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February 22, 2019

Honorable Kevin McNulty
UNITED STATES DISTRICT COURT
District Of New Jersey
50 Walnut Street
Newark, NJ 07102

Re: Kaul v Christie, et al.,
Docket No. 16-CV-02364
Request for entry of Default + Default Judgment against Defendant Lewis Stein, Esq.

Dear Judge McNulty,

I write this letter to respectfully request that the Court render a decision regarding a motion I filed on November 11, 2018 for entry of Default + Default against Defendant Lewis Stein, Esq (D.E. 278 Page ID 6596). I would also respectfully request, in consideration of the time that has passed since the application, that the motion be decided within two (2) weeks.

I would also like to bring to the Court's attention, the fact that a letter I filed on November 29, 2018, was not posted to the court docket (**Exhibit 1**). This letter was in reply to Defendant Stein's two-page letter (D.E. 282 Page ID 6634) in response to my motion, and it evidences his misrepresentation to the Court that he "**took permanent medical leave (retirement) from the my 46-year association with the law firm of Nussbaum, Stein, Goldstein …**". Defendant Stein continues to this day to be associated with the practice of law, a fact that is, however, irrelevant to the fact that the law demands the entry of default and default judgement against Defendant Stein.

With regards to discovery this case has been in existence for three (3) years, having been filed on February 22, 2016 in the United States Federal Court for the Southern District of New York, and during this three (3) year period the Court has prohibited me from engaging in any discovery from either the defendants or any third-party witnesses. I do not consider this to be consistent with Rule 1 of the Federal Rules of Civil Procedure. As this Court is aware, the record in this matter, in its journey from the S.D.N.Y. through the Second Circuit Federal Court of Appeals to this Court, is replete with arguments that I would not receive "**substantive justice**" in New Jersey. Defendant Stein was given the benefit of the doubt by this Court, in its opinion of July 7, 2017, when it found that Defendant Stein's failure to answer the First Amended Complaint was because

"**The recipient might well have been confused, however, by the attachment of a caption indicating that the defendant is being sued in the Southern District of New York, where the case was previously venued.**"(D.E. 202 Page 3768).

Thus to ensure there was no chance that confusion might once again overcome Defendant Stein, I instructed the process server to have him sign a CONFIRMATION OF SERVICE (D.E. 281-5 Page ID 6627). This document was attached to the motion for default and default judgment.

Finally, there is a matter that was recently brought to my attention, that I believe is relevant to my argument regarding the provision of substantive justice in New Jersey, and it is that in 2002, in your capacity as a lawyer, you represented University Physician Associates of New Jersey in the matter of Howard v Robert Heary, MD (**Exhibit 2**). University Physician Associates is the faculty practice of Defendant University Hospital, and is the practice with which Defendant Heary is affiliated. I believe this presents a conflict of interest, as does the fact that law firm at which Judge Mannion was a partner, Decottis + Fitzpatrick + Cole, filed a lawsuit against me in 2004 (DeCottis v Kaul: BER-L-4456-04). From the commencement of this case I have argued that the "***politico-legal nexus***" in New Jersey, and in the courts physically located in the State of New Jersey, would restrict my access to substantive justice (Kaul v Christie: UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT – Case No 16-1397-CV) (**Exhibit 3**).

"16) The plaintiff-appellant could not have reasonably brought the case in the District of New Jersey, because of the politico-legal nexus between the defendant-appellees and the federal judiciary." (D.E. 41 Page 4 of 170).

"18) The District of New Jersey will be strained to deliver impartial justice because of the politico-legal nexus between its judiciary and the defendant-appellees." (D.E. 41 Page 4 of 170).

These arguments appear to be consistent with the facts that default and default judgment have not been entered against Defendant Stein, and that the Court has, for a period of three (3) years, has barred me from engaging in any discovery. These arguments support that the case be re-venued in the S.D.N.Y., where the Court will be substantially less conflicted. This case has officially been brought to the attention of the Second Circuit Federal Court of Appeals and the United States Supreme Court. It has however, not yet been placed before the Third Circuit Federal Court of Appeals.

I would therefore respectfully repeat my request that the Court, by March 8, 2019, have entered default and default judgment against Defendant Lewis Stein, Esq, and enter an order that permits me to commence discovery.

I thank you for your consideration.

Yours sincerely

Richard Arjun Kaul, MD
cc: All Counsel via e-mail
Clerk of the Court
Judge Steven C. Mannion
The United States Court of Appeals for the Third Circuit
The United States Supreme Court

Exhibit 1

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November 28, 2018

Honorable Kevin McNulty
UNITED STATES DISTRICT COURT
District of New Jersey
50 Walnut Street
Newark, NJ 07102

Re: Kaul v Christie, et al.,
Docket No. 16-CV-02364
Response to letter from Defendant Lewis Stein, Esq to Judge McNulty

Dear Judge McNulty,

I write this letter in furtherance of my response to Defendant Stein's 'opposition' to my motion for default judgment. In his letter, Defendant Stein claims that he ***"took permanent medical leave (retirement)"*** from his ***"association with the law firm of Nussbaum, Stein, Goldstein, Bronstein & Kron."***. His name remains on both the placard outside his office at Town Centre Building, 66 Sunset Strip #205, Succasunna, NJ 07876, and on the website of his law firm, Nussbaum + Stein + Goldstein + Bronstein + Kron (copy enclosed).

On November 28, 2018, at approximately 9:30am EST, I spoke with a representative in the Court User Resource Center, Office of the Ombudsman at the Morris County Superior Court (973 656 3969). This individual informed me that according to the 2019 NJ Lawyers Diary + Manual, Bar Directory of NJ, Defendant Stein is still practicing law.

Defendant Stein is still in ***"association"*** with his law firm and is still practicing law, the discipline he is alleged to have corrupted in collusion with his racketeering co-defendants, NJMG + Washburn (D.E. 241 Page ID 5772).

I was referred to the Office of the Ombudsman by the New Jersey State Bar. I will be filing an ethics complaint against Defendant Stein and I would ask that the Court refer Defendant Stein to the Ethics Committee of the New Jersey Supreme Court. He has been less than honest in these proceedings, as he was when he procured a warrant to have me arrested (warrant enclosed) on June 8, 2012. He coordinated this date with K2 Defendant Hafner, to occur five days prior to the hearing before K2 Defendant, NJBME, a proceeding that resulted in the illegal suspension of my license. Defendant Stein, despite his ***"46-year association"*** with his law firm, appears not to believe the law applies to him.

Defendant Stein's ***"46-year association"*** provides context to a statement made by my prior attorney, Robert Conroy, on June 13, 2012 that ***"this [suspension/revocation] is all coming out of Morris County"*** (D.E. 192-2 Page ID 3588).

I thank you for your consideration, and would respectfully request the Court enter default judgment against Defendant Stein.

Yours sincerely

Richard Arjun Kaul, MD

cc: All Counsel via e-mail
Clerk of the Court
Judge Steven C. Mannion

NUSBAUM, STEIN, GOLDSTEIN
BRONSTEIN & KRON, P.A.
20 Commerce Blvd., Suite E
Succasunna, NJ 07876
(973) 584-1400
Attorneys for Plaintiffs

FILED
JUN 08 2012
Hon. Donald S. Coburn
J.A.D. ret., t/a on recall
Morris County

JAMES R. JARRELL AND
SHEILA G. JARRELL, his wife,
Plaintiffs,

v.

RICHARD A. KAUL, JOHN T. FORD, SUSSEX COUNTY TOTAL HEALTH CENTER, INC., MARKET STREET SURGICAL CENTER, LLC, AND JOHN DOES 1-10,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NUMBER: MRS-L-2634-07

Civil Action

WARRANT FOR ARREST

TO: The Sheriff of Passaic County
77 Hamilton Street
Paterson, NJ 07505

The Sheriff of Morris County
Court Street, PO Box 900
Morristown, NJ 07963

You are hereby commanded to arrest **Dr. Richard A. Kaul** between the hours of 7:30 a.m. and 2:00 p.m. on a day when the Court is in session at any location, including his office at 111 Wanaque Avenue, Pompton Lakes, New Jersey, and bring him forthwith before a Judge of the Superior Court, Morris County, Courthouse, Washington & Court Streets, Morristown, New Jersey to await the further order of the Court in this matter.

Local police departments are authorized and directed to provide assistance to the officer executing this Warrant.

WITNESS:

Hon. Donald S. Coburn, J.S.C.

Clerk of the Superior Court

Date: June 8, 2012

NUSBAUM, STEIN, GOLDSTEIN, BRONSTEIN & KRON

A Professional Corporation
Counsellors At Law

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-Of Counsel-
PAUL R. NUSBAUM

CERTIFIED BY THE SUPREME COURT OF NEW JERSEY
*Matrimonial Attorney
^Workers' Compensation
□Member Florida Bar
◊Member New York Bar
+Member Pennsylvania Bar

June 8, 2012
Via Facsimile (201) 444-1787

Jeffrey B. Randolph, Esq.
The Law Office of Jeffrey Randolph, LLC
139 Harristown Road, Suite 205
Glen Rock, NJ 07452

Re: Jarrell v. Kaul
Docket No. MRS-L-2634-07

Dear Mr. Randolph:

As you know, Judge Coburn signed a Warrant for Arrest of the Defendant, Dr. Richard Kaul, after hearing oral argument this morning and considering the papers on Plaintiffs' Motion in the above referenced matter. We will withhold the issuance of the Warrant for Arrest pending Dr. Kaul's appearance early next week for his discovery deposition. Pursuant to communications, Dr. Kaul's discovery deposition has now been confirmed for Wednesday, June 13, 2012 at 2:00 p.m. here at my office with our office requesting the court reporter.

In addition, as we agreed, this will further confirm that Dr. Kaul will bring with him his filed tax returns for the past two years.

Very truly yours,

Lewis Stein

Lewis Stein

LS:svd
cc: Philip A. Fishman, CSR- via email

Phone: 973-245-9780

Toll Free: 866-397-5451

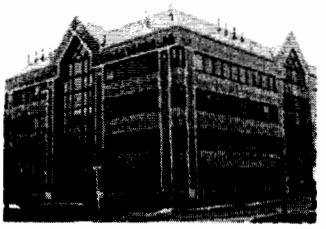
Fax: 973-584-8747

Brief description of your legal issue

CONTACT US TODAY

NUSBAUM STEIN

Town Centre Building
66 Sunset Strip
Suite 205
Succasunna, NJ 07876
Succasunna Law Office Map



Bar Admissions

New Jersey

U.S. Court of Appeals 3rd Circuit

U.S. Supreme Court

How can we help you?

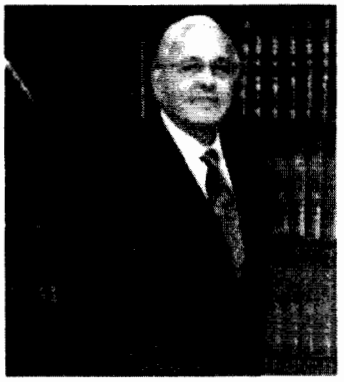
Name	Email Address	Phone

reduced charges, he now concentrates on personal injury litigation with an emphasis on medical malpractice.

He was one of the first eleven lawyers in the State of New Jersey certified by the Supreme Court in 1982 as both a certified civil and criminal lawyer, attesting to his skills as a trial lawyer. He has been admitted to practice in the Courts of the State of New Jersey as well as the United States District Court, Third Circuit Court of Appeals and the United States Supreme Court.

His status as a preeminent lawyer has been recognized by the Morris County Bar Association honoring him as recipient of its first Lifetime Achievement Award in 2003, after serving as its President in 1990; and by the NJ State Bar Association as a trustee from 1998 to 2004, with its Professionalism Award in 2006 as well as the coveted Chairmanship of its Committee on Approval of Judicial and Prosecutorial Appointments by the governor in 2005 and 2006. He also holds membership in the American Bar Association and the Association for Justice, a national association of plaintiff's personal injury lawyers. He also has been offered membership in the American Trial Lawyers Association, an Association of the 100 Best Trial Lawyers in New Jersey.

Location: **Phone:**
Fax: **Email:**
Email Me



Lewis Stein is the founding member of the litigation section of the firm. He brings to today's cases a notable record of success on behalf of clients injured in automobile accidents, by unsafe products, and as the result of bad medical treatment. He has appeared in all State and Federal Courts, and obtained jury verdicts as high as five million ($5,000,000.00) dollars and a number of settlements in excess of one million ($1,000,000.00) dollars. His cases in the Supreme Court of New Jersey have established the standard for assessing loss of future income to injured children, preserved the rights of supermarket patrons to obtain justice when a fall is caused by the store's operation, and successfully argued on behalf of the NJ State Bar Association to maintain access to the courts for permanently injured victims of automobile accidents.

A New York University Law School graduate (Juris Doctor) and Appellate Court law clerk whose early career included a term as a Public Defender for Morris, Sussex and Warren Counties and the defense of four first degree murder indictments that resulted in one acquittal, and two significantly

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973-245-

Lewis Stein

Succasunna, New Jersey

973-245-9780

866-397-5451 (Toll free)

973-584-8747

Areas Of Practice

Exhibit 2

HOWARD v. Dr. Robert Heary and Karen Romano, Defendants-Appellants.

Supreme Court of New Jersey.

Joseph HOWARD and Marie Howard, Plaintiffs-Respondents, v. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, Dr. C. Ruebenacker, Dr. C. Vaicys, Dr. Grigorian, M. Felix, Kristin Schwerzer, J. Esposito, E. Wheeler, Jonathan Dalmer, John Does 1-25 (fictitious names), Jane Does 1-25 (fictitious names), Jim Does 1-25 (fictitious names), Betty Does 1-25 (fictitious names), and ABC Corps., 1-20 (fictitious names), Defendants, Dr. Robert Heary and Karen Romano, Defendants-Appellants.

Decided: June 18, 2002

R. Scott Eichhorn, Springfield, argued the cause for appellants (McDonough, Korn & Eichhorn, attorneys; Matthew S. Schorr, of counsel; Mr. Schorr and William S. Mezzomo, on the briefs). Bruce H. Nagel, Livingston, argued the cause for respondents (Nagel Rice Dreifuss & Mazie, attorneys; Mr. Nagel, Robert H. Solomon and Adam M. Slater, of counsel; Mr. Nagel, Mr. Solomon and Mr. Slater, on the briefs). Joel M. Silverstein, Roseland, submitted a brief on behalf of amicus curiae Medical Society of New Jersey (Stern, Greenberg & Kilcullen, attorneys). Kevin McNulty, Newark, submitted a brief on behalf of amicus curiae University Physician Associates of New Jersey, Inc. (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys).
The opinion of the Court was delivered by

In this appeal we consider what causes of action will lie when a plaintiff contends that a physician misrepresented his credentials and experience at the time he obtained the plaintiff's consent to surgery.

I.

Plaintiff, Joseph Howard, came under the care of defendant, Dr. Robert Heary, in February 1997 for neck pain and related complaints. He had a history of cervical spine disease. Following a car accident in 1991, he was diagnosed with spondyliosis, with spinal cord compression extending from the C3 to C7 cervical discs. According to various doctors who examined him at that time he had severe cervical spinal stenosis, and he was advised to undergo a "decompressive cervical laminectomy because of the extent of his cervical pathology." Although the condition was "worsening progressively," plaintiff decided to forego surgery.

In January 1997, another automobile accident caused plaintiff injuries that included a cerebral concussion, cervical syndrome with bilateral radiculopathies, and low back syndrome with bilateral radiculopathies. Plaintiff sought the care of Dr. Boston Martin, who had treated him after the 1991 accident. Dr. Martin concluded that plaintiff's spinal condition had worsened significantly and recommended that plaintiff be seen at the University of Medicine and Dentistry of New Jersey (UMDNJ) by Dr. Heary, a Professor of Neurosurgery and the Director of UMDNJ's Spine Center of New Jersey.

Dr. Heary had two pre-operative consultations with plaintiff. In the first consultation, Dr. Heary determined that plaintiff needed surgery to correct a cervical myelopathy secondary to cervical stenosis and a significantly large C3 C4 disc herniation. Because of the serious nature of the surgery, Dr. Heary recommended that plaintiff's wife attend a second consultation. The doctor wanted to explain again the risks, benefits, and alternatives to surgery, and to answer any questions concerning the procedure.

Plaintiff returned with his wife for a second consultation, but what transpired is disputed. An "Office Note" written by Dr. Heary detailing the contents of the consultation states that "[a]ll alternatives have been

discussed and patient elects at this time to undergo the surgical procedure, which has been scheduled for March 5, 1997." Dr. Heary asserts that he informed plaintiff and his wife that the surgery entailed significant risks, including the possibility of paralysis. Plaintiffs dispute that they were informed of such risks. Further, they contend that during the consultation plaintiff's wife asked Dr. Heary whether he was Board Certified and that he said he was. Plaintiffs also claim that Dr. Heary told them that he had performed approximately sixty corpectomies in each of the eleven years he had been performing such surgical procedures. According to Mrs. Howard, she was opposed to the surgery and it was only after Dr. Heary's specific claims of skill and experience that she and her husband decided to go ahead with the procedure.

Dr. Heary denies that he represented that he was Board Certified in Neurosurgery.[1] He also denies that he ever claimed to have performed sixty corpectomies per year for the eleven years he had practiced neurosurgery.

Dr. Heary performed the surgical procedure on March 5, 1997, but it was unsuccessful. A malpractice action was filed alleging that Mr. Howard was rendered quadriplegic as a result of Dr. Heary's negligence.

During pretrial discovery, Dr. Heary and Mr. and Mrs. Howard were deposed. Plaintiffs claim that they learned from Dr. Heary's deposition that he had misrepresented his credentials and experience during the pre-surgery consultation. In his deposition Dr. Heary stated that he was not Board Certified at the time of the surgery, and that he had performed approximately "a couple dozen" corpectomies during his career. Based on that allegedly new information, plaintiffs moved unsuccessfully to amend their original complaint to add a fraud count.

In denying the motion, the trial court reasoned that "the plaintiff can get before the jury everything that is necessary without clouding the issue [with] is there a fraud here against the doctor. I have to agree with counsel for defendant that that, in essence, is not the nexus of malpractice." The court added that the fraud count would be duplicative, because if it were true that the doctor had misrepresented his credentials and experience plaintiffs still would be required to prove that Dr. Heary deviated from the acceptable standard of care to be entitled to recovery.

On leave to appeal the interlocutory order, the Appellate Division reversed and remanded with direction to the trial court to permit amendment of the complaint to include a "deceit based claim." Howard v. University of Medicine and Dentistry, 338 N.J.Super. 33, 39, 768 A.2d 195 (2001). Rejecting the contention that the amended complaint caused undue prejudice to defendant, the Appellate Division held that the denial of the motion for leave to amend did not comport with the interests-of-justice standard. Id. at 38, 768 A.2d 195. In respect of the merits of the newly pled claim based on deceit, the panel disagreed that plaintiff would be required to prove negligent performance of the surgery in order to recover damages. Ibid. The Appellate Division likened the claim for fraudulent misrepresentation to a claim for battery, when a doctor, other than the one authorized under principles of informed consent, performs the surgery. Id. at 39, 768 A.2d 195. In such circumstances, proof of negligent performance by the doctor would not be required. Ibid.

We granted defendant's motion for leave to appeal, 168 N.J. 287, 773 A.2d 1152 (2001).

II.

Presently, a patient has several avenues of relief against a doctor: (1) deviation from the standard of care (medical malpractice); (2) lack of informed consent; and (3) battery. Colucci v. Oppenheim, 326 N.J.Super. 166, 180, 740 A.2d 1101 (App.Div.1999), certif. denied, 163 N.J. 395, 749 A.2d 369 (2000) (citations omitted). Although each cause of action is based on different theoretical underpinnings, "it is now clear that deviation from the standard of care and failure to obtain informed consent are simply sub-groups of a broad claim of medical negligence." Teilhaber v. Greene, 320 N.J.Super. 453, 463, 727 A.2d 518 (App.Div.1999) (citations omitted). The original complaint in this case alleged a standard medical malpractice claim of deviation from the standard of care. Plaintiffs' motion to amend the complaint to add a fraud claim raises the question whether a patient's consent to surgery obtained through alleged misrepresentations about the physician's professional experience and credentials is properly addressed in a claim of lack of informed consent, or battery, or whether it should constitute a separate and distinct claim based on fraud.

A.

We focus first on the distinction between lack of informed consent and battery as they are recognized in New Jersey. The doctrine of informed consent was tied initially to the tort of battery, but its evolution has firmly established it as a negligence concept. See Largey v. Rothman, 110 N.J. 204, 207-08, 540 A.2d 504 (1988) (tracing history of theory of informed consent). Early cases recognized a cause of action for an "unauthorized touching" or "battery" if a physician did not obtain consent to perform a medical procedure. See, e.g., Mohr v. Williams, 95 Minn. 261, 104 N.W. 12, 14-15 (1905) (finding physician liable for operating on left ear when permission given only for surgery on right ear); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914) (citations omitted) (declaring importance of personal autonomy in medical setting: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."). Because doctors ordinarily lacked the "intent" to harm normally associated with the tort of battery, however, courts examining the nuances of the doctor-patient relationship realized that conceptually

a cause of action based on lack of patient consent fit better into the framework of a negligence cause of action. See Marjorie Maguire Shultz, From Informed Consent to Patient Choice: A New Protected Interest, 95 Yale L.J. 219, 225 (1985) ("Given the absolute nature of battery, the narrowness of its defenses, and the breadth of its remedies, doctors could end up paying significant damages after providing faultless medical treatment, simply because some minor informational aspect of the consent process was questioned.").

By the mid-twentieth century, as courts began to use a negligence theory to analyze consent causes of action, the case law evolved from the notion of consent to informed consent, balancing the patient's need for sufficient information with the doctor's perception of the appropriate amount of information to impart for an informed decision. See Largey, supra, 110 N.J. at 208, 540 A.2d 504 (quoting Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal.App.2d 560, 317 P.2d 170, 181 (Cal.App.1957) ("[a] physician violates his duty to the patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.")).

The doctrine of informed consent continued to be refined. See Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, 1106, modified on other grounds, 187 Kan. 186, 354 P.2d 670 (1960) (holding that doctor's required disclosure was "limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances," known as the "professional standard"). Eventually, the "prudent patient," or "materiality of risk" standard was introduced. Canterbury v. Spence, 464 F.2d 772, 786-88 (D.C.Cir.1972), cert. denied, 409 U.S. 1064, 93 S.Ct. 560, 34 L.Ed.2d 518 (1972). That patient-centered view of informed consent stresses the patient's right to self-determination, and the fiduciary relationship between a doctor and his or her patients. Id. at 781-82. The standard balances the patient's need for material information with the discretion to be exercised by the doctor, and requires a physician to disclose material information to the patient even if the patient does not ask questions. Ibid. "A risk would be deemed 'material' when a reasonable patient, in what the physician knows or should know to be the patient's position, would be 'likely to attach significance to the risk or cluster of risks' in deciding whether to forgo the proposed therapy or to submit to it." Largey, supra, 110 N.J. at 211-212, 540 A.2d 504 (quoting Canterbury, supra, 464 F.2d at 787).

In New Jersey, as in most jurisdictions, informed consent is "a negligence concept predicated on the duty of a physician to disclose to a patient information that will enable him to 'evaluate knowledgeably the options available and the risks attendant upon each' before subjecting that patient to a course of treatment." Perna v. Pirozzi, 92 N.J. 446, 459, 457 A.2d 431 (1983) (quoting Canterbury, supra, 464 F.2d at 780). Although we originally followed the "professional" standard for assessing claims of informed consent, Kaplan v. Haines, 96 N.J.Super. 242, 257, 232 A.2d 840 (App.Div.1967), aff' d.o.b., 51 N.J. 404, 241 A.2d 235 (1968), that standard was replaced by the "prudent patient" standard set forth in Canterbury. Largey, supra, 110 N.J. at 216, 540 A.2d 504.

Thus, to sustain a claim based on lack of informed consent, the patient must prove that the doctor withheld pertinent medical information concerning the risks of the procedure or treatment, the alternatives, or the potential results if the procedure or treatment were not undertaken. Perna, supra, 92 N.J. at 460, 457 A.2d 431 (citation omitted). See also Matthies v. Mastromonaco, 160 N.J. 26, 34-35, 733 A.2d 456 (1999) (noting requirement of exploring medically reasonable invasive and noninvasive alternatives, including risks and likely outcomes of both). The information a doctor must disclose depends on what a reasonably prudent patient would deem significant in determining whether to proceed with the proposed procedure. Largey, supra, 110 N.J. at 211-212, 540 A.2d 504.

A plaintiff seeking to recover under a theory of lack of informed consent also must prove causation, id. at 215, 540 A.2d 504, thereby requiring a plaintiff to prove that a reasonably prudent patient in the plaintiff's position would have declined to undergo the treatment if informed of the risks that the defendant failed to disclose. Canesi v. Wilson, 158 N.J. 490, 504-05, 730 A.2d 805 (1999) (citation omitted). If the plaintiff would have consented to the proposed treatment even with full disclosure, the burden of proving causation is not met. Largey, supra, 110 N.J. at 215-16, 540 A.2d 504. Accordingly,

[t]o establish a prima facie case for medical negligence premised on a theory of liability for lack of informed consent, a plaintiff must show "(1) the physician failed to comply with the [reasonably-prudent-patient] standard for disclosure; (2) the undisclosed risk occurred and harmed the plaintiff; (3) a reasonable person under the circumstances would not have consented and submitted to the operation or surgical procedure had he or she been so informed; and (4) the operation or surgical procedure was a proximate cause of plaintiff's injuries."

[Teilhaber, supra, 320 N.J.Super. at 465, 727 A.2d 518 (citations omitted) (emphasis added).]

The damages analysis in an informed consent case involves a comparison between the condition a plaintiff would have been in had he or she been properly informed and not consented to the risk, with the plaintiff's impaired condition as a result of the risk's occurrence. Canesi, supra, 158 N.J. at 505, 730 A.2d 805 (citations omitted) (noting that "there must be medical causation [from the procedure], that is, a causal connection between the undisclosed risk [of the procedure performed] and the injury ultimately sustained"). Our case law does not require a plaintiff to prove that the physician deviated from the standard of care in performing the operation or procedure; the physician's negligence is in the inadequate disclosure and the damages claimed derive from the harm to the patient caused by a procedure that would not have occurred if the disclosure had

been adequate. Id. at 506, 730 A.2d 805 (analyzing causation requirements of informed consent and wrongful birth actions; although both require disclosure of risks that reasonably prudent patient would consider material, informed consent action requires plaintiff to demonstrate that undisclosed risk materialized and injury to patient resulted from treatment provided). In summary, in an action based on lack of informed consent,

the plaintiff must prove not only that a reasonably prudent patient in [his or] her position, if apprised of all material risks, would have elected a different course of treatment or care. In an informed consent case, the plaintiff must additionally meet a two-pronged test of proximate causation: [he or] she must prove that the undisclosed risk actually materialized and that it was medically caused by the treatment.

[Ibid.]

B.

Our common law also authorizes a medical battery cause of action where a doctor performs a surgery without consent, rendering the surgery an unauthorized touching. Perna, supra, 92 N.J. at 460-61, 457 A.2d 431. Because battery is an intentional tort, it is reserved for those instances where either the patient consents to one type of operation but the physician performs a substantially different one from that for which authorization was obtained, or where no consent is obtained. Matthies, supra, 160 N.J. at 35, 733 A.2d 456 (citing 3 David W. Louisell & Harold Williams, Medical Malpractice §§ 22.02, 22.03 (1999)); Samoilov v. Raz, 222 N.J.Super. 108, 119, 536 A.2d 275 (App.Div.1987).

In circumstances where the surgery that was performed was authorized with arguably inadequate information, however, an action for negligence is more appropriate. Tonelli v. Khanna, 238 N.J.Super. 121, 126-27, 569 A.2d 282 (App.Div.), certif. denied, 121 N.J. 657, 583 A.2d 344 (1990). Battery actions are less readily available in part because of the severity of their consequences. In an action for battery, a patient need not prove that the physician deviated from either the applicable standard for disclosure or the standard for performance of the operation. Perna, supra, 92 N.J. at 460-61, 457 A.2d 431. Accordingly, "[a]n operation undertaken without [any] consent (battery) even if perfectly performed with good medical results may entitle a plaintiff to at least nominal and even punitive damages." Whitley-Woodford v. Jones, 253 N.J.Super. 7, 11, 600 A.2d 946 (App.Div.1992) (citations omitted).

The decision in Perna represents the unusual circumstance where the consent granted was vitiated, rendering the circumstances the equivalent of an unauthorized touching-in other words, a battery. In that matter, the defendant urologists were part of a medical group that operated as a self-described "team." Perna, supra, 92 N.J. at 451, 457 A.2d 431. Their method of operation included a decision made immediately prior to a surgical procedure designating the specific member of the group who was to perform the surgery. Unaware of that practice, the plaintiff entered the hospital on the advice of his family physician for tests and a urological consultation. In the hospital, the plaintiff was examined by one physician member of the practice group who previously had treated the plaintiff for a bladder infection. Ibid. The doctor recommended the removal of kidney stones and the plaintiff signed a consent form naming that physician as the surgeon. The operation ultimately was performed by two other physicians from the practice group, both of whom were unaware that only the original doctor's name appeared on the consent form. Id. at 452, 457 A.2d 431. Post-surgical complications developed and the plaintiff became aware of the substitution of doctors. Ibid.

Plaintiff sued based on lack of informed consent. Perna, supra, 92 N.J. at 452, 457 A.2d 431. The court instructed the jury that the plaintiff could recover only if the substitution of surgeons caused his damages. Id. at 453, 457 A.2d 431. The jury found for the defendants, and on appeal the Appellate Division affirmed. Id. at 450, 457 A.2d 431. On certification to this Court, the matter was reversed and remanded. Id. at 465-66, 457 A.2d 431. The Court referred to the substitution of surgeons as "ghost surgery" because the doctor to whom informed consent was given was not the surgeon who performed the surgery. In that circumstance, the Court concluded that that surgeon did not have the plaintiff's informed consent. Id. at 463 n. 3, 464-465, 457 A.2d 431 (citing Judicial Council of the American Medical Ass' n, Op. 8.12 (1982)). Denominating the matter a battery, the Court held that the plaintiff was entitled to "recover for all injuries proximately caused by the mere performance of the operation, whether the result of negligence or not." Perna, supra, 92 N.J. at 460-61, 457 A.2d 431. The Court held that if the patient suffers no injuries except those that may be foreseen from the operation, he then is entitled at least to nominal damages and, in an appropriate case, may be entitled to damages for mental anguish resulting from the belated knowledge that the operation was performed by a doctor to whom he had not given consent. Id. at 461, 457 A.2d 431.

Thus, although a claim for battery will lie where there has been "ghost surgery" or where no consent has been given for the procedure undertaken, if consent has been given for the procedure only a claim based on lack of informed consent will lie. A claim based on lack of informed consent properly will focus then on the adequacy of the disclosure, its impact on the reasonable patient's assessment of the risks, alternatives, and consequences of the surgery, and the damages caused by the occurrence of the undisclosed risk. See W. Page Keeton, et al., Prosser and Keeton on Torts § 32 at 190 (5th ed.1984).

III.

A.

In finding that a deceit-based claim was appropriate in this matter, the Appellate Division analogized the allegations concerning Dr. Heary's misrepresentations about his credentials and experience to the "ghost surgery" situation discussed in Perna. Howard, supra, 338 N.J.Super. at 38-39, 768 A.2d 195. At the outset, we note that this case is not factually analogous to Perna where a different person from the one to whom consent was given actually performed the procedure. 92 N.J. at 451-52, 457 A.2d 431. Nor is this a case where someone impersonating a doctor actually touched a patient. See Taylor v. Johnston, 985 P.2d 460, 465 (Alaska 1999) (noting that "battery claim may lie if a person falsely claiming to be a physician touches a patient, even for the purpose of providing medical assistance"). Here, defendant explained the procedure, its risks and benefits, and the alternatives to the surgery. He then performed the procedure; another person did not operate in his stead as in the "ghost surgery" scenario. See Thomas Lundmark, Surgery by an Unauthorized Surgeon as a Battery, 10 J.L. & Health 287 (1995-1996) (defining ghost surgery as "surgery by a surgeon [to whom] the patient has not consented"). The facts in Perna simply are not helpful here.

Few jurisdictions have confronted the question of what cause of action should lie when a doctor allegedly misrepresents his credentials or experience. Research has revealed only one jurisdiction that has allowed a claim based on lack of informed consent under similar circumstances. See Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495, 498 (Wis.1996) (analyzing doctor's affirmative misrepresentation as claim for lack of informed consent and finding that reasonable person would have considered information regarding doctor's relative lack of experience in performing surgery to have been material in making intelligent and informed decision). Although some suggest that a claim based in fraud may be appropriate if a doctor actively misrepresents his or her background or credentials, we are aware of no court that has so held. See, e.g., Bethea v. Coralli, 248 Ga.App. 853, 546 S.E.2d 542, 544 (Ga.Ct.App.2001) (holding that patient may not bring claim for fraud independent of claim of medical malpractice); Ditto v. McCurdy, 86 Hawai'i 84, 947 P.2d 952, 958 (Hawaii 1997) (holding that failure to disclose lack of board certification as plastic surgeon, as opposed to other board certifications possessed, did not violate requirements for informed consent or render doctor liable for fraud); Paulos v. Johnson, 597 N.W.2d 316, 320 (Minn.Ct.App.1999) (allegation of misrepresentation is not actionable as independent fraud claim); Spinosa v. Weinstein, 168 A.D.2d 32, 571 N.Y.S.2d 747, 751-54 (N.Y.App.Div.1991) (holding that fraudulent representations made to plaintiff did not render her consent to foot surgery equivalent to absence of consent; rather, claim had to do with whether there was failure to obtain informed consent); cf. Duttry v. Patterson, 565 Pa. 130, 771 A.2d 1255, 1259 (Pa.2001) (holding that alleged affirmative misstatement of credentials does not support claim for lack of informed consent, but suggesting that claim for misrepresentation may be appropriate).

The thoughtful decision of the Appellate Division notwithstanding, we are not convinced that our common law should be extended to allow a novel fraud or deceit-based cause of action in this doctor-patient context that regularly would admit of the possibility of punitive damages, and that would circumvent the requirements for proof of both causation and damages imposed in a traditional informed consent setting. We are especially reluctant to do so when plaintiff's damages from this alleged "fraud" arise exclusively from the doctor-patient relationship involving plaintiff's corpectomy procedure. See Spinosa, supra, 571 N.Y.S.2d at 753 (citations omitted) (holding that concealment or failure to disclose doctor's own malpractice does not give rise to claim of fraud or deceit independent of medical malpractice, and noting that intentional tort of fraud actionable " 'only when the alleged fraud occurs separately from and subsequent to the malpractice . and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice' "). Accordingly, we hold that a fraud or deceit-based claim is unavailable to address the wrong alleged by plaintiff.

We next consider whether a claim based on lack of informed consent is the more appropriate analytical basis for the amendment to the complaint permitted by the Appellate Division.

B.

Our case law never has held that a doctor has a duty to detail his background and experience as part of the required informed consent disclosure; nor are we called on to decide that question here. See In re Conroy, 98 N.J. 321, 346, 486 A.2d 1209 (1985) (stating that informed consent doctrine anticipates "a patient's consent, obtained after explanation of the nature of the treatment, substantial risks, and alternative therapies.") (quoting Norman L. Cantor, A Patient' s Decision to Decline Life Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, 26 Rutgers L.Rev. 228, 346 (1973)); Matthies, supra, 160 N.J. at 36-41, 733 A.2d 456. See generally 3 David W. Louisell & Harold Williams, Medical Malpractice § 22.04(3)(a) (1998) (noting that ordinary scope of disclosure involves "information concerning (1) the diagnosis; (2) the general nature of the contemplated procedure; (3) the risks involved; (4) the prospects of success; (5) the prognosis if the procedure is not performed; and (6) alternative medical treatments"). Courts generally have held that claims of lack of informed consent based on a failure to disclose professional-background information are without merit. See, e.g., Ditto, supra, 947 P.2d at 958 (holding that informed consent does not require doctor to "affirmatively disclose his or her [professional] qualifications or lack thereof to a patient"); Foard v. Jarman, 326 N.C. 24, 387 S.E.2d 162, 167 (N.C.1990) (finding that because informed consent statute imposed no affirmative duty to discuss experience, facts presented "no genuine issue regarding defendant's experience which [bore] on the issue of informed consent").

Although personal credentials and experience may not be a required part of an informed consent disclosure under the current standard of care required of doctors, the question raised in this appeal is whether significant misrepresentations concerning a physician's qualifications can affect the validity of consent obtained. The

answer obviously is that they can.

In certain circumstances, a serious misrepresentation concerning the quality or extent of a physician's professional experience, viewed from the perspective of the reasonably prudent patient assessing the risks attendant to a medical procedure, can be material to the grant of intelligent and informed consent to the procedure. See 1 Dan B. Dobbs, The Law of Torts, § 251 at 660-61 (2001) (citing Kokemoor, supra, and discussing that some authority has begun to suggest that patient is entitled to information concerning doctor's experience in performing specific surgery). In Kokemoor, supra, the Supreme Court of Wisconsin reviewed a case in which the plaintiff alleged that her surgeon did not obtain her informed consent to perform a surgical procedure because he had misrepresented his experience in response to a direct question during a pre-operative consultation. 545 N.W.2d at 505. At trial, evidence was introduced suggesting that the type of surgery performed-basilar bifurcation aneurysm-was "among the most difficult in all of neurosurgery." Ibid. The court found that evidence of the defendant's lack of experience was relevant to an informed consent claim because "[a] reasonable person in the plaintiff's position would have considered such information material in making an intelligent and informed decision about the surgery." Ibid. See also Bethea, supra, 546 S.E.2d at 544 (recognizing that fraudulent misrepresentation of facts material to consent may support claim based on lack of informed consent); Paulos, supra, 597 N.W.2d at 320 (suggesting misrepresentation by doctor that he was board certified in plastic surgery may present issue of informed consent).

The allegation here is that defendant's misrepresentations concerning his credentials and experience were instrumental in overcoming plaintiff's reluctance to proceed with the surgery. The theory of the claim is not that the misrepresentation induced plaintiff to proceed with unnecessary surgery. See Tonelli, supra, 238 N.J.Super. at 128, 569 A.2d 282 (noting that plaintiff alleged that doctor performed unnecessary surgery for personal gain). Rather, plaintiff essentially contends that he was misled about material information that he required in order to grant an intelligent and informed consent to the performance of the procedure because he did not receive accurate responses to questions concerning defendant's experience in performing corpectomies and whether he was "Board Certified." Plaintiff allegedly was warned of the risk of paralysis from the corpectomy procedure; however, he asserts that if he had known the truth about defendant's qualifications and experience, it would have affected his assessment of the risks of the procedure. Stated differently, defendant's misrepresentations induced plaintiff to consent to a surgical procedure, and its risk of paralysis, that he would not have undergone had he known the truth about defendant's qualifications. Stripped to its essentials, plaintiff's claim is founded on lack of informed consent.

As noted earlier, a patient-specific standard of what is material to a full disclosure does not apply in a claim based on lack of informed consent. Thus, plaintiff's subjective preference for a Board Certified physician, or one who had performed more corpectomies than defendant had performed, is not the actionable standard. Nonetheless, assuming the misrepresentations are proved, if an objectively reasonable person could find that physician experience was material in determining the medical risk of the corpectomy procedure to which plaintiff consented, and if a reasonably prudent person in plaintiff's position informed of the defendant's misrepresentations about his experience would not have consented, then a claim based on lack of informed consent may be maintained.

Modern advances in medicine coupled with the increased sophistication of medical consumers require an evolving notion of the reasonably prudent patient when assessing a claim based on lack of informed consent. See Schultz, supra, 95 Yale L.J. at 221-22. That said, most informed consent issues are unlikely to implicate a setting in which a physician's experience or credentials have been demonstrated to be a material element affecting the risk of undertaking a specific procedure. The standard requires proof on which an objectively reasonable person would base a finding that physician experience could have a causal connection to a substantial risk of the procedure. Largey, supra, 110 N.J. at 213-15, 540 A.2d 504 3 David W. Louisell & Harold Williams, Medical Malpractice § 22.05(3) (2001).

The alleged misrepresentations in this case about "physician experience" (credentials and surgical experience) provide a useful context for demonstrating the difficulty inherent in meeting the materiality standard required in order for physician experience to have a role in an informed consent case. We recognize that a misrepresentation about a physician's experience is not a perfect fit with the familiar construct of a claim based on lack of informed consent. The difficulty arises because physician experience is not information that directly relates to the procedure itself or one of the other areas of required medical disclosure concerning the procedure, its substantial risks, and alternatives that must be disclosed to avoid a claim based on lack of informed consent. But the possibility of materiality is present. If defendant's true level of experience had the capacity to enhance substantially the risk of paralysis from undergoing a corpectomy, a jury could find that a reasonably prudent patient would not have consented to that procedure had the misrepresentation been revealed. That presumes that plaintiff can prove that the actual level of experience possessed by defendant had a direct and demonstrable relationship to the harm of paralysis, a substantial risk of the procedure that was disclosed to plaintiff. Put differently, plaintiff must prove that the additional undisclosed risk posed by defendant's true level of qualifications and experience increased plaintiff's risk of paralysis from the corpectomy procedure.

The standard for causation that we envision in such an action will impose a significant gatekeeper function on the trial court to prevent insubstantial claims concerning alleged misrepresentations about a physician's experience from proceeding to a jury. We contemplate that misrepresented or exaggerated physician

experience would have to significantly increase a risk of a procedure in order for it to affect the judgment of a reasonably prudent patient in an informed consent case. As this case demonstrates, the proximate cause analysis will involve a two-step inquiry.

The first inquiry should be, assuming a misrepresentation about experience, whether the more limited experience or credentials possessed by defendant could have substantially increased plaintiff's risk of paralysis from undergoing the corpectomy procedure. We envision that expert testimony would be required for such a showing. The second inquiry would be whether that substantially increased risk would cause a reasonably prudent person not to consent to undergo the procedure. If the true extent of defendant's experience could not affect materially the risk of paralysis from a corpectomy procedure, then the alleged misrepresentation could not cause a reasonably prudent patient in plaintiff's position to decline consent to the procedure. The court's gatekeeper function in respect of the first question will require a determination that a genuine issue of material fact exists requiring resolution by the factfinder in order to proceed to the second question involving an assessment by the reasonably prudent patient. Further, the trial court must conclude that there is a genuine issue of material fact concerning both questions in order to allow the claim to proceed to trial.

Finally, to satisfy the damages element in a claim based on lack of informed consent, a plaintiff typically has to show a causal connection between the inadequately disclosed risk of the procedure and the injury sustained. Canesi, supra, 158 N.J. at 505, 730 A.2d 805. If that risk materialized and harmed plaintiff, damages for those injuries are awarded. Ibid. Here, if successful in his claim based on lack of informed consent, plaintiff may receive damages for injuries caused by an inadequately disclosed risk of the corpectomy procedure. However, as noted, to be successful plaintiff must prove that defendant's allegedly misrepresented qualifications and experience can satisfy the stringent test for proximate causation that is required for physician experience to be material to the substantial risk of the procedure that occurred (paralysis) and injured plaintiff. If he can, then plaintiff may be compensated for that injury caused by the corpectomy irrespective of whether defendant deviated from the standard of care in performing the surgical procedure.

In conclusion, plaintiff's medical malpractice action will address any negligence in defendant's performance of the corpectomy procedure. We hold that in addition plaintiff may attempt to prove that defendant's alleged misrepresentation about his credentials and experience presents a claim based on lack of informed consent to the surgical procedure, consistent with the requirements and limitations that we have imposed on such a claim.

IV.

We reverse that portion of the decision below that would permit a separate action for fraud in view of our conclusion that misrepresentations concerning a physician's credentials and experience ordinarily are to be cognizable in a claim based on lack of informed consent. All aspects of plaintiff's complaint against defendant arise out of plaintiff's consent to a medical procedure and defendant's performance of that procedure. Permitting a cause of action based on lack of informed consent, in addition to the malpractice action, is all that is required and appropriate to address plaintiff's allegations.

The judgment of the Appellate Division is affirmed in part, and reversed in part. The matter is remanded to the trial court to allow plaintiff the opportunity to amend his complaint to allege lack of informed consent, consistent with the requirements for prevailing on that claim as set forth in this opinion.

FOOTNOTES

1. Although he was Board Eligible at the time of Mr. Howard's surgery, Dr. Heary did not become Board Certified in Neurosurgery until November 1999. "A physician is considered to be a surgical specialist if the physician: (1) Is certified by an American surgical specialty board approved by the American Board of Medical Specialties; or (2) Has been judged eligible by such a board for its examination by reason of education, training and experience." American College of Surgeons Statements on Principles, Section II.A.

Exhibit 3

No. 16-1397-cv

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD ARJUN KAUL, MD.,

Plaintiff-appellant

v.

CHRISTOPHER J. CHRISTIE, ESQ., et al.

Defendant-appellees

On Appeal from an Interlocutory Order of
The United States District Court for the Southern District of New York,

BRIEF OF APPELLANT

Richard Arjun Kaul, MD
Propria Persona
120 Temple Terrace
Palisades Park, NJ 07650
201-989-2299

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Plaintiff-Appellant Richard Arjun Kaul, MD ("Plaintiff-Appellant") appeals from an interlocutory order (Appendix-Exhibit1) entered on April 19 2016 pursuant to a decision by the United States District Court, Southern District of New York (Sullivan, R) transferring the matter, sua ponte, to the United States District Court, District of New Jersey, under 28. U.S.C. § 1404 (a)

JURISDICTIONAL STATEMENT

The district court and this Court have subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity of citizenship). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292 (b) in that this is an appeal from an interlocutory order entered on April 19 2016 by the district court transferring, sua ponte, the matter from United States District Court, Southern District of New York to the United States District Court, District of New Jersey.

The plaintiff-appellant was a New York resident from 2005 to 2013 when the causes of action accrued and the defendant-appellants were residents of New Jersey and New York. The matter alleges damages in excess of $75,000.

The plaintiff-appellant filed a Rule 5. petition for permission to appeal, in a timely manner on April 29 2016, within the ten days proscribed pursuant to 28 U.S.C. § 1292 (b)

STATEMENT OF CASE

a) **The case is an intersection of medicine, law, business and politics. It stems from political corruption in New Jersey, professional jealousy and business competition in the minimally invasive spine surgery sector. The case has federal and global consequences.**

This case stems from a medical professional battle between neurosurgeons and minimally invasive spine surgeons. What has become known in the media as '**The**

Spine Turf Wars' commenced in or around 1999, and is a dispute about who is qualified to perform minimally invasive spine surgery. There has been protracted nationwide litigation in state courts, medical licensing boards and state administrative agencies. The neurosurgeons used the financial superiority of their professional society political action committees, to purchase political favor, in order to advance their business agendas. They employed a three pronged strategy:

1. They encouraged patients to file medical malpractice lawsuits against minimally invasive spine surgeons, and then provided members of the neurosurgical community as medical experts.
2. They used their positions as the 2011 Presidents of the North American Spine Society (NASS) and the American Medical Association (AMA) to devalue the CPT codes used by insurance companies to calculate the dollar reimbursements for endoscopic disc decompression, a procedure commonly performed by minimally invasive spine surgeons.
3. They purchased political favor to advance state healthcare legislation advantageous to their commercial interests, and used state medical boards to suspend or revoke the medical licenses of minimally invasive spine surgeons.

The neurosurgeons' intention was to drive the minimally invasive spine surgeons out of business through unfair competition, in order to monopolize the minimally invasive spine surgery market. The consequence of this has been an increase in the prices that neurosurgeons now charge patients, and insurance companies for professional services.

b) <u>The treatment of spine disease was revolutionized by the invention of the mobile fluoroscopic unit and the technique of Fluroscopic Guidance and Interpretation (FGI).</u>

Underpinning the economic, legislative and political threads of the case is technology. Commencing in the mid 1990s with the invention of a mobile x-ray or fluoroscopic unit, also known as a C-arm, the ability to visualize the bony anatomy of the spine intra-operatively without having to open the back, became a reality of clinical practice. Prior to this invention the only way to address, for example a herniated spinal disc, was to remove the surrounding muscles and bone. This approach caused immense collateral damage to the back and resulted in poor clinical outcomes. The C-arm revolutionized spine care in much the same way that x-ray contrast angiography changed the course of cardiac care in the late 1980s. Today 95% of patients with coronary artery disease are treated not by cardiac surgeons but by interventional cardiologists.

In approximately 1995 the field of interventional pain started to emerge, as anesthesiologists combined their skills in performing epidural injections, with the enhanced spinal visualization afforded by the C-arm, to inject pain relieving steroids into patients' spines. These procedures were carried out on a same day basis and began to mitigate the need for spine surgery. This signaled the commencement of the encroachment into spine care of physicians from non-neurosurgical specialties. Advances in anesthesia and post operative pain control allowed an increasing number of spinal procedures to be performed in outpatient surgical centers. The shift away from hospitals and into physician owned ambulatory facilities, was detrimental to hospital's revenue streams. The surgical centers provided a more cost effective option. Physicians who had been denied clinical privileges at hospitals for fundamentally commercial reasons, were now able to perform minimally invasive spine surgeries in their state licensed surgical centers. By 1999 the use of the fluoroscopic C-arm became the standard of care for all minimally invasive spinal procedures. The particular skill that physicians who regularly performed these procedures developed, became known as Fluroscopic

Guidance and Interpretation (FGI). To understand how a minimally invasive spine surgeon safely and effectively combines radiological data obtained from 2-D imaging, with a knowledge of 3-D spinal anatomy is most effectively illustrated by referring to the temporal spatial techniques that an instrument rated fighter pilot uses as he maneuvers his plane at night in a 3-D frame, based on 2-D instrument data. The instrument rated pilot is the equivalent of the minimally invasive spine surgeon skilled in FGI, while the neurosurgeon is the equivalent of the non-instrument rated pilot who can only fly under direct vision. The latter is the equivalent of only being able to perform open spine surgery, which requires the destruction and removal of muscle and bone.

In late 1999/early 2000 endoscopic technology that had been used in orthopedic joint procedures since the mid 1990s, was modified for use in the spine. A number of surgical instrument companies developed spinal endoscopes that permitted the removal of herniated disc fragments. The placement of these endoscopes required the physician to be proficient in FGI, which meant that minimally invasive spine surgeons, because of their extensive training with the C-arm, were often more technically capable than neurosurgeons, whose training did not involve FGI. As these differences in technical capability emerged the neurosurgeon's share of the spinal market continued to decrease. The less invasive approach associated with minimally invasive technologies led to improved patient outcomes, which resulted in more patients choosing to have their back pain treated with spinal intervention. The fear among patients of paralysis started to decrease, which combined with improved diagnostics, caused a rapid increase in the number of patients willing to undergo surgery. The treatment of patients with back pain had progressed from the simple dispensation of medications in the 1980s to one of the most profitable sectors of global healthcare in 2012. Post-residency fellowships in minimally invasive spine surgery had become some of the most sought after programs, and

the fight over who was qualified to perform these procedures culminated in the coalescing of political corruption and unfair trade practices in New Jersey, that provide the basis for this action.

STATEMENT OF FACTS

a) The conspiracy against the plaintiff-appellant began in 2008

In 2008 one of the plaintiff-appellant's neurosurgical competitors encouraged a patient, on whom the plaintiff-appellant had operated, to file a complaint with the medical board. The neurosurgeon had a neurologist friend on the medical board, who ensured that the case was prosecuted. On February 3rd 2010, the plaintiff-appellant appeared before the medical board and answered questions about his medical training, and the care he had provided to the patient. It was not until April 2012, by which point he had performed 800 minimally invasive spine surgeries, with no deaths, life threatening complications and a good to very good outcome in 90-95% of his patients, that the medical board filed a complaint to suspend/revoke his license. During the two years between February 2010 and April 2012 he opened a Medicare certified and AAAHC accredited surgical center in Pompton Lakes.

b) The defendant-appellee state forged court transcripts

The plaintiff-appellant's medical license was suspended on June 13th 2012 in a highly publicized manner, in which the New Jersey Attorney General, Jeffrey Chiesa, Esq, made pre-hearing prejudicial comments to the press, that the plaintiff-appellant was not qualified to perform minimally invasive spine surgery. These were made during a May 2012 interview with CBS-Radio's journalist Marla Diamond. These comments were made almost one year before the matter was

heard. The prejudicial media surrounding the case continued from April 2012 up until October 2015.

In May 2012 it was recommended to the plaintiff-appellant by a New Jersey attorney that he should file a restraining order against the medical board in the United States District Court for the District of New Jersey, until the question of what clinical privileges a plenary medical license for medicine and surgery afforded its holder, had been answered. In the attorney's opinion the plenary license and the alternative privileges regulation were legally inconsistent, and within the latter there was no requirement for alternative privileges in minimally invasive spine surgery. The plaintiff-appellant discussed the attorney's suggestion with his attorney, Robert Conroy, who stated in an e-mail that the **"this district court has shown itself to be most sympathetic to the state".** Conroy advised the plaintiff-appellant that an appeal to the District of New Jersey would be futile, because of its relationship with the defendant-appellee politician.

On April 9th 2013 the matter was litigated in the New Jersey Office of Administrative Law. It concluded on June 30th 2013 and involved 23 days of testimony. The plaintiff-appellant had an independent court transcriptionist attend the hearing on several days in May, as he had been alerted to the issue of court transcription fraud on June 13th 2012 by Robert Conroy, who represented him before the medical board on June 13th 2012. Robert Conroy brought his own transcriptionist to the June 13th 2012 hearing and told the plaintiff-appellant about the medical board that, **"they have a habit of tampering with the transcripts"**.

On May 6th 2013 the state's expert witness, neurosurgeon Dr. Gregory Przybylski, testified under cross examination that no standards existed for training in minimally invasive spine surgery. This critical admission and other parts of his testimony were recorded differently in the transcript produced by the state retained reporter. Additionally, when the plaintiff-appellant's attorney requested copies of

the transcript from the deputy attorney general, she refused to provide them. He made several requests in August and September 2013, but all were denied.

c) The US Attorney for New Jersey refused to investigate forged court transcripts

During the medical board hearing on February 12th 2014 in Trenton, it admitted that differences existed between the two transcripts. Prior to the commencement of the hearing the deputy attorney general had objected to the introduction of the independent transcript. However, the issue of court transcription fraud was already in the public domain, due to the fact that the plaintiff-appellant had sent a letter to President Obama dated January 5th 2014 regarding the matter. The letter had been posted on the plaintiff-appellant's website, which was the reason the medical board acquiesced to the motion made by the plaintiff-appellant's attorney.

On January 29th 2015 the plaintiff-appellant filed a complaint with the office of the US Attorney for New Jersey in which he requested an investigation of the forged transcripts. He received no response and on February 13th he telephoned the Newark office to ascertain the status of the complaint and was told by a female individual that "they were not an investigative agency", who then hung up. However, prior to filing the complaint with the US Attorney the plaintiff-appellant had attempted to initially file a complaint with the FBI offices in Newark, but was instructed by the agents that the complaint should be filed with the US Attorney, which is what he did, and which led to nothing.

d) The plaintiff-appellant was exposed to almost four years of highly prejudicial media coverage, that concluded in October 2015, and which has tainted the jury pool

In August 2013 the plaintiff-appellant was interviewed by Lindy Washburn, a journalist at the Bergen Record, who because she illegally recorded the interview, is named as a defendant. From April 2012 Washburn had been in constant contact

with the state who gave her information about the case that were not in the public domain. On Sunday November 17th 2013 the Bergen Record published Washburn's six-thousand-word article that was released, with seemingly malicious intent, to coincide with a professional spine meeting the plaintiff-appellant had organized in Memphis, Tennessee. The Society for Advanced Spinal Intervention (SASI) was formed in August 2012 in order to develop standards for minimally invasive spine surgery, and held it's inaugural meeting on the 16th November 2013 at the Medical Education Research Institute in Memphis. The negative publicity created by Washburn's article caused fear amongst the physician members of the nascent society, which caused it to cease operations shortly thereafter.

On December 13th 2013 the individual the plaintiff-appellant had retained to handle his public affairs, received an e-mail from Washburn that the administrative law judge had recommended revocation of his medical license. He immediately telephoned his attorney, who stated that he had no knowledge of the opinion. The fact that Washburn had the information before the attorney, was symptomatic of the improper conduct in which the state engaged with the Bergen Record.

LEGAL ARGUMENT

a) THE SDNY IS MORE CONVENIENT FOR THE WITNESSES

1. The SDNY has a better transportation network than the District of New Jersey

"The convenience of the witnesses" clause of 1404 has been interpreted by the *Gulf Oil Co. v Gilbert, 330 U.S. 501 (1947)* as meaning to include the following factors for consideration: a) relative of ease of access to sources of proof. The SDNY is within 15 miles of the District of New Jersey, and is in fact more convenient location to which to transport proof, because of its superior communications network. b) availability of compulsory process for attendance of

unwilling witnesses, and the cost of obtaining willing witnesses. There are witnesses located in New York and New Jersey and there is no difference in either the ease or difficulty of either cost or availability of having them produced. For the witnesses from other states the SDNY is a better venue because of its advanced transportation network. c) relative advantages and obstacles to a fair trial. The SDNY will provide a politically impartial venue. The plaintiff-appellant will not receive a fair trial in New Jersey and has made a significant showing as to why. These include the forging of court transcripts, extensive local prejudicial media coverage for almost four years, pre-hearing statements in May 2012 from the defendant-appellee attorney general to the media which tainted the public and the fact that the defendant-appellee politician was the US Attorney from 2000-2008 and the current US Attorney worked under his direction. The defendant-appellee politician is a close political advisor to the presumptive 2016 Republican Party nominee, whose sister was a District Judge in New Jersey and is now on an appellate judge on the Third Circuit Court of Appeals. The federal courtroom in the District of New Jersey is physically located in the state of New Jersey, which itself is a defendant, and the proper functioning of the building depends on the state. The defendant-appellee politician's administrative staff are currently accused of closing three lanes on September 9th 2013 of a federal interstate highway and bridge. The SDNY has no obstacles to a fair trial, while the District of New Jersey would be strained to deliver impartial justice.

None of the appellees have claimed that they would be unable to produce witnesses, and for those witnesses not resident in either the SDNY or the District of New Jersey, the issue is completely irrelevant. It will be no more inconvenient for a witness from Illinois, Maryland or Nebraska if the matter was venued in the SDNY as opposed to the District of New Jersey, and in fact arguably more convenient, because of the greater transportation network associated with the

SDNY. The public transportation to the DNJ is less efficient and the train station is more distantly located from the courthouse than it is in the SDNY. For the defendants not from the NJ-NY area the SDNY is an easier venue to reach because it is served by two large international airports, while the DNJ has only one, which has a worse record for flight delays than the two that serve the SDNY. The passenger train network into the SDNY is served by Grand Central and Penn Station and will provide a more efficient and cost-effective network to all parties from the north-east, than that provided to the DNJ. There are approximately six subway lines that connect these stations to the subway station next to the SDNY, and they run 24 hours a day. The subway station is approximately five hundred feet from the SDNY. The DNJ does not have a comparable public transportation system whereby the parties only have to walk five minutes from the station to the courthouse. This means that if the matter were venued in the DNJ the non NJ-NY parties would be forced to rent and drive cars on the notoriously congested and convoluted New Jersey road system, on which repair work was ordered stopped by the defendant-appellee politician as part of an ongoing political spat in Trenton. If convenience is measured in time, then the SDNY is the more convenient venue.

2. The District Court transferred the matter, without a reasonable enquiry of party and witness convenience.

In *STEWART ORGANISATION, INC. v RICOH CORP, 487 U.S. 22 (1988)*, the Supreme Court states "Section 1404(a) is intended to place discretion in the district court to adjudicate motion for transfer according to an "individualized, case-by-case consideration of convenience and fairness" *Van Dusen v Barrack 376 U.S. 612, 622 (1964)*. A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors". There is no evidence that the district court performed an analysis that could be considered proper, by any reasonable individual or standard. See, *Farrell v Wyatt, 408 F.2d*

662 (2d Cir. 1969) ""The idea behind § 1404(a) is that where a `civil action' to vindicate a wrong — however brought in a court — presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, **after findings**, transfer the whole action to the more convenient court." This remedial purpose — the individualized, case-by-case consideration of convenience and **fairness** — militates against restricting the number of permissible forums within the federal system. The case-specific factors prove that the SDNY is a more convenient location and the DNJ is a politically prejudiced venue, that will be strained to administer impartial jurisprudence. The Supreme Court then went on to say "In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue. The flexible and individual analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences". None of the defendant-appellants expressed any objections to the plaintiff-appellant's letter dated April 6 2016 to the district court, in which he argued that the SDNY was the proper venue.

The district court fashioned its March 29th order in such as way as to equate a non-response, with an affirmative response to transfer. In order to reach an informed conclusion that properly considered the convenience of witnesses, information should have been gathered pertaining to the location of the witnesses. Without any investigation that compared the geographical distance of the appellees to the SDNY to the District of New Jersey, the district court concluded that, for the convenience of witnesses, the matter should be transferred to the DNJ. There are multiple appellees for whom the SDNY presents greater geographical convenience. These appellees filed no objection to the appellant's motion to oppose the change of venue ordered by the district court. Witness inconvenience is considered only in

geographic terms- that is, proximity to or from the forum. The crucial distance is 100 miles. The fact that the SDNY and the DNJ are no more than 15 miles apart means that there is no greater inconvenience for the witnesses if the matter is venued in the SDNY, as compared to the DNJ. In fact, the SDNY has more a more extensive public transportation network than does the DNJ and will be a more central and economically situated location for the witnesses. Courts speak in terms of "relative distances" and the nature and availability of transportations facilities. In *Bailey v New York Cent. R.R., 166 F Supp 191 (E.D. Pa. 1958)* the court stated "where travel distances are "relatively short" transfer will not be granted". The SDNY and the District of New Jersey are no more than 15 miles apart. The SDNY is geographically closer to the majority of the defendants than is the District of New Jersey, which makes the District of New Jersey less, not more convenient to the parties and witnesses.

3) **The District Court essentially ignored the appellant-plaintiff's venue privilege**

In *Hoffman v Blaski, 363 U.S. 335 (1960)* the Supreme Court states "If, when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought". The matter is currently in the DNJ. The SDNY is a venue in which the case not only "might it have been brought" but, was actually brought. Pursuant to Blaski this would therefore permit the DNJ on motion by the plaintiff-appellant to transfer the matter back to the SDNY.

With respect to the convenience of parties, the first factor that the trial judge should have considered was the plaintiff's choice of the SDNY. The plaintiff chose the forum for the reasons enunciated in this brief. There has always been a judicial sanctity about respecting the plaintiff's choice of forum and most courts have taken the position that unless the balance of factors in favor of and against transfer is

strongly in favor of the defendants, then the plaintiff's choice of forum should rarely be disturbed. *See, Headrick v Atchison, T.& S. F. Ry. Co, 182 F.2d 174 (10th Cir. 1950)*. These courts all agree that a simple balance of convenience in favor of the defendants is not enough to justify the transfer. All of the New Jersey and New York based defendants are located within a thirty-mile radius of the SDNY, and for many of these defendants the DNJ is equidistant from their place of business. The defendants not based in New Jersey or New York, can have no reasonable argument as to the inconvenience of the SDNY, as it is arguably easier to reach, than is the DNJ. The appellant's choice of forum is the leading element in determining the convenience of the parties. However, the reasons given by the trial judge in consideration of the defendant-appellees ability to litigate the matter, such as the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the cost of transporting witnesses, the possibility of viewing the premises when required, and the location of the parties' books, records and documents, simply do not stand the test of reason. The majority of the witnesses are located within a thirty-mile radius of the SDNY, as are their books, records and documents. The facilities at which the appellant performed minimally invasive spine surgery are all located within a thirty-mile radius of the SDNY, and can be readily inspected, by all the defendant-appellees. For the reasons stated elsewhere in this brief it is the plaintiff-appellant's right to an impartial court that will be impeded if the matter is venued in the DNJ, as compared to the greater neutrality that will be afforded to all parties if the matter is venued in the SDNY. Although it is generally held that the convenience or inconvenience of counsel of the litigants is not a relevant factor, it is a fact in the instant matter, that a number of the appellees are represented by counsel who are geographically closer to the SDNY than to the DNJ. This is certainly germane to the economic convenience of certain parties.

4) **The transport of records to the SDNY will not produce substantial hardship for the defendant-appellees**

The Court in *Keller-Dorian Colorfilm Corp.v Eastman Kodak Co.,88F.Supp. 863 (S.D.N.Y. 1949)* states "Although the merits of an application of this nature may not be determined solely by the number of witnesses to be called by the parties from within the district, for the importance of their testimony and their individual convenience carries more weight, this element may not be entirely disregarded. One is left with the general impression, after reading the voluminous papers submitted, that no one forum will be suitable or convenient to all the litigants. Inconvenience must be met and endured by all parties to actions of this kind; **perhaps, convenience should be waived as one of the burdens attendant on the vastness of their national and international business activities**. We are not judging the relative convenience of small and local concerns". The defendant-appellees are all either large multi-national corporations, large national corporations or high net-worth individuals for whom no hardship can be imagined if the matter is venued in the SDNY. The Court then concluded with "It is apparent that the trial of these actions will be long; counsel's estimate of six months is conservative. Of course, it would serve the convenience of this court and of other litigants with pending causes to transfer the action to some other less burdened district. **No district court may, however, order such a transfer only to serve its personal convenience**. It is not found that bringing these actions in this district is an imposition on this court". Although the district court, naturally, made no explicit reference to its own inconvenience, the rapidity of transfer and lack of substantive enquiry, suggest it might have been a consideration.

The evidence that will be presented at trial will have been gathered during the discovery phase, and there will be no convenience differential between the SDNY

and the DNJ, in terms of delivering documents to the courthouse. *See, In the Matter of Emanuel Josephson, 218 F.2d 174 (1st Cir. 1954)* (Holding that the transferee forum must be shown to be more convenient) The documents located in NJ are just as easily transported to the SDNY as they are to the DNJ, and those that are in other states will experience no inconvenience differential if the matter is venued in the SDNY. The distance between the documents in NJ and the SDNY is less than fifteen miles and no substantial hardship can be expected in which the Keller-Dorian court said that the difficulties imposed were "not out of proportion to the magnitude of the litigation". The location of the records is not important unless transporting them would produce substantial hardship, which in this matter is highly unlikely. The inclusion, therefore, of this factor by the district court in it's forum analysis, does not support the conclusion that the DNJ is a more convenient venue. Service of the complaint and summons has been effectuated on all defendants in the case since it was filed on February 22nd 2016, and enforcement of subpoenas will not be any more difficult if the matter is venued in the SDNY. Unwilling witnesses can be just as easily compelled to comply with procedure if the matter is venued in the SDNY.

b) THE SDNY IS MORE CONVENIENT FOR THE PARTIES

1. The District Court abused it's discretion by disturbing the plaintiff-appellant's choice of forum, absent good cause or a reasonable enquiry as to convenience of witnesses or parties

In Mediostream Inc. v Acer Inc. et al, CV 10-5762, the Fifth Circuit concluded with "In sum, the convenience of the parties and witnesses, the sources of proof, the local interest, and the compulsory process factors all significantly favor transfer. Meanwhile, **no factor remotely favors** keeping this case in the Eastern District of Texas. Although Dell may be a likely source of evidence at trial and is

closer to the Eastern District of Texas, the district court's conclusion that Dell's presence in Texas was enough to preclude transfer here is in our view a clear abuse of discretion". In the instant matter, however, there are a multitude of factors that favor keeping the case in the SDNY, and although it is the commission of the transfer, as oppose to the denial of transfer, that constitutes the abuse of discretion, the issue of abuse is no different. With respect to the convenience of parties, the first factor that the trial judge should have considered was the plaintiff's choice of the SDNY. The plaintiff chose the forum for the reasons enunciated in this brief. There has always been a judicial sanctity about respecting the plaintiff's choice of forum and most courts have taken the position that unless the balance of factors in favor of and against transfer is strongly in favor of the defendants, then the plaintiff's choice of forum should rarely be disturbed. These courts all agree that a simple balance of convenience in favor the defendant is not enough to justify the transfer. All of the New Jersey and New York based defendants are located within a thirty-mile radius of the SDNY, and for many of these defendants the District of New Jersey is equidistant from their place of business. The defendants not based in New Jersey or New York can have no reasonable argument as to the convenience of the SDNY, as it is arguably easier to reach, than is the District of New Jersey. Even if the transfer were considered under the more liberal understanding adopted by some courts, that do not cast the plaintiff's selection in the leading role and indeed shift the burden to the plaintiff to show an absence of a need for transfer, it would require that the defendants made a prima facie showing of that need. In the instant matter none of the defendants made such a showing, and in fact, the transfer was ordered not on a motion from any of the defendants, but simply at the volition of the trial judge. Despite the ruling in the case of Norwood v Kirkpatrick, in which the view was taken that transfer under § 1404 (a) involved a broader discretion that had previously existed under the doctrine of forum non

convenienes, few cases followed this precedent. However, even if one accepts that the breadth of the trial judge's discretion was rooted in the authority of the aforementioned case, in the matter at hand it is evident that there was an abuse of discretion. The trial judge gave no meaningful consideration to the facts the appellant presented in his letter dated March 29 2016. Although not explicitly stated by the trial judge the issue of his own convenience ought to be considered in this appeal, as a factor that he improperly weighed in his cursory venue analysis. The case was filed on February 22nd 2016 and within four weeks an order had been filed to transfer the matter to the DNJ by March 31st. Other than the mere formality of indicating an intention to transfer the matter, in the form of an order that was more a directive than genuine enquiry, the trial judge did not appear interested to know whether the appellees considered the SDNY convenient or inconvenient.

2. The plaintiff-appellant's choice of forum did not constitute vexatiousness or oppression of the defendant-appellees

In *Gulf Oil v Gilbert, 330 U.S. 501 (1947)* the Supreme Court states "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". The appellees have not shown that they would incur substantial hardship if the matter were venued in the SDNY. The question of convenience or inconvenience of the SDNY was not placed before the defendant-appellees. The trial judge ordered the transfer in the absence of proof and without due consideration to the appellant's venue privilege. However, even if one accepts the older thinking described in the forum non convenienes cases, that trial in the chosen forum must constitute vexatiousness or oppression of the defendant before transfer will be granted, the defendant-appellees have made no argument that their right to a fair trial would be compromised, nor their interests prejudiced, if the matter were adjudicated in the SDNY. See, *Wilson v Great Atl. & Pac. Tea Co.,*

156 F. Supp. 767 (W.D. Mo. 1957). The plaintiff-appellant has, however, clearly stated why his access to substantive justice would be curtailed if the matter were adjudicated in the DNJ.

Even if the transfer were considered under the more liberal understanding adopted by some courts that does not cast the plaintiff's selection in the leading role and indeed shifts the burden to the plaintiff to show an absence of a need for transfer, it would require that the defendants made a prima facie showing of that need. In the instant matter none of the defendants made such a showing, and in fact, the transfer was ordered not on a motion from any of the defendants, but simply sua ponte. The plaintiff-appellant was denied venue privilege, and because the March 23rd order did not invite the defendant-appellees to render their opinion as to the issue of convenience of the SDNY, the plaintiff-appellant was denied the opportunity to respond to any objections that might have been raised. Any conversation regarding venue became muted by the manner in which the District Court fashioned its enquiry. Simply put, the District Court fast tracked the case out of the SDNY, without any meaningful consideration of venue convenience or interest of justice. Had the plaintiff-appellant been afforded the opportunity to contest objections from the defendant-appellees, it would have been shown that the SDNY was at least as equally convenient as the DNJ, if not more, and a such the transfer could therefore have not occurred, see Millar Bros. & Co. v Pennsylvania R.

The appellant chose the SDNY is good faith, see *Gulf Oil v Gilbert*, without any design to vex, harass or oppress the defendant-appellees and the defendant-appellees have provided no proofs to show otherwise. The SDNY is less than fifteen miles from the DNJ and is almost equidistant from the locations of all the non NY/NJ appellees. It was the venue in which there was a continuation of the defendant-appellees acts of conspiracy that commenced in 2008 in New Jersey but metastized to New York shortly thereafter. Two of the central defendant-appellee

neurosurgeons are New York residents and have academic appointments at Manhattan based hospitals, while a number of the corporate defendant-appellees are listed on the NYSE.

3. The defendant-appellees made no prima facie showing of a need to transfer the case

The court's decision to shift the burden to the plaintiff-appellant to prove an absence of a need to transfer, occurred in the absence of any prima facie showing by the defendant-appellees of indeed any reasonable need for venue transfer that satisfied the convenience or interest of justice clauses of 1404. The trial judge offered no fact specific argument to support the transfer, other than to say that a number of the appellees resided in New Jersey. All of the New Jersey appellees reside within a thirty-mile radius of the SDNY, while the appellant and one of the appellee physicians reside within a fifteen-mile radius of the SDNY. There can be no reasonable argument that the appellees will be anymore inconvenienced if the matter is venued in the SDNY, as opposed to the DNJ, and in fact a reasonable argument can be made that the SDNY is a more convenient location for all of the appellees. The same argument that has been made in regards to the convenience of the parties applies to the convenience of the witnesses. There exists no convenience differential between the SDNY and the DNJ and in fact the SDNY, because of it's well developed public transportation system, provides a more convenient and economical venue

c) THE DISTRICT COURT'S LEGAL CITATIONS ARE NOT FACTUALLY PROXIMATE TO THE INSTANT MATTER

1. The principal place of business of the corporate defendant-appellees is the SDNY and not the DNJ

D.H. Blair & Co. v Gottdiener, 462 F.3d 95, 106 (2d Cir. 2006)- The district court has interestingly applied a case that actually supports the appellant's argument that because a number of the appellees are publicly traded on the NYSE, the main location of their business, that of the SDNY, is proper venue. The relevant part states:

The Investors Transacted Business in New York

"N.Y. C.P.L.R. § 302(a)(1) permits a court to exercise personal jurisdiction over an out-of-state party if that party "transacts any business within the state" and if the claim arises from these business contacts. See CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir.1986). To meet the transacting business element under N.Y. C.P.L.R. § 302(a)(1), it must be shown that a party "`purposely availed [himself] of the ***privilege*** *of conducting activities within New York and thereby invoked the benefits and protections of its laws . . .."' Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 787 (2d Cir.1999) (quoting Parke-Bernet Galleries v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506, 509 (1970)) (alterations in original). "To determine whether a party has* ***`transacted business' in New York, courts must look at the totality of circumstances concerning the party's interactions with, and activities within, the state."*** *Id."*

Berkshire Hathaway, Geico and Allstate used the NYSE to invest monies that ought to have been paid to the appellant. These appellees derive the majority of their profit from stock transactions as oppose to retail. These appellees have benefited from the protections of New York afforded them under N.Y. C.P.L.R. The District Court ignored these facts in its consideration of venue. The 2nd circuit

in the Blair matter recognized the weight that should be afforded to the parties place of business and denied the investors petition to move the case to the Southern District of Florida, based on the fact that its principal place of business was the SDNY. *See, Sullivan v Behimer, et al., 261 F.2d 317 (7th Cir. 1959)* (Holding that venue is proper where business is conducted by any of the parties). *See also, Stanley Works v Globemaster, Inc., 400 F.Supp. 1325 (D. Mass. 1975).* The district court in the instant matter has relied on the Blair case in an attempt to illustrate its discretion in granting or denying motions for venue transfer, without fully appreciating that the facts of the Blair matter actually support the appellants proposition that the SDNY is the proper venue, because it is the principal place of business for defendant-appellees who played a central role in the scheme against the appellant. Additionally, these appellees conducted elements their conspiracy in offices located in the SDNY.

"There are sufficient business contacts to support personal jurisdiction over the Investors under New York's long-arm statute...Furthermore, the Investors' contacts with New York provided fair warning of the possibility of being ***subject to the jurisdiction*** *of New York. See Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40, 43 (1988)."*

The defendant-appellees whose principal place of business is the SDNY have had contact with New York and could not have, but known, that they would be subject to the jurisdiction of New York.

To meet the "arising out of" requirement of N.Y. C.P.L.R. § 302(a), there must be "a substantial nexus" between the transaction of business and the claim. *Agency*

Rent A Car, 98 F.3d at 31; *McGowan v. Smith,* 52 N.Y.2d 268, 437 N.Y.S.2d 643, 419 N.E.2d 321, 323 (1981)

Monies that were owed to the appellant by the appellees were invested on the NYSE, which enabled the appellees to unjustly profit through the business apparatus of the NYSE, under the protection of New York law. There is a direct connection between the profit of the defendant- appellees and the loss of the plaintiff-appellant, that would not have been as fruitful, if the appellees had not been able to benefit from the financial advantage provided by the NYSE.

The Blair Court correctly applied the law to the fact that the investors had their principal place of business in New York and concluded that the SDNY was the proper venue. The Court arrived at this conclusion even though the investors were not publicly traded companies, as is in fact the case in the instant matter. If the District Court had applied the law in a manner akin to that applied in the Blair case, a case which the District Court has used to buttress its discretionary authority, then the District Court could not have but concluded that the SDNY was the proper venue. The Blair case hurts the District Court.

2. <u>The plaintiff-appellant has made a clear showing that the District Court abused its discretion</u>

Filmline (Cross Country) Prods. Inc v. United Artists Corp., 865 F 2d. 513, 520 (2d Cir. 1989)

The relevant part states:

The determination whether to grant a change of venue requires a balancing of conveniences, which is left to the sound discretion of the district court.

Carlenstolpe v. Merck & Co., Inc., 819 F.2d 33, 35 (2d Cir. 1987) (forum non conveniens); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 218-19 (2d Cir. 1978), cert. denied, 440 U.S. 908, 99 S. Ct. 1215, 59 L. Ed. 2d 455 (1979). That discretion will not be disturbed upon appeal without a ***clear showing of abuse****. A. Olnick & Sons v. Dempster Bros. Inc., 365 F.2d 439, 443-44 (2d Cir. 1966).*

The District Court failed to consider factors such as the principal place of business of numerous appellees, the prejudicial effect on the appellant of having the matter venued in the DNJ and the fact that a number of the appellees who played a central role in the conspiracy are New York residents. The District Court erred in its evaluation of the convenience consideration for the witnesses and parties, by failing to properly ascertain the geographical and chronological convenience for the witnesses and parties. The common sense consideration that trying the defendant-appellee state in a court located in that state, presents clear a conflict of interest, is an issue to which the District Court gave absolutely no consideration. The plaintiff-appellant has made a strong showing that the district court clearly abused its discretion.

"A challenge to a venue determination, furthermore, is usually made by a pretrial request for mandamus. See Carlenstolpe, 819 F.2d at 34-35; Olnick, 365 F.2d at 442-43. Here, on the contrary, UA made no effort to obtain pretrial review, but now seeks a new trial because of an allegedly improper refusal to grant a change of venue. As we have said, however, such a ruling "is almost impossible to correct by review after trial." Olnick, 365 F.2d at 444; see Kasey v. Molybdenum Corp. of Am., 408 F.2d 16, 20 (9th Cir. 1969); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Sec. 3855, at 473-74 (1986). Rather, as we stated in Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir.), cert. denied, 340 U.S. 851, 71 S. Ct. 79, 95 L. Ed. 624 (1950), "should [the movant] ... finally lose on the

merits below, any error in the interlocutory order [denying a change of venue] would probably be incorrectible on appeal, for [the movant] could hardly show that a different result would have been reached had the suit been transferred."

The Court recognized the difficulty in turning the clock back on an issue of venue and imagining a different outcome if venue had been changed. The message is that venue is a battle that can only be reasonably be fought before the commencement of substantive litigation, which is exactly what the plaintiff-appellant is doing. The District Court uses the Filmline case to bolster its discretional authority regarding venue transfer, but the 2nd circuit, after having addressed the procedural infirmities of post-trial venue appeals, states that the defendant-appellant made no showing that the district court had abused its discretion. In the matter at hand the plaintiff-appellant has made a substantial showing of discretionary abuse. The transfer order of the district court, flies in the face of common sense.

UA's claim is that Lippincott was susceptible to subpoena in the Central District of California, to which transfer was sought, but not in New York, and UA was therefore required to rely upon the deposition testimony of a crucial witness at trial. UA stresses that the convenience of witnesses is an expressly stated consideration in section 1404(a), and that this is " [p]robably the most important factor" in deciding an application under that section. 15 C. Wright, A. Miller & E. Cooper Sec. 3851, at 415 (1986).

In the matter at hand the majority of the witnesses are located within a thirty-mile radius of the SDNY. In the Filmline case the defendant-appellant wanted the case moved to California because that was the location of one of the witnesses. The facts and circumstances of the Filmline case are markedly different to those in the case before this court, where it cannot reasonably be concluded that a convenience

differential exists between the SDNY and the DNJ. In fact, because of the more robust public transportation network surrounding the SDNY, it can be argued that it is indeed the more convenient venue

3. The defendant-appellees have purposely availed themselves of the privilege of doing business in the SDNY

Bank of Am., N.A. v. Wilmington Trust FSB, 943 F. Supp. 2d 417, 426 (S.D.N.Y. 2013)

The court's opinion regarding the applicable legal standard under §1391, for determination of venue is:

On a motion to dismiss for improper venue under Rule 12(b)(3), "Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper." French Transit, Ltd. v. Modern Coupon Sys., Inc., 858 F.Supp. 22, 25 (S.D.N.Y.1994); see also Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir.2005) ***("If the court chooses to rely on pleadings and affidavits, the plaintiff need only make a prima facie showing of [venue].")*** *(quoting CutCo Indus. v. Naughton, 806 F.2d 361, 364-65 (2d Cir. 1986)).*

Section 1391 provides that civil actions may be properly brought in:

(2) a judicial district in which a ***substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;*** *or*

28 U.S.C. § 1391(b). The statute further defines "residency" for venue purposes, in relevant part, as being satisfied where the defendant entity "is subject to the

court's personal jurisdiction *with respect to the civil action in question ..." 28 U.S.C. § 1391(c)(2).*[2]

Personal jurisdiction in New York is established either under CPLR § 301, which allows for "general" jurisdiction predicated on a ***continuous or systematic course of doing business,*** *see JW Oilfield Equip., LLC v. Commerzbank, AG, 764 F.Supp.2d 587, 592 (S.D.N.Y.2011), or CPLR § 302, which allows for specific jurisdiction over non-domiciliaries where, in relevant part, the entity "transacts any business within the state or contracts anywhere to supply goods or services in the state," and the "cause of action aris[es] from" those actions, see CPLR § 302(a). See also Erickson Prods., Inc. v. Atherton Trust, No. 12 Civ. 1693, 2013 WL 1163346, at *3 (S.D.N.Y. Mar. 20, 2013) (finding that in order to establish jurisdiction under CPLR § 302(a) "a plaintiff must show that ` (1)* ***defendant purposefully availed himself of the privilege of doing business*** *in the forum state such that the defendant could foresee being brought into court there; and (2)* ***plaintiff's claim arises out of or is related to the defendant's contacts with the forum state.'"*** *(quoting Aqua Prods., Inc. v. Smartpool, Inc., No. 04 Civ. 5492, 2005 WL 1994013, at *5 (S.D.N.Y. Aug. 18, 2005))).*

The plaintiff-appellant has made more than a prima facie showing that the SDNY is the proper venue. The plaintiff-appellant had been a property owing, tax paying New York resident from 2005 to 2013. The defendant-appellees scheme commenced in 2008 and concluded in 2015. For the majority of the time that was the scheme was ongoing, the plaintiff-appellant was a New York resident. The plaintiff-appellant became obligated to sell his Manhattan townhouse as a consequence of the defendant-appellees acts. The plaintiff-appellant was forced to move to New Jersey because of the impact the defendant-appellees acts had on his

estate, and would not have moved otherwise. As a consequence, the state and city of New York have been deprived of tax revenue from the plaintiff-appellant, that it would otherwise have received, but for, the defendant-appellees acts. The defendant-appellees acts commenced in New Jersey but spread to New York. The defendant-appellees have residences and conduct business in New York in the healthcare and finance industries.

In the Bank of Am. case the court correctly determined that because of bankruptcy proceedings in the Southern District of Florida, it was the proper venue, and thus replaced the defendants motion to dismiss with an order to transfer. In the matter at hand there were no contemporaneous bankruptcy proceedings in the DNJ and should the defendant-appellee file motions to dismiss, the plaintiff-appellant, not having waived venue privilege, will motion the DNJ to follow the precedent of the SDNY, and instead transfer the matter back to the SDNY, in lieu of dismissal.

The Bank of Am. court opined:

Although the causes of action in this case may not be sufficiently linked to Wilmington Trust's New York office to establish jurisdiction under New York's longarm statute, see McGowan v. Smith, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 419 N.E.2d 321 (N.Y.1981) ("Essential to the maintenance of a suit against a nondomiciliary under CPLR 302 (subd. (a), par. 1) is the existence of some ***articulable nexus*** *between the business transacted and the cause of action sued upon.") (internal citation omitted), Bank of America has nevertheless made a prima facie showing that Wilmington Trust is subject to personal jurisdiction under New York law. See Gulf Ins. Co., 417 F.3d at 355 (where court relies on pleadings and affidavits, plaintiff need only make a prima facie showing of venue); see also GMAC Commercial Credit, LLC v. Dillard Dep't Stores, Inc., 198 F.R.D.*

402, 406 (S.D.N.Y.2001) (finding personal jurisdiction under New York's general provision of CPLR § 301 where defendant maintained an office and place of business in New York). Therefore, the Court finds that, because all defendants are subject to personal jurisdiction in New York, Section 1391(b)(1) is satisfied.

The gains obtained by the defendant-appellees were at the expense of losses incurred by the plaintiff-appellant. The defendant-appellee insurance companies profited from the scheme, because it permitted them to avoid having to pay the plaintiff-appellant monies owed for clinical services that had been provided to clients of the defendant-appellee insurance companies. The defendant-appellee neurosurgeons profited from the scheme because they removed the plaintiff-appellant from the healthcare marketplace, which improperly caused an increase in their business revenues. There is a clearly defined nexus that links the commercial and professional interests of the parties more definitively to the SDNY than the DNJ.

4. **The District Court failed to accord the plaintiff-appellant the venue privilege weight, usually associated with an individual action.**

Krulisky v. Bristol Myers Squibb Co., No. 10-cv-8700 (DLC), 2011 WL 2555963 (S.D.N.Y. June 27 2011)

The relevant part states:

"Although a plaintiff's choice of forum is ordinarily given substantial weight, that choice is entitled to "less significant consideration in a [] putative [] class action than in an individual action." *In re Warrick, 70 F.3d 736, 741 n.7 (2d Cir. 1995). This principle has been applied to collective actions under the FLSA. E.g.,*

*Amick v. American Exp. Travel Related Services Co., Inc., No. 09 Civ. 9780(AKH), 2010 WL 307579, at *2 (S.D.N.Y. Jan. 26, 2010). Furthermore, a plaintiff's choice of forum is also not accorded much weight where, as here, the plaintiffs' residence and the locus of operative facts are not in the selected forum. See Iragorri v. United Technologies Corp., 274 F.3d 65, 71-72 (2d Cir. 2001) (forum non conveniens analysis); Amick, 2010 WL 307579, at *2 (§1404 analysis)."*

The plaintiff-appellant's case is the exact opposite of a class action lawsuit, and the plaintiff-appellant's venue privilege should have been afforded more weight than the "little weight" it was ascribed by the district court. The plaintiff-appellant was a tax paying, property owning New resident from 2005 to 2013 and New York was one of the loci of a scheme that commenced in 2008 and concluded in 2015. In contrast, in the Krulisky case, the plaintiff was never a New York resident, had never paid taxes in New York and none of the operative facts occurred in the Southern District of New York. The Krulisky plaintiff had been a Florida resident for the entire duration of the operative facts, that underpinned the complaint.

"The parties did not brief other factors typically included in the transfer analysis, such as their ***relative means*** *and the transferee forum's familiarity with the governing law. Therefore, these factors will be considered neutral"*

The plaintiff-appellant has no driving license because it was suspended by the defendant-appellee state, because the plaintiff-appellant became unable to continue child support payments, which occurred as a consequence of the loss of his medical license and ability to earn a living. The plaintiff-appellant lives within walking distance of the George Washington Bridge and is able to reach the SDNY via the New York Subway system. The DNJ does not have an equivalent public

transportation system and is a far more inconvenient location for the plaintiff-appellant. The plaintiff-appellant has substantially fewer means than the defendant-appellees. The SDNY is familiar with the transferee forum's governing law as the majority of lawyers admitted to practice law in New York, are also admitted in New Jersey.

5. **The locus of operative facts as well as the interests of efficiency and fairness favor a New York forum**

NY Marine and Gen. Ins. Co. v LaFarge N. Am., Inc., 599 F 3d 102, 112 (2d Cir. 2010)

The relevant part states:

"As the District Court noted, among its other observations, the American Club Policy was negotiated and executed in New York, issued by a New York insurer, stipulated to apply New York law, and agreed upon to be litigated in the United States District Court for the Southern District of New York in the event Lafarge brought a claim against the American Club. See Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. v. Lafarge N. Am., Inc., 474 F.Supp.2d 474, 482-90 (S.D.N.Y.2007). Thus, the locus of operative facts as well as the interests of efficiency and fairness favor a New York forum"

It would seem that, although the district court has not specifically stated, this section of the case is the one which describes what the district court refers to as "setting forth similar factors". If that is so, then the application of this case misses the mark entirely. The loss of the plaintiff-appellant's New Jersey medical license was a consequence of defendant-appellees' unlawful scheme. The perpetration of

the acts constitute the 'crimes', the license loss was the consequential damage. Taking a physician's license is not illegal per se, but when it is taken in an unlawful manner in which members of the defendant-appellee state forged court documents, then it is both illegal and criminal. The acts of conspiracy that furthered the scheme occurred to a large extent in New York, were committed by defendant-appellees whose businesses and residences are located in New York and which caused material damage to the plaintiff-appellant's New York estate. In the NY Marine matter the insurance policy was a **contract,** not a medical license, that provided insurance coverage in Louisiana. In the matter at hand the plaintiff-appellant never entered into any agreement with the issuer of the license to have disputes limited to the issuer's state. The plaintiff-appellant did not negotiate with the issuer of the medical license to obtain the license. The license was issued based on the plaintiff-appellant's medical education and qualifications. The plaintiff-appellant signed the application forms for the medical license while in the United Kingdom, in 1996. There is no stipulation by the issuer that it is only New Jersey law that can be applied to disputes, or indeed any agreement that litigation would proceed in the DNJ. The loss of the license does not constitute the violation. It is the unlawful manner in which the plaintiff-appellant's property was taken, that constitute the 'crimes'.

In the United States if a physician loses his or her license in one state it becomes almost impossible to procure a license in any other state. The state action has federal consequences. State medical boards are currently permitted to conduct their affairs without federal oversight, despite the fact that their state governments receive Medicare money. This lack of federal oversight fostered an attitude in the defendant-appellee medical board of omnipotence, that caused them to believe it was acceptable to forge court transcripts and commit a fraud against the court.

Although not strictly the purview of this Court, it is suggested that state medical boards have independent regulatory oversight by healthcare professionals from other states, to ensure that medical boards comply with accepted federal standards of healthcare regulation. This would lend towards a standardization of physician regulation across the country, and minimize the effect of local corruption.

6. **The plaintiff-appellant's choice of forum is based on reasons recognized as legally valid**

Anderson v City of New York, No. 13-cv-4628 (DLC), 2014 WL 1378121 (S.D.N.Y. Apr. 8 2014)

In the Anderson case none of the operative facts occurred in the SDNY. In the matter at hand New York was one of the loci of operative facts, where the conspiracy continued, after having commenced in New Jersey.

The relevant part states:

"A court must also accord at least "some weight" to the plaintiff's choice of forum. Atlantic Marine Constr., 134 S. Ct. at 581 n.6 (citation omitted). As the Court of Appeals has observed when addressing a motion to dismiss a case on forum non conveniens grounds, "[t]he more it appears that a . . . ***plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice."*** *Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 154 (2d Cir. 2005) (quoting Iragorri v. United Techs. Corp., 274 F.3d 65, 71-72 (2d Cir. 2001) (en banc)). Conversely, "the more it appears that the plaintiff's choice . . . was motivated by forum-*

shopping reasons . . . the less deference the plaintiff's choice commands." Id. (quoting Iragorri, 274 F.3d at 72)."

The plaintiff-appellant filed the lawsuit in the SDNY for legally valid reasons, that included the fact he had been a tax paying, property owning New York resident from 2005-2013, the period over which the majority of the defendant-appellees acts occurred. The plaintiff in the Anderson case had never lived in the SDNY, none of the operative facts occurred in the SDNY and none of the defendants lived in the SDNY.

*"Here, the parties do not **dispute** that this action would have been properly filed in the Eastern District, that plaintiff resides in the Eastern District, and that the "locus of operative facts" is the Eastern District. As there appears to be little "bona fide connection . . . to the forum of choice" here, plaintiff's decision to file in the Southern District is entitled to little deference. Iragorri, 274 F.3d at 72. Given the **proximity and ease of transit** between the Southern District and Eastern District courthouses, the other factors are of little weight, although the ease of access to sources of proof favors the Eastern District. The only "countervailing factor" offered by plaintiff in favor of the Southern District is the convenience of the parties' counsel, but the convenience of counsel is not ordinarily accorded much if any weight in this analysis. Legrand, 2010 WL 742584, at *2 (collecting cases)."*

The plaintiff-appellant absolutely disputes the **"where it might have been brought"** phrase under the interest of justice clause of 1404, on the grounds that the legal apparatus of the New Jersey administrative, state and federal systems have proven themselves unable to deliver impartial jurisprudence to the plaintiff-appellee. Commencing with the defendant-appellee attorney general making

prejudicial comments to the media in May 2012, to a refusal by a state court to appoint a special prosecutor and ad hoc medical board, to the forging of court transcripts and the refusal of the US Attorney for New Jersey to investigate the forgery, the evidence is overwhelming that justice will simply not see the light of day in New Jersey. The facts that the defendant-appellee politician was the US Attorney from 2000-2008, that the current US Attorney worked under his direction and that the presumptive Republican nominee's sister, with whom the defendant-appellee politician worked, was a judge in the District of New Jersey, and now sits on the Third Circuit Court of Appeals, present conflicts of interest, that no reasonable mind could conclude would not suffocate justice.

The district court characterizes the assertion by the plaintiff-appellant that the defendant-appellee politician has significant influence in the District of New Jersey, as "insignificant or without merit". The district court does not present any explanation as to how it arrived at this conclusion, in light of the facts stated above.

d) THE INTERESTS OF JUSTICE WILL BE MORE READILY SERVED IN THE SDNY

1. It is the public's interest to have the matter venued in the SDNY because the lead defendant-appellee is a political advisor to the 2016 Republican Party nominee, who is a New York resident.

The dispute that caused the matter at hand is a disagreement between neurosurgeons and minimally invasive spine surgeons as to what qualifications, education and training are required to perform minimally invasive spinal discectomies and fusions. There is no accepted standard, and this fact was admitted to by one of the defendant-appellee neurosurgeons, who testified during legal proceedings in the New Jersey Administrative Court (see attached). The lack of

any standard (nationally or globally) continues to cause conflict in the medico-legal arena and it is in the public's interest to have the issue resolved, in order that the public can know which physicians are qualified to perform minimally invasive spine surgery. The issue has global relevance, as any standard that becomes established in the United States will likely become a global standard. The beneficiaries of this will be patients. However, permitting the issue to become sidetracked into a venue that has clearly shown itself to be hostile to the appellant, is more likely than not, to suffocate the case, and thus leave the public without any clear indication of which physicians are appropriately qualified to perform minimally invasive spine surgery.

The public's interest in this case is immense because the issue of political corruption occupies a central position. The SDNY was recently the location of a high profile prosecution of two senior New York politicians, who were found guilty of exploiting public office for personal gain. The appellant's complaint makes the same case, but in many ways the allegations are far more serious, as they implicate the defendant-appellees in schemes of medical, business and legal fraud. One of the defendant-appellees is a politician is apolitical advisor to the 2016 Republican Party presumptive nominee, an issue that is of immense public interest. The Republican Party presumptive nominee is related to a judge who sat on the bench in the DNJ, and who now sits on the 3rd Circuit Court of Appeals. The appellee politician was the US Attorney for the DNJ from 2000-2008 and is the governor of the defendant-appellee state. The jury pool in the DNJ has been tainted against the plaintiff-appellant, because of the extensive negative media coverage, that commenced in April 2012 and lasted till October 2015. See, *Sinderbrand v Schuster, 170 N.J. Super.506 (1979)* (holding that the local media coverage in New Jersey had prejudiced the jury pool). The political nexus between the defendant-

appellee politician, defendant-appellee state and the DNJ judiciary is evident, and both the facts and common sense would dictate that the DNJ will be a hostile venue to the plaintiff-appellant. It is hard to imagine how justice could be fairly dispensed in a courtroom in a state in which one of the defendant-appellees is the state itself. In this matter the plaintiff-appellant's venue privilege was not afforded appropriate weight by the district court. This occurred because the district court mischaracterized the plaintiff-appellant's choice of venue by incorrectly understanding that the appellant was an only New York resident in 2012, without either appreciating or failing to consider the facts that the appellant had been a New York property owning tax paying citizen from 2005 to 2013, which was the majority of the time that defendant appellees unlawfully conspired against the plaintiff-appellant. The defendant-appellees did not demonstrate to the district court what relative inconvenience they would suffer if the matter remained in the SDNY, and in fact the manner in which the district court fashioned the March 16th and 23rd orders, permitted the court to equate a non-response from the defendant-appellees with an affirmative response to transfer. Simply put, the district court failed to properly ascertain what was truly convenient for the parties and witnesses, while not giving any meaningful consideration to the plaintiff-appellant arguments

2. The plaintiff-appellant will be prejudiced if the matter remains venued in the District of New Jersey and has the right to be protected under New York Law

The defendants have made no argument that their right to a fair trial would be compromised, nor their interests prejudiced, if the matter were adjudicated in the SDNY. The appellant, however, has clearly stated why his access to substantive justice would be curtailed if the matter were adjudicated in the District of New Jersey.

Even if the transfer were considered under the more liberal understanding adopted by some courts, that does not cast the plaintiff's selection in the leading role and indeed shifts the burden to the plaintiff to show an absence of a need for transfer, it would require that the defendants made a prima facie showing of that need. *See Brown v Insurograph, Inc., 90 F.Supp. 828 (1950).* In the instant matter none of the defendants made such a showing, and in fact, the transfer was ordered not on a motion from any of the defendants, but simply at the volition of the trial judge. Despite the ruling in the case of Norwood v Kirkpatrick, 28, in which the view was taken that transfer under § 1404 (a) involved a broader discretion that had previously existed under the doctrine of forum non convenienes, few cases followed this precedent. However, even if one accepts that the breadth of the trial judge's discretion was rooted in the authority of the aforementioned case, in the matter at hand it is evident that there was an abuse of discretion. The trial judge gave no evidentiary weight to the facts the appellant presented in his attachments and letter dated March 29th 2016, regarding the issue of forged court transcripts, a request on June 7th 2012 by the appellant's attorney for the appointment of a special prosecutor and ad hoc medical board, and the fact that the lead defendant was the US Attorney for the District of New Jersey from 200-2008 and is currently the governor of the State of New Jersey.

The fact that the appellant's medical practice was located in the DNJ is of limited relevance. The cumulative acts of conspiracy that commenced in 2008 began in New Jersey and within one year had spread to New York, Washington, D.C. and Illinois. The effect of the appellee's acts was the revocation of the appellant's New Jersey medical license, which caused the loss of the appellant's Manhattan townhouse, and irreparable harm to the appellant's digital reputation. The appellant had been a New York property owner and tax paying citizen since 2005 and remained a New York resident till May 2013. The appellant was a New York

resident for six years while the appellee's conspired to commit wrongful acts against his estate and reputation. The appellees conducted their scheme in both New York, New Jersey, Illinois and Washington, DC. The commission of the 'crimes' continued in multiple states. The license revocation was one of the fruits of the defendant-appellees' racket.

Although the SDNY is the most crowded district court in the nation, it is the court in this matter that will most likely lead to the speediest resolution of the case strictly on it's merits, because there is less potential for political bias. Although the appellant respectfully acknowledges the federal court's intent of impartiality, the circumstances of this matter are exceptional and justice is more likely to sustain harm if the matter is venued in the DNJ. The risk of political influence that undeniably exists in the DNJ is more likely to lead to protracted legal proceedings that would follow appeals made from adverse rulings. The appellant would have no basis to appeal decisions because of politically engineered prejudice, if the matter were venued in the SDNY. The circumstances of this case engender the DNJ with a higher risk profile for protracted litigation, while the SDNY, because of it's political impartiality to the appellees, will provide a safer environment in which to administer the case and a venue more likely to lead a speedier resolution.

Criminal case law supports venue wherever the 'crime' has been commenced, conducted or concluded, and in this case the conspiracy was conducted in New York. The civil RICO claims have a quasi-criminal component to their function and structure, which make them amenable to the aforementioned venue application of criminal case law.

3. The plaintiff-appellant could not reasonably have brought the case in the District of New Jersey because of the politico-legal nexus between the defendant-appellees and the federal judiciary

The trial judge invoked the inherent authority of the court to transfer the matter sua ponte because he believed the DNJ would be more convenient to the parties and witnesses, and that the DNJ would more readily serve the interests of justice. The record in the state licensing matter indicates that there was forgery of the court transcripts and that this matter was brought to the attention of the US Attorney for the District of New Jersey, the appellant administrative law judge and the appellant politician. None of the appellants took any investigative or remedial action. Justice clearly was not served in the state licensing matter and it cannot reasonably be expected to be properly served if the matter at hand is allowed to proceed in the DNJ.

The "where it might have been brought" phrase of 1404 assumes only legal criteria in regards to venue. It has been interpreted to include considerations of political corruption, of the nature alleged in the instant matter, and which would if applied to the instant matter conclude that the DNJ is an improper venue. See, *United States of America v Gerardo Hernandez, No. 01-17176, (11th Cir. 2005)* (holding that because of political hostility towards the defendants in the Southern District of Florida, they did not receive affair trial and that the defendant's concerns about the prejudicial nature of the forum provided grounds for a change of venue). The plaintiff-appellant in the instant matter, has provided more than an adequate showing of cause that the DNJ, because of the appellee politician's connections to the federal judiciary, will be strained to ensure impartial jurisprudence for the entirety of the litigation. The appellant's healthcare attorney filed a motion in June 2012 that asked a state court to appoint a special prosecutor and ad hoc medical board to the medical licensing proceedings. The motion was denied. The appellant has reason to believe that the DNJ will follow the same path as the defendant-appellee medical board and defendant-appellee state, and is therefore of the mind

that "where it might have been brought "cannot reasonably, and in consideration of all the circumstances, be interpreted as meaning the DNJ. The trial judge abused his discretion by failing to properly apply 1404 to the facts of the matter at hand.

4. **It is in the public's interest to have the matter venued in the SDNY because it will more readily lead to the creation of an educational standard for minimally invasive spine surgery**

The war between neurosurgeons and minimally invasive spine surgeons has been raging since 1999, when a Washington State based physician, Solomon Kamson, had his medical license suspended for three months' consequent to complaint filed with the medical board by neurosurgical competitors. The action resulted in a period pf protracted litigation in state and administrative courts, but failed to establish any standards minimally invasive spine surgery. The unsettled issues have continued to cause professional conflict that is costly, and prevents the public from knowing what physicians are appropriately qualified to perform minimally invasive spine surgery. The risk of allowing the matter to proceed in the DNJ is that no progress regarding professional standards will come from the case. The lack of any standard will continue to be a source of confusion for insurance companies, hospitals and most importantly patients. The DNJ, because it is in many ways a part of the appellee state, might be obstructed by political forces in a manner that common sense would dictate, are far less likely in the SDNY. The minimally invasive spine care sector is one of the largest and most economically significant aspects of American healthcare. However, the lack of any standard is a significant cause of continuing confusion.

5.The District of New Jersey will be strained to deliver impartial justice because of the politico-legal nexus between its judiciary and the defendant-appellees.

The history of the case in New Jersey has been plagued by official misconduct since it's commencement. In 2008 one of the appellee neurosurgeons began telling patients, whom the appellant had treated, that they should file medical malpractice lawsuits and medical board complaints against the appellant. The appellant and appellee competed for the same patients. The appellant neurosurgeon used his political power to organize other physicians against the appellant. The appellant engineered a scheme with the appellee medical board and appellee governor to revoke the appellant's medical license. The quid pro quo with the appellee politician was that he would receive money in return for which he would use his unilateral power and order the appellee medical board to revoke the appellant's medical license. With no prior warning the legal proceedings began on April 2nd 2012, and were accompanied by a period of almost non-stop media coverage orchestrated by the appellee politician. On June 7th 2012 the appellant's attorney filed a lawsuit in state court that asked the court to appoint a special prosecutor and ad hoc medical board. The attorney had over twenty years of experience litigating cases before the appellee medical board and was cognizant of its constitutionally flawed structure and the political corruption that existed in the appellant's case. He believed that the appellant would not receive a fair trial in New Jersey. The state court application was denied. In May 2012 the defendant-appellee attorney general, a political appointee who had orchestrated a number of the defendant-appellee politician's political campaigns, prejudiced the public by making pre-trial defamatory statements to the media, that the appellant was not qualified to perform minimally invasive spine surgery. I believe it is highly relevant that a number of the defendants, who are lawyers, have close professional and business ties with the

New Jersey federal judiciary. As is stated in my initial application to the 2nd circuit that was filed on April 29th 2016, New Jersey federal judges come from the same legal community that supplies lawyers to the New Jersey private sector. The issue of the 'revolving' door between the New Jersey public and private legal sectors will make it impossible for me to have the matter litigated fairly in New Jersey. There also exists the possibility that the out of state defendants and their lawyers, who have no business/political connections with New Jersey, might also be at a disadvantage to those that do.

There is an undeniable commercial nexus between the New Jersey legal and political communities, that in my case, has proven itself to be contrary to the interests of justice. Gibbons, P.C., is the law firm that represents one of the defendants, and also happens to be the firm at which the Presiding Judge, was a partner. The conflict of interest is clear.

6.The defendant-appellee state committed fraud on the court when it used forged documents to procure judgment against the plaintiff-appellant. The United States District Court for the District of New Jersey is physically dependent on the defendant-appellee state.

The appellant retained the services of an independent transcriptionist on certain days in May 2013 during the hearing in the Office of Administrative Law, due to his concerns about that the appellee state would alter transcripts. The concerns were confirmed when it became evident that in fact the appellee state had altered court transcripts in critical areas. Specifically, there had been changes to the testimony of the appellee state's neurosurgical expert, which modified his admissions under cross examination that no standards existed for minimally invasive spine surgery. These admissions were of immense significance as they were both contrary to all of his previous testimony and sworn expert reports, in

which he opined on at least thirty occasions that the appellant had grossly deviated from the standard of care. The appellee neurosurgeon lied under oath as he knew that no standards existed for minimally invasive spine surgery. The appellant sent letters to the appellee administrative law judge, the appellee politician and the state transcription service, that asked for an investigation into the matter. The appellant received no response. On February 12th 2014 the appellee medical admitted that differences existed between the transcription authored by the state's transcriptionist and that by the independent transcriptionist. The state appellee's deputy attorney general attempted to have the evidence of the independent transcription barred, but the appellee medical board allowed it, based on the fact that the issue of transcription fraud was already in the public domain. The appellant had posted on his website, a copy of a letter he sent to the President of the US.

On January 29th the appellant visited the FBI office in Newark to file a complaint against the defendant-appellee politician and ask the FBI to investigate the forged transcripts. The appellant explained the circumstances to two agents, who advised that he should file the complaint with the US Attorney's office in Newark. The appellant submitted a hand written complaint to the US Attorney and two weeks later, after having received no response, he called the office to enquire as to the status of the complaint and was told by a female representative "that they were not an investigative agency". The individual was dismissive in tone and it seemed to the appellant that she had been instructed to quash the complaint.

The highly prejudicial media coverage that extended from April 2012-October 2015 consisted of at least nine articles, none of which were less than one thousand words and one which was six thousand words. The latter appeared on the Sunday front page of the second largest newspaper publication in New Jersey. No such print publications appeared in New York. The New Jersey jury pool is tainted.

The appellee politician is still the governor and within the last three years has received political donations from the law firm at which the presiding judge was a partner. The SDNY is a convenient jurisdiction that is politically neutral with regards to all the parties. It's transportation network is superior to the DNJ, whose roads are infamously congested and poorly maintained. The SDNY provided greater ease of access for non NJ/NY appellees than does the DNJ and is the proper venue because the acts that constitute the 'crime' occurred in New York and occurred when the appellant was a tax paying property owning resident. The appellant never had any intention of leaving New York, but became obligated as a consequence of the appellee's acts.

The phrase "where it might have been brought" cannot reasonably be interpreted to mean the DNJ, if one genuinely considers the totality of the circumstances that surrounded and surround the matter.

STANDARD OF REVIEW

The de novo standard of review should be applied as there are mixed questions of law and fact, *See Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 168 & n.3 (2d Cir. 2001)* The district court did not properly ascertain the facts necessary to satisfy the transfer provisions of U.S.C. § 1404 (a), but also did not correctly apply case law to the facts upon which it based it's conclusion

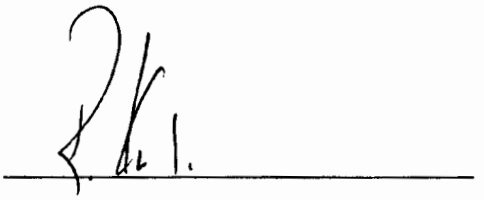
CONCLUSION

For the reasons set forth above, the Order of the District Court should be declared null and void, and the matter transferred back to the United States District Court, Southern District of New York.

Dated: July 14, 2016

Palisades Park, New Jersey

Respectfully submitted



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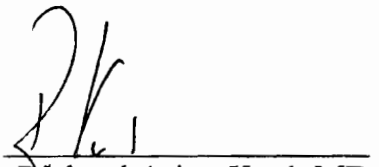
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points and contains 13374 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the table of contents and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief

Dated: July 14, 2016



Richard Arjun Kaul, MD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Richard Arjun Kaul, MD Plaintiff-Appellant, v. Christopher J. Christie, Esq Defendant-Appellee,	16-1397-cv

CERTIFICATE OF SERVICE

I, Richard Arjun Kaul, do hereby certify that on July 14, 2016, I caused a true and correct copy of the Brief of Appellant to be served on all the defendant-appellees.

Dated: July 14, 2016

Richard Arjun Kaul, MD