovery of damages for alienation of affections and criminal conversation, the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship... . On the other hand, when the tort rule is designed primarily to compensate the victim for his injuries, the state where the injury occurred, which is often the state where the plaintiff resides, may have the greater interest in the matter.

And the Restatement explains that the relative importance of the factors varies according to the tort involved. Comment f states, *inter alia*,

> In situations involving the multistate publication of matter that injures the plaintiff's reputation... or causes him financial injury... or invades his right of privacy... the place of the plaintiff's domicile, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law.

The substance of the plaintiffs' interference with prospective business advantage claim is that Mr. Cohen disparaged them in media accessible in multiple states and thus encouraged potential clients to look elsewhere for service. Mr. Cohen's multi-state publication of matter, which allegedly caused financial injury to the plaintiffs, is most closely analogous to commercial disparagement or defamation. Indeed, the same allegations predicate the plaintiffs' defamation, commercial disparagement, and interference with prospective business advantage claims. As the comments to Section 145 suggest, and as Section 150 makes explicit, Colorado – the state of Mr.

Greenberg's domicile and the corporate-plaintiffs' principal place of business – has the most significant relationship to the alleged wrongdoing. Restatement (Second) of Conflicts of Laws § 150 (1971).

The plaintiffs' claims for civil extortion and civil conspiracy rest upon Messrs. Cohen's and Kory's alleged secret plot to force the plaintiffs into mediation by threatening publicly to assert spurious claims. Civil extortion in California (Colorado has recognized no such claim) constitutes a cause of action for the recovery of money obtained by the wrongful threat of criminal or civil prosecution. *Fuhrman v. California Satellite Systems*, 231 Cal. Rptr. 113, 122 (Cal. Ct. App. 1986), *overruled on other grounds*, *Silberg v. Anderson*, 786 P.2d 365 (Cal. 1990). "It is essentially a cause of action for moneys obtained by duress, a form of fraud." *Id.* Not all unjust extractions are cognizable. The Restatement admonishes,

> The threat of beginning a civil action to enforce a claim, if made in good faith and unaccompanied by threatened seizure of property of the person or by other oppressive circumstances, is not duress and, if payment is made without mistake of fact, there can be no restitution even though the claim is baseless and the claimant is unreasonable in believing that it has validity.

Restatement (First) of Restitution § 71 cmt. b (1937). Properly viewed, then, the gravamen of the plaintiffs' claim is not the unwarranted payment by them in response to a threat of litigation but rather the bad faith of Mr. Cohen in threatening suit. Thus, California, the state in which Mr. Cohen allegedly acted, possesses the dominant interest and its law applies to this claim.

The conspiracy claim allows joint recovery of damages against all defendants who united or cooperated in inflicting a tortious wrong – here, civil extortion – against the plaintiffs. *Mox, Inc., v. Woods*, 262 P. 302, 303 (Cal. 1927); *More v. Johnson*, 568 P.2d 437, 439-440 (Colo. 1977). "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is

organized to achieve." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 459 (Cal. 1994). "A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action." *Id.* at 457.

The California Supreme Court discerned from these principles a clear distinction between criminal and civil conspiracy. "The gist of the crime of conspiracy is the agreement to commit the unlawful act, while the gist of the tort is the damage resulting to the plaintiff from an overt act or acts done pursuant to the common design." *de Vries v. Brumback*, 349 P.2d 532, 536 (Cal. 1960) (citations omitted). Similarly, the Colorado Supreme Court has stated, "The essence of a civil conspiracy claim is not the conspiracy itself, but the actual damages resulting from it." *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989). Thus, Colorado, the state where the plaintiffs here reside and allegedly suffered injury, is the state with the dominant interest.

The COCCA claim must be analyzed under the Colorado statute that predicates it; the parties do not identify an analogous California statute. The parties agree that the claims for injunctive and declaratory relief are procedural, and therefore governed by federal law.

B. The claims

1. Interference with prospective business advantage

Colorado recognizes the tort of intentional interference with a prospective business relation and defines the tort with reference to the Restatement (Second) of Torts (1979). *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995). Section 766B of the Restatement provides,

One who intentionally and improperly interferes with another's prospective contractual

> relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Demonstration of the tort requires a showing of intentional and improper interference preventing formation of a contract. *Amoco Oil Co.*, 908 P.2d at 500.

Mr. Cohen challenges as inadequate the plaintiffs' allegations of protected relationships. The plaintiffs have identified two prospective clients who declined to engaged the plaintiffs after referencing Mr. Cohen's alleged calumnies, which they had read. One reneged on a prior pledge to invest with the plaintiffs after her accountant discovered Mr. Cohen's press release on the internet. The other was referred to the plaintiffs by a current client before finding the press release on the internet. Taking these allegations as true, as I must at this stage, I find that the plaintiffs have alleged a "reasonable likelihood or probability that a contract would have resulted." *Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995), *cert. denied*, 516 U.S. 810, 116 S. Ct. 58, 133 L. Ed. 2d 22 (1995). *See Duran v. Clover Club Foods Co.*, 616 F. Supp. 790, 794 (D. Colo. 1985); *Behunin v. Dow Chemical Co.*, 650 F. Supp. 1387, 1393 (D. Colo. 1986).

Citing *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003), Mr. Cohen next argues that the claim fails for failure to plead that he acted for the purpose of interfering with a particular relationship of which he had knowledge. However, as I determined above, Colorado, not California law applies to this claim. Furthermore, the *Korea Supply* court held,

> We conclude that the tort of intentional interference with prospective economic advantage does not require a plaintiff to plead that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, to satisfy the intent requirement for this tort, it is sufficient to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action.

Id. at 949-950.

The parties have identified no Colorado cases explicating the requisite intent. However, the Restatement, which the Colorado courts have adopted, accords with the *Korea Supply* decision. "The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." Restatement (Second) of Torts § 766B cmt. d (1979).

The Restatement goes on to explain that a defendant's purpose goes to the question whether any interference was improper.

> One [factor] is the actor's motive and another is the interest sought to be advanced by him. Together these factors mean that the actor's purpose is of substantial significance. If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper.

Ibid.

The end for which Mr. Cohen acted when he released his statement on the internet and to the press does not commend a finding of impropriety. The plaintiffs allege that Messrs. Cohen and Kory kept their assertions secret as they attempted to force the plaintiffs to submit a claim to their insurer. Only after the plaintiffs filed this pre-emptive suit did Mr. Cohen respond publicly with his version of events. Even assuming, as I must, that Mr. Cohen's public assertions were defamatory and untrue, I am left with no grounds on which to find that any interference with the plaintiffs' prospective business relations was anything other than incidental to his purpose. The plaintiffs allege that Mr. Cohen's invariable purpose has been to obtain from them the monies he could not obtain from Ms. Lynch.

The Restatement cautions that other factors bear upon the degree of impropriety and refers to Section 767.

> To determine whether the defendant acted improperly, a court is to consider: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relation between the parties.

Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859, 873 (Colo. 2004) (*citing* Restatement (Second) of Torts § 767 (1979)).

Nothing in the Second Amended Complaint indicates that Mr. Cohen persuaded or intimidated prospective clients into rejecting the plaintiffs' services. *Krystkowiak*, 90 P.3d at 874. Nowhere do the plaintiffs allege that Mr. Cohen used or threatened physical violence, fraud, or civil or criminal prosecution against their prospective clients. *Amoco Oil Co.*, 908 P.2d at 502. To the extent that Mr. Cohen's motives and interests can be discerned from the allegations, it appears that he was attempting to refute the plaintiffs' allegations and to strong-arm the plaintiffs into mediating his purportedly spurious claims. And Mr. Cohen compromised the plaintiffs' reputation only after they first filed suit against him. The claim for intentional and improper interference must be dismissed.

2. Civil extortion

California recognizes the tort of civil extortion and defines it as "the recovery of money obtained by the wrongful threat of criminal or civil prosecution." *Fuhrman*, 231 Cal. Rptr. at 122. "To be actionable the threat of prosecution must be made with the knowledge of the falsity of the claim." *Id.* Also, the plaintiff must have paid the money demanded. *Id.* Expenditures of

attorney fees do not constitute actual damages for the purpose of establishing the tort. *Id.*

The plaintiffs allege that the scheme concocted by Messrs. Cohen, Kory, and Lindsay and Ms. Superfon failed when Ms. Lynch exposed their plot. The plaintiffs did not accede to Mr. Cohen's demands for repayment. Nor do they allege that they submitted a claim to their insurer. They claim only to have expended corporate resources providing information about Traditional Holdings' investments to Mr. Cohen – an effort, they concede, that they undertook to be cooperative, not in response to undue threats – and to have paid attorney fees prosecuting this action. The claim for civil extortion must be dismissed.

3. Civil conspiracy

The plaintiffs must allege the five elements of a civil conspiracy claim. "There must be: (1) two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Jet Courier Service*, 771 P.2d at 502. "The essence of a civil conspiracy claim is not the conspiracy itself, but the actual damages resulting from it." *Id.*

The conspiracy claim fails for two reasons. First, the unsuccessful extortion attempt by Messrs. Cohen, Kory, and Lindsay and Ms. Superfon – the alleged unlawful overt act – does not serve. "[C]onspiracy is a derivative cause of action that is not actionable per se." *Double Oak Const., L.L.C. v. Cornerstone Development Intern., L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003). "If the acts alleged to constitute the underlying wrong provide no cause of action, then there is no cause of action for the conspiracy itself." *Id.* The alleged civil extortion provides no cause of action because civil extortion in not recognized in Colorado and, in any event, the plaintiffs did

not accede to Mr. Cohen's demands.

Messrs. Cohen's and Kory's scheme to publish libelous defenses of their conduct might predicate a distinct conspiratorial objective. However, this purported scheme lacks the requisite numerosity of participants because an agent – Mr. Kory here – "cannot be held liable for conspiracy with his principal where the agent acts within the scope of his authority and do not rise to the level of active participation in a fraud." *Astarte, Inc. v. Pacific Indus. Systems, Inc.*, 865 F. Supp. 693, 708 (D. Colo. 1994). Mr. Kory's alleged participation in the published defense of his client, whether or not that defense was true in all respects, was well within the scope of his authority as an attorney. Because Mr. Lindsay and Ms. Superfon are not alleged to have participated in the scheme to defame the plaintiffs, Mr. Cohen is not alleged to have conspired with anyone for that purpose.

Second, the plaintiffs have alleged no damages. Conceding that they made no payments in response to the threats of litigation, the plaintiffs nevertheless propose three categories of damages. First, they claim to suffered injury to their reputation. However, any such injury resulted not from the failed extortion attempt, which the plaintiffs allege Mr. Cohen veiled in secrecy, but rather from the subsequent alleged defamation. Second, they allege that they diverted corporate resources in order to respond to Messrs. Cohen's and Kory's demands for information concerning Traditional Holdings in the weeks following Ms. Lynch's dismissal. However, nothing in the Second Amended Complaint indicates that the plaintiffs undertook these efforts as a result of the extortion attempt. Indeed, the Second Amended Complaint proclaims that Mr. Kory extolled the plaintiffs' voluntary cooperation in the aftermath of the Cohen-Lynch separation. Third, the plaintiffs assert that they may recover attorney fees expended in defense of

Mr. Cohen's advances. However, attorney fees are recoverable as damages only when they accrue in litigation with a third party that naturally and probably results from the defendant's wrongful act. *Stevens v. Moore and Co. Realtor*, 874 P.2d 495, 496 (Colo. App. 1994). Absent this or some other exception, Colorado adheres to the American Rule, under which each party bears its own fees. *Bunnett v. Smallwood*, 793 P.2d 157, 160, 163 (Colo. 1990); *Double Oak Const.*, 97 P.3d at 150.

4. COCCA

Colo. Rev. Stat. § 18-17-104(3) provides, "It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

> To state a primary violation of COCCA section 104(3), a plaintiff is required to prove the defendant (1) through the commission of two or more predicate acts (2) which constitute a pattern (3) of racketeering activity (4) directly or indirectly conducted or participated in (5) an enterprise and (6) the plaintiff was injured in its business or property by reason of such conduct.

F.D.I.C. v. Refco Group, Ltd., 989 F. Supp. 1052, 1074 (D. Colo. 1997). Mr. Cohen argues that the Second Amended Complaint fails adequately to allege the existence of an enterprise, predicate acts, and injury.

The plaintiffs' COCCA claim fails for the same reasons that their conspiracy claim miscarried: they allege that they did not succumb to Mr. Cohen's machinations. The ill effects of Mr. Cohen's litigation threats and the purported conspirators' attempts to secure Ms. Lynch's perjurious cooperation were limited to the plaintiffs' expenditures of attorney fees. Civil remedies for violations of COCCA are available only to a person "injured by reason of" a violation. Colo. Rev. Stat. § 18-17-106(7). The plaintiffs are required to allege that one or more injuries resulted

from each of the predicate acts. *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 803 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999). They have alleged no damage resulting to them from the predicate acts.

Again, the plaintiffs reference the injury to their reputation resulting from Mr. Cohen's calumny. They rightly identify the defamation as the source of any damages they have suffered. However, the published statements were not part of – indeed, were inconsistent with – any pattern of racketeering activity. Indeed, the allegations are that Messrs. Cohen and Kory reversed their tactics – changing from secret extortion to public declamation – after the extortion scheme failed.

Subsection 4 of Section 18-17-104 makes it unlawful to "conspire or endeavor" to violate Subsection 3. Citing *People v. Young*, 694 P.2d 841 (Colo. 1985) and *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo. App. 1993), the plaintiffs argue that Mr. Cohen violated Subsection 4 by his mere attempt to violate Subsection 3. However, as the *New Crawford Valley* court made clear, civil remedies for conspiracies and attempts under Subsection 4 are available only to those who have suffered actual damages. *New Crawford Valley*, 877 P.2d at 1374. As explained above, the plaintiffs have not satisfied this requirement.

5. Injunction

Mr. Cohen asks me to dismiss the injunction claim because it constitutes a prayer for prior restraint of his speech. Citing *New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) he notes that injunctions against future speech are disfavored under the First Amendment. The plaintiffs respond that defamation is properly enjoined because it is not protected speech. They also point out that Mr. Cohen already published the speech and

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that an injunction would merely prohibit him from repeating the alleged calumny.

When constructed narrowly to restrain only unprotected speech, injunctions against the assertion of factual claims do not impermissibly infringe upon First Amendment rights. *United States v. Bell*, 414 F.3d 474, 484 (3d Cir. 2005); *United States v. Kaun*, 827 F.2d 1144, 1150, 1151-1152 (7th Cir. 1987); *United States v. White*, 769 F.2d 511, 517 (8th Cir. 1985). *See also B. Willis, C.P.A., Inc. v. Goodpaster*, 183 F.3d 1231, 1233-1234 (10th Cir. 1999), cert. denied, 528 U.S. 1046, 120 S. Ct. 581, 145 L. Ed. 2d 483 (1999). A defamatory statement of fact not touching a matter of public concern or a public figure does not enjoy the First Amendment protection identified in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). *Quigley v. Rosenthal*, 327 F.3d 1044, 1057-1061 (10th Cir. 2003), *cert. denied*, 540 U.S. 1229, 124 S. Ct. 1507, 158 L. Ed. 2d 172 (2004). *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). It is equally well settled that speech on matters calculated to redress a personal grievance does not involve a matter of public concern. *Salehpoor v. Shahinpoor*, 358 F.3d 782, 788 (10th Cir. 2004), *cert. denied*, 543 U.S. 812, 125 S. Ct. 47, 160 L. Ed. 2d 16 (2004).

Mr. Cohen replies that the Second Amended Complaint's prayer is too broad; it does not merely ask me to forfend the repetition of defamatory speech but rather seeks the suppression of any statements about the plaintiffs that do not meet with the plaintiffs' prior approval. While the scope of the requested injunction is, no doubt, unduly ambitious, the proper response is not dismissal of the entire claim. Assuming the plaintiffs' allegations to be true, I find it possible to craft a constitutional injunction in response to the plaintiffs' prayer and I will not dismiss this cause of action.

6. Declaratory judgment

Mr. Cohen asks me to exercise my discretion to dismiss the plaintiffs' declaratory judgment claim. He argues that the requested declarations concerning the plaintiffs' lack of involvement in the management of Traditional Holdings and Ms. Lynch's authority, as attorney in fact, to manage his assets, constitute procedural fencing and are best understood as affirmative defenses to his own counterclaims. Citing *St. Paul Fire and Marine Insurance Co. v. Runyon*, 53 F.3d 1167, 1169 (10th Cir. 1995), he argues that declaratory judgment would not settle the controversy, would not clarify the legal relations at issue, and is requested merely for procedural fencing, and that resolution of these issues in the context of his own counterclaims would be more effective.

Mr. Cohen misapprehends the plaintiffs' allegations. Foundational to the charges of the Second Amended Complaint is the assertion that Mr. Cohen accused the plaintiffs of violating duties that they did not owe. Clarifying what obligations, if any, the plaintiffs owed to Mr. Cohen to protect him against mismanagement of Traditional Holdings will clarify the legal relations of the parties and assist in settling the controversy at the center of this action. Furthermore, because these questions bear upon the plaintiffs' claims as well as Mr. Cohen's counterclaims, I am not convinced that the plaintiffs request declaratory judgment as a procedural fencing device. The controversy is definite and concrete, touching the legal relations of the parties. 28 U.S.C. § 2201(a); *Kunkel v. Continental Cas. Co.*, 866 F.2d 1269, 1273 (10th Cir. 1989). A live need exists for a declaration of the plaintiffs' rights and duties. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983-984 (10th Cir. 1994). I decline to dismiss the declaratory judgment claim.

Accordingly, it is ORDERED that:

1) Mr. Cohen's motion to dismiss is GRANTED in part and DENIED in part; and

2) the plaintiffs' claims for intentional interference with a prospective business relation, civil extortion, civil conspiracy, and violation of and conspiracy to violate COCCA are DISMISSED.

Dated: December __4__, 2006, in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
Lewis T. Babcock, Chief Judge

Exhibit Q:
Judge Lewis Babcock Order
dated January 23, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Civil Case No. 05-cv-01233-LTB-MJW

NATURAL WEALTH REAL ESTATE, INC., d/b/a Agile Advisors, Inc. a Colorado corporation,
TACTICAL ALLOCATION SERVICES, LLC, d/b/a Agile Allocation Services, LLC, a Colorado limited liability company,
AGILE GROUP, LLC, a Delaware limited liability company,
GREENBERG & ASSOCIATES SECURITIES, INC., d/b/a Agile Group, a Colorado corporation, and
NEAL R. GREENBERG, a Colorado resident,

Plaintiffs and Counterclaim Defendants,

v.

LEONARD COHEN, a Canadian citizen residing in California,

Defendant and Counterclaim Plaintiff, and

KELLEY LYNCH, a United States citizen residing in California, and
JOHN DOE, Numbers 1-25,

Defendants,

v.

TIMOTHY BARNETT, a Colorado citizen,

Counterclaim Defendant.

ORDER

Neal Greenberg, Agile Group, LLC, and Timothy Barnett (collectively, the "counterclaim defendants") move for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), dismissing several of the counterclaims of the defendant, Leonard Cohen, against them. The motion is adequately briefed and oral argument would not materially aid its resolution. For the reasons

stated below, I GRANT the motion.

I. Mr. Cohen's allegations

In his counterclaims against Mr. Greenberg, Agile Group, and Timothy Barnett, a vice president of the plaintiff Tactical Allocation Services, LLC ("Tactical"), Mr. Cohen alleges the following. The defendant Kelley Lynch, Mr. Cohen's manager, introduced Mr. Cohen to Mr. Greenberg in 1996 or 1997. Mr. Cohen retained Mr. Greenberg and the other plaintiffs, which Mr. Greenberg directs, to manage assets he had earned from his successful song writing and recording career.

Mr. Greenberg introduced Mr. Cohen to Richard Westin, a tax attorney who is not a party to this case. Mr. Westin, with the assistance of Mr. Greenberg and Ms. Lynch, allegedly sold Mr. Cohen's music publishing company and with the proceeds funded two charitable remainder trusts. The plaintiffs managed the trusts on Mr. Cohen's behalf. Mr. Cohen returned many of the proceeds he received from the trusts to the plaintiffs for further investment.

In 2001, Mr. Greenberg, Ms. Lynch, and Mr. Westin allegedly sold royalty rights to which Mr. Cohen was entitled under an agreement with Sony Music. Mr. Westin created Traditional Holdings LLC, into which the proceeds from the sale – $8 million – less transaction costs – more than $3 million – were deposited. Mr. Cohen alleges that neither Mr. Westin nor Mr. Greenberg informed him that Ms. Lynch held the controlling interest in Traditional Holdings. (The plaintiffs have alleged that Ms. Lynch had power of attorney over all of Mr. Cohen's financial dealings, but Mr. Cohen makes no mention of this.) Though Traditional Holdings issued an annuity contract to Mr. Cohen, the counterclaim defendants allegedly failed to place adequate constraints on Ms. Lynch's authority to control the funds. Agile Group managed the investments.

Ms. Lynch purportedly requested, and Agile Group established, a money market account, into which funds from Traditional Holdings investments could be drawn. Ms. Lynch then began requesting transfers into the account. Upon each request, Agile Group would sell some portion of Traditional Holdings' securities, then transfer the proceeds to the account, from which Ms. Lynch would make withdrawals. The plaintiffs"should have known" that Ms. Lynch's management of the assets in this way was contrary to Mr. Cohen's goals and intentions. Ms. Lynch allegedly told the plaintiffs that the withdrawals were for her own benefit and use. Agile Group accounted the withdrawals as shareholder loans and did not deduct them against the value of Traditional Holdings' assets.

The plaintiffs have alleged that they sent to Ms. Lynch and Mr. Cohen regular communications concerning the status of Traditional Holdings' investments. As Ms. Lynch withdrew increasing sums from the account, Mr. Greenberg and others warned against perceived profligacy. Mr. Cohen alleges that most of these missives and statements never reached him. Specifically, he alleges,

> The Agile Group's January 16, 2004 letter warning of the "desperate situation" reflects the Agile Group's belief that Cohen must not have understood what was happening to his money and the transactions in the account intended to fund his private annuity. However, the Agile Group also knew or had reason to believe that Cohen was unlikely to actually receive the letter because Lynch would intercept it.

Additionally, the plaintiffs allegedly sent complete account statements only to Ms. Lynch. To Mr. Cohen, the plaintiffs sent abbreviated statements, which did not fully reflect Ms. Lynch's depletion of the assets. By these purported artifices, the plaintiffs and Mr. Barnett kept Mr. Cohen ignorant of the true state of affairs until late 2004. By then, the value of Traditional Holdings' assets had diminished from $4.7 million to under $150,000. However, Mr. Cohen states that Ms. Lynch

withdrew approximately $592,000 with his consent and for his benefit.

II. Documents incorporated by reference

The counterclaim defendants proffer documents that they assert are incorporated by reference into Mr. Cohen's counterclaims, and in light of which the counterclaims must be evaluated. Those documents that are central to Mr. Cohen's counterclaims, the authenticity of which is undisputed, are properly considered without converting the motion into a motion for summary judgment. *MacArthur v. San Juan County*, 309 F.3d 1216, 1221 (10th Cir. 2002), *cert. denied* 539 U.S. 902 (2003). "Mere legal conclusions and factual allegations that contradict such a properly considered document are not well-pleaded facts that the court must accept as true." *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1385 (10th Cir. 1997). "If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *Id.*

First submitted is a July 24, 1997 Investment Advisory Agreement ("1997 Agreement") between Tactical and Mr. Cohen. The express purpose of the 1997 Agreement was Tactical's evaluation and management of Mr. Cohen's assets, in the amount of "75 K." The document identifies the services Tactical was to provide and the obligations each party adopted toward each other. It disclaims, "[Tactical] provides no tax or legal advice and [Mr. Cohen] agrees that he... shall consult his... own independent tax consultant or legal counsel concerning any and all transactions, exchanges, or trades, and the legal consequences thereof." Under the heading "REGISTERED INVESTMENT ADVISOR," Mr. Cohen represented his understanding "that [Tactical] is a Registered Investment Advisor in compliance with the Investment Advisors Act of 1940 and all applicable state authorities... ." The 1997 Agreement stated that it "contains the full

and complete agreement and understanding of [Tactical] and [Mr. Cohen]. Any and all prior or contemporaneous agreements, understandings, representations, and promises have been incorporated and merged into the express written terms of this agreement." Mr. Cohen represented that Tactical had made "no oral representations or promises contrary or inconsistent with the terms and conditions of this agreement."

The Articles of Organization for Traditional Holdings ("Articles") appear. The document appoints to Ms. Lynch "100% of Class B common shares and 99.5% of Class A common shares," and to Mr. Cohen ".5% of Class A common shares." Any member is permitted to lend money to and transact any business with Traditional Holdings. The manager is responsible for, among other things, delivering to each member an annual report no later than 120 days after the close of the fiscal year. Mr. Westin signed the Articles as incorporator and pursuant to powers of attorney, which accompany the Articles, appointing him to sign on behalf of Mr. Cohen and Ms. Lynch.

There follows the Operating Agreement for Traditional Holdings, which Ms. Lynch and Mr. Cohen both signed as members. The Operating Agreement names both Ms. Lynch and Mr. Cohen as managers, with enumerated rights and responsibilities. Each manager is an agent of Traditional Holdings, with the authority to bind it contractually.

An annuity agreement between Traditional Holdings and Mr. Cohen purports to provide for the sale of Mr. Cohen's intellectual property to Traditional Holdings in exchange for fixed monthly payments to Mr. Cohen. Ms. Lynch signed the document on Traditional Holdings' behalf. Mr. Cohen signed as the annuitant.

A limited partnership agreement for the Agile Safety Fund, LP ("Fund"), purports to include Traditional Holdings as a limited partner. Ms. Lynch's signature appears for Traditional

Holdings. The Fund manages the assets of its constituent partners through investment managers selected by its general partner, Agile Safety Group, LLC. (The relationship, if any, between this entity and Agile Group, LLC and Greenberg & Associates Securities, Inc., d/b/a Agile Group, is not revealed. However, an accompanying Private Placement Memorandum for the Fund identifies the plaintiff Mr. Greenberg as the Chief Executive Officer of Agile Safety Group, LLC.) The recitation of the partners' respective rights and obligations in the Fund's partnership agreement consists of twenty-eight pages.

A separate subscription agreement for the Fund sets forth the particular terms of agreement between Agile Safety Group, LLC and Traditional Holdings. The document, signed by Ms. Lynch, assesses Traditional Holdings' initial capital contribution at two million dollars. Ms. Lynch's name and a Los Angeles address appear in response to a request for Traditional Holdings to identify "the names and addresses of the officers, directors, partners, managers, members and principal beneficiaries as the case may be."

Next come the storied warning letters from Mr. Greenberg to Mr. Cohen, which Mr. Cohen claims not to have received. A two-page, January 16, 2004 letter from Mr. Greenberg to Mr. Cohen references a prior, April 13, 2001 warning letter and a March 21, 2002 conversation between the two men concerning Mr. Cohen's withdrawals and expenditures. The document continues,

> However, things have not improved despite our warnings. At this point, you only have an estimated $2.1 MM left in capital in Traditional Holdings, LLC. The rest consists of loans to you and Kelley. The total loan amount currently stands at $1,648,634 notwithstanding over $1 MM that was also withdrawn during the 2nd quarter of 2002.

The letter continues in this vein, describing in detail Mr. Cohen's assets, their availability, and

their management. It also expresses Mr. Greenberg's concern over the loans to Mr. Cohen and Ms. Lynch from Traditional Holdings and the implications thereof. Mr. Greenberg characterized Mr. Cohen's finances as "quite desperate."

A June 25, 2004 letter from Mr. Greenberg to Mr. Cohen begins, "I hate to always be the harbinger of doom, but your situation is getting quite desperate. Since my last letter of January 16, 2004, you have taken additional withdrawals amounting to $1,170,000 from Traditional Holdings and $35,000 from the Sabbath Day CRT." The letter expresses other concerns, including over the manner in which Mr. Cohen requested reports of his assets. Mr. Greenberg offered to fly to Los Angeles to discuss the situation with Mr. Cohen.

The counterclaim defendants also produce various reports, addressed to Mr. Cohen but allegedly not received, disclosing the condition of his assets and the withdrawals Ms. Lynch had made purportedly on his behalf. Also included is an email communication from Mr. Barnett's email address to Mr. Cohen, written over Mr. Greenberg's name, and a reply from Mr. Cohen indicating that he was in Bombay.

The counterclaim defendants have produced documents not incorporated into Mr. Cohen's counterclaims. A durable power of attorney, signed by Mr. Cohen, purports to appoint Ms. Lynch as his attorney in fact. Email communications among and between Ms. Lynch, Mr. Barnett, and Mr. Greenberg contain Ms. Lynch's instructions concerning what financial information to report to her and Mr. Cohen. The contents of these documents are not properly before me at this stage of the proceedings. No doubt they will reappear in support of Rule 56 motions.

I prophesy a conflagration that Mr. Cohen ought not rekindle. An investment advisory

agreement and a financial planning agreement ("2002 Agreements"), both dated February 26, 2002 and identifying Ms. Lynch and Mr. Cohen as "the CLIENT," appear in the record. In denying Mr. Cohen's motion to compel arbitration, filed October 11, 2005, I ruled on December 21, 2005 that Mr. Cohen is bound by the 2002 Agreements because Ms. Lynch signed them on his behalf with apparent authority. I will not revisit my previous ruling on the force and subject-matter of the 2002 Agreements, which now comprises the law of the case, *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000), absent substantial and relevant evolution of the record. Indeed, before filing any more motions, the parties would be well-advised to examine my numerous orders in this case and to avoid issues previously culled. I emphasize the point because the plaintiffs and Mr. Cohen have historically induced "a wasteful expenditure of resources by [the] court[] and litigating parties." *Id.*

III. Choice of law

The parties dispute which state's laws apply. In ruling upon Mr. Cohen's recent motion to dismiss partially the plaintiffs' Second Amended Complaint, I discussed at some length the principles governing the choice of law. I will thus abbreviate the discussion here.

Mr. Cohen's claims are conveniently consolidated in four groups. First, he asserts a claim for breach of contract premised upon Agile Group's agreement with him to manage his money. The counterclaim defendants do not assail this claim. Second, he presses claims against the counterclaim defendants for fraud and negligent misrepresentation. Third, alleged breaches of various duties predicate three claims – breach of fiduciary duty, negligence, and professional negligence. Fourth, Mr. Cohen accuses the counterclaim defendants of aiding and abetting Ms. Lynch's purported fraud and breach of fiduciary duty.

Applying Colorado's choice-of-law provisions, *Shearson Lehman Brothers, Inc. v. M & L Investments*, 10 F.3d 1510, 1514 (10th Cir. 1993), I note that the "most significant relationship test" of Restatement (Second) Conflicts of Laws (1971) applies to both contract and tort actions. *Fire Ins. Exchange v. Bentley*, 953 P.2d 1297, 1300 (Colo. Ct. App. 1998); *Hawks v. Agri Sales, Inc.*, 60 P.3d 714, 715 (Colo. Ct. App. 2001).

Reference to the Restatement leads to the conclusion that Colorado law applies to Mr. Cohen's tort counterclaims. Mr. Cohen suffered his alleged injury in Colorado, where Agile Group managed his money, and in Kentucky, where Traditional Holdings is incorporated and resident. The counterclaim defendants performed their purportedly inconstant activities in Colorado. Though Mr. Cohen is a Canadian citizen and resides in California, the plaintiffs and Mr. Barnett reside and work in Colorado. Finally, the relationship between the parties centered around Agile Group's management of Mr. Cohen's assets, which they performed in Colorado. Restatement (Second) Conflicts of Laws § 145 (1971). Colorado law thus controls. Review of the misrepresentation claims in light of Section 148 of the Restatement yields the same result.

IV. Professional liability

A. Professional negligence

Because Mr. Cohen did not undertake to demonstrate good cause, I previously denied his motion to file late the certificate of review mandated in Colo. Rev. Stat. § 13-20-602(1). The counterclaim defendants again assert that the extent and nature of their duties to Mr. Cohen are not within the general knowledge of lay fact finders and that expert testimony will prove indispensable at trial. Colo. Rev. Stat. § 13-20-602(2). Dismissal of Mr. Cohen's claims for negligence, breach of fiduciary duty, and professional negligence is, they argue, thus required.

In response, Mr. Cohen makes no arguments, but instead renews his request that the Court accept his proffered certificate for the reasons stated in his prior motion. To review: Mr. Cohen argued that his claim for professional negligence does not rest upon duties that the counterclaim defendants owed to him in their professional capacities. To express the argument is to refute it.

B. Negligence and breach of fiduciary duty

The question, with which Mr. Cohen provides no assistance, remains whether the claims for breach of fiduciary duty and putatively simple negligence stand upon the heightened duties a licensed professional owes to his client or rather upon the common duties a lay person assumes in commonly-perceived relationships. Answer is found in *Martinez v. Badis*, 842 P.2d 245 (Colo. 1992), wherein the Colorado Supreme Court observed that the certificate is requisite to those claims that require a claimant to establish a *prima facie* case by means of expert testimony, regardless of the designations assigned to those claims by the claimant. *Id.* at 249. Thus, the filing requirement applies to every action for damages or indemnity based upon the alleged professional negligence of a licensed professional, § 13-20-602(1), including claims for negligence and breach of fiduciary duty. *Id.* at 252.

In response to Agile Group's request for dismissal, it is incumbent upon Mr. Cohen to demonstrate that no expert testimony is required to prove his claims. *Ibid* at 251. He has not done so. Indeed, he cannot do so. Expert testimony would be necessary to elucidate the parties' competing criticisms of and justifications for the formation of Traditional Holdings, its putative tax benefits, risks, controlling interests, and investment advantages. Likewise, except to the extent that the counterclaim defendants' duties are subsumed within express contractual