The Government's Allegations – As Stated at Reverse Proffer of Sept. 16th

- **Frank Parlato entered into a Letter of Intent (LOI), dated Jan. 8, 2008, with the Bronfmans.**
  - In the LOI, the Bronfmans wired $1M to Parlato, to "be deducted and repaid" to the Bronfmans against Parlato's ultimate compensation.
  - In the LOI, Parlato agreed to a "lien on [his] interest in One Niagara," and further agreed "not to dilute or dissipate said interest in One Niagara while same stands as security for the repayment of Draw."
- **Frank Parlato owes the Bronfmans $1M.**
- **Frank Parlato wrongfully sold his interest in One Niagara.**
  - Parlato sold his interest in One Niagara in July 2010.
  - This "alienation" is "final" in September 2011, when a note relating to the sale is paid off.
- **Frank Parlato alienated One Niagara to defraud the Bronfmans.**
- **These actions constitute a scheme to defraud.**

HSE

The Government's Allegations – As Stated at Reverse Proffer of Sept. 16th

The Government cannot prove <u>any</u> of those allegations.

1 – The Government Cannot Show the Parties Entered into the Letter of Intent.

- **The Government cannot prove that Frank Parlato ever entered into the Letter of Intent, dated January 8, 2008.**
  - The LOI is the basis for the cited promise "not to dilute or dissipate said interest in One Niagara while same stands as security for the repayment of Draw."
- **The Government has no executed Letter of Intent.**
  - At the reverse proffer, the prosecution team stated that it had such a record.
  - The FBI agreed to provide any such copy.
  - The U.S. Attorney's Office has confirmed that the FBI has been unable to locate any executed LOI.

1 – The Government Cannot Show the Parties Entered into the Letter of Intent.

- **The Bronfmans affirm that they <u>never</u> entered into the LOI.**
  - They filed a complaint against Frank Parlato, dated Apr. 2, 2012.
  - The complaint nowhere states that the Bronfmans entered into the LOI.
  - Nor does the complaint state that Frank Parlato agreed not to sell any interest in One Niagara.
  - Rather, the complaint states that "the Bronfmans loaned Parlato $1.0 million as a demand loan," "**<u>without a written agreement</u>**."
  - That flatly contradicts the existence of the LOI as a binding contract.
- **The Bronfmans have verified these allegations are true.**

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1 – The Government Cannot Show the Parties Entered into the Letter of Intent.

- **The Bronfmans also denied, in courtroom testimony, that the Letter of Intent governed their loan to Parlato.**
  - Clare Bronfman testified in *Precision Development v. Plyam* in LA, on, among other days, March 28, 2011.
- **Clare Bronfman was presented with a copy of the Letter of Intent.**
  - Q: And does that have Mr. Parlato's signature on it to your knowledge?
  - A: Yes, it does. I believe that's his signature. Trans. at 36:12-21.

1 – The Government Cannot Show the Parties Entered into the Letter of Intent.

- **She testified that it did <u>not</u> reflect the agreement on the $1M.**
  - Q: Well, let's go to the language on the million dollars. Is that the language that you agreed to for the million dollars?

    A: I don't believe it was. Trans. at 37:1-4.

1 – The Government Cannot Show the Parties Entered into the Letter of Intent.

- **Without an enforceable Letter of Intent, the Government's theory fails on its own terms.**
  - None of the other agreements relating to Frank Parlato's employment by Precision Development LLC, Castle Asset Management Inc., or the Bronfmans have any terms relating to the One Niagara.
  - The Letter of Intent was the sole source of any purported duty by Frank Parlato to maintain his interest in One Niagara.
  - Without the Letter of Intent, Frank Parlato had no obligation to maintain an interest in One Niagara.
  - Thus, Frank Parlato was free to sell his interest in One Niagara in July 2010.
- **There is thus no basis for the proposed charge.**

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2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Even if the LOI had been executed, the Government's theory would fail.**
  - **The Bronfmans wrongfully terminated the LOI.**
  - **Frank Parlato is entitled to damages beyond the $1M, and could thus keep the $1M (and sue for more).**
  - **In addition, the Bronfmans' repudiation relieved Frank Parlato of any obligation to repay the $1M.**

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Point A – The Bronfmans Wrongfully Terminated Frank Parlato's Employment Under the LOI.**
  - **Under the Letter of Intent, Frank Parlato had the right to continued employment.**
    - He was entitled to employment through the "completion of the Companies developments and the final distribution of Owner Compensation and CEO Compensation."
    - The only exception was termination "by written mutual agreement of the parties."
  - **By law, Frank Parlato could be involuntarily terminated only if he materially breached the contract.**
    - *See, e.g., Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.,* 500 F.3d 171, 186 (2d Cir. 2007) ("Under New York law, a party's performance under a contract is excused only where that party . . . has committed a material breach.").

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Yet the Bronfmans involuntarily terminated Frank Parlato in a "pissing match" over an accounting of expenses.**
  - This was the Government's own characterization at the reverse proffer.
- **The termination was by letter dated March 14, 2008.**
  - The letter states that the Bronfmans "request, and . . . [Parlato] agreed, [that Parlato] provide a full and exact accounting of all services . . . provided for the Bronfmans, an itemization of the Bronfman's varied business interests, and an accounting of any and all expenses paid."
  - The letter terminated Parlato subject to "reconsider[ing] [his] reinstatement in some or all capacities" upon receipt of the "requested accounting."

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **There is no evidence that the Bronfmans ever made the demand for an accounting as claimed by the letter.**
  - The letter states that the Bronfmans "request, and . . . [Parlato] agreed, [that Parlato] provide a full and exact accounting of all services . . . provided for the Bronfmans, an itemization of the Bronfman's varied business interests, and an accounting of any and all expenses paid."
- **Crockett, the Bronfmans' attorney, suggested that this was, in fact, a recent claim (and fabrication).**
  - The termination letter qualifies the claims against Parlato with the caveat that counsel was "told in the ***past few hours*** about concerns the Bronfmans have had about [the] use of funds."

HSE

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Frank Parlato immediately responded with a thorough accounting.**
  - He sent an email on March 15, 2008, to Bob Crockett, with a full accounting.
- **We have seen no evidence of any reply or rebuttal.**
  - Rather, the Bronfmans and their counsel simply ignored the response.
  - They failed to reinstate Parlato.
- **They appear to have manufactured this issue as a pretext for wrongful termination.**
  - NXIVM had a history of similar behavior.

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **In New York, parties may terminate a contract only if there is a material breach defeating the object of the contract.**
  - **In New York, a party may terminate a contract solely on the basis of a material breach.** *See Callanan v. Powers,* 199 N.Y. 268, 284 (1910); *see also Merrill Lynch & Co. Inc.,* 500 F.3d at 186; *Mackinder v. Schawk, Inc.,* No. 00 Civ. 6098 (S.D.N.Y. Aug. 2, 2005) (employment contract).
  - **"For a breach to be material, it must 'go to the root of the agreement between the parties.'"** *New Windsor Volunteer Ambulance Corps v. Meyers,* 442 F.3d 101, 117 (2d Cir. 2006).
  - **To justify termination, a breach must be "so substantial that it defeats the object of the parties in making a contract."** *Felix Frank Assocs. Ltd. v. Austin Drugs Inc.,* 111 F.3d 284, 289 (2d Cir. 1997); *Babylon Assocs. V. County of Suffolk,* 101 A.D.2d 207 (2d Dep't 1984) ("a breach must be . . . so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.").

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Partial breaches do not justify termination.**
  - **"A slight breach will not end the other party's further duty to perform the contract."** *New Windsor Volunteer Ambulance Corps,* 442 F.3d at 117 (quoting 23 Williston on Contracts 63:3, at 438-39 (4th ed. 2002)); see id. ("If a breach is only partial, . . . it does not entitle him simply to treat the contract as at an end.").
  - **The failure to provide a timely accounting is a partial breach, which cannot justify terminating a contract.** *See, e.g., Donovan v. Ficus Invest., Inc.,* 2008 N.Y. Slip Op. 51797 (N.Y. Sup. Ct. 2008) (holding that failure to provide access to records was not material breach); *Weschler v. Hunt Health Sys., Ltd.,* 94 Civ. 8294 (S.D.N.Y. Aug. 11, 2004) (accounting failures and breach of paperwork obligations did not constitute material breach).

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Moreover, termination is inappropriate for curable breaches.**
  - **"An injured party's right of termination . . . is limited by the doctrine of cure."** *Simco Inc. v. Metro-North Commuter R. Co.,* 133 F. Supp. 2d 308, 312 (S.D.N.Y. 2001).
  - **"Fairness ordinarily dictates that the party in breach be allowed a period of time – even if only a short one – to cure the breach if it can."** *Farnsworth on Contracts,* Total Breach and Termination 8:18; Restatement (Second) on Contracts 237.
  - **A party must "express[] dissatisfaction before abandoning [a] contract, and give [a] defendant an opportunity to mend its ways."** *Brede v. Rosedale Terrace Co.,* 216 N.Y. 246, 249-250 (1915)(Cardozo, J.) ("The contract was in the course of performance; . . . and the plaintiff was not at liberty to put an end to the contract without notice to the defendant that the [work] must be hastened. Notice in such circumstances is the plain requirement of good faith.")

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Here, the Bronfmans wrongfully terminated Frank Parlato for a delay in providing an accounting of expenses.**
  - **This was, at most, a partial breach.** This "pissing match" related to an insubstantial fraction of the tens of millions of dollars under management.
  - **Parlato quickly cured the breach.** He provided an accounting one day after the termination letter.
  - **The Bronfmans could not treat this delayed accounting as a material breach defeating the entire object of the contract.** It was marginal, minor, and quickly cured. It was an entirely improper basis for termination.
- **The Bronfmans thus improperly terminated the LOI.**

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2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Point B – Frank Parlato Is Entitled to Damages in Excess of $1M.**
  - **In New York, the wrongful termination of a contract entitles a counterparty to expectation damages for breach.**
    - "A wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach. . .. [T]he nonrepudiating party . . . [may] recover the present damages." *Am. List Corp. v. U.S. News & World Report, Inc.,* 75 N.Y.2d 38, 44 (1989). "The general measure of damages . . . is expectancy damages." *JR Loftus, Inc. v. White,* 85 N.Y.2d 874 (1995).

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- Point B – (cont.)
  - **Expectation damages provides the aggrieved party with lost profits.**
    - "This doctrine gives force to the provisions of a contract by placing the aggrieved party in the same economic position it would have been in had both parties fully performed." *Bausch & Lomb Inc. v. Bressler,* 977 F.2d 720, 729 (2d Cir. 1992) (applying New York law).
    - These are measured from the time of the breach. *See Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.,* 500 F.3d 171, 185 (2d Cir. 2007).

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- Point B – (cont.)
  - **Here, Frank Parlato was entitled to millions of dollars in expectation damages.**
    - Parlato was entitled to a third of net profits on a real estate venture, in which the Bronfmans had invested more than thirty million dollars.
    - Even a modest return on investment of 120% (*i.e.,* > $6M of net profit) would translate into millions of dollars of expected compensation damages due to Parlato (*i.e.,* > $2M).
    - Those damages were greater than the $1M that the Bronfmans had transferred to Frank Parlato.
  - **Thus, the Bronfmans owed Parlato damages fully offsetting any amount otherwise due to the Bronfmans.**

HSE

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- **Point C – Moreover, Frank Parlato Was Relieved of Any Obligation to Pay the Bronfmans.**
  - **As a general matter, a party's wrongful termination of a contract relieves the aggrieved party of the duty to perform.**
    - "The doctrine relieves the nonrepudiating party of its obligation of future performance." *Am. List Corp. v. U.S. News & World Report,* 75 N.Y.2d 38, 43 (1989); *Weintraub v. Schwartz,* 131 A.D. 663, 666 (2d Dep't 1987) ("Assuming the plaintiffs have breached their own obligations under the contract, they would be precluded from seeking to enforce [the agreement] against the defendant.")

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- Point C – (cont.)
  - **Wrongful termination excuses the party from repayment duties.**
    - An aggrieved party is "relieved of the obligation to repay proceeds already advanced." 22A N.Y. Jur. Contracts 421; *see, e.g., Binghamton Masonic Temple, Inc. v. City of Binghamton,* 158 Misc. 2d 916 (N.Y. Sup. Ct. Aug. 25, 1993) (holding breach "excused [the] obligation . . . to repay the proceeds previously advanced").
  - **Thus, the Bronfman's wrongful termination also relieved Parlato of any obligation to repay the $1M.**

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- In Summary –
  - **Assuming, *arguendo,* that the parties agreed to the LOI, the Bronfmans wrongfully terminated Parlato under the LOI.**
    - Their "pissing match" (in the Government's terms) over an accounting and expenses was a wholly inadequate basis for termination under NY law, especially as Parlato immediately cured the purported breach.
  - **The wrongful termination allowed Parlato to keep the $1M because the Bronfmans owed him more than $1M.**
    - The Bronfman's wrongful termination entitled Parlato to lost profits, which would have surpassed the $1M advance/loan.

HSE

2 – Frank Parlato Would Not Owe Any Money to the Bronfmans Under the LOI Anyhow.

- In Summary – (cont.)
  - **Moreover, the wrongful termination relieved Parlato of any obligation to repay the Bronfmans.**
    - This is separate and apart from Parlato's entitlement to damages above and beyond the $1M.
  - **For these reasons, too, there is no basis to the Government's proposed charge.**

HSE

3 – Frank Parlato Was Free to Sell One Niagara Without Violating the LOI

- **Even if the LOI had been executed, Frank Parlato was free to sell One Niagara.**
  - **When the Bronfmans wrongfully repudiated the LOI, they excused Frank Parlato of any obligation to repay the $1M and, therefore, any obligation to maintain One Niagara as a security.**
  - **Moreover, by terminating the LOI, the Bronfmans elected to permit Parlato to sell his interest in One Niagara.**

3 – Frank Parlato Was Free to Sell One Niagara Without Violating the LOI

- **Point A – By Repudiating the LOI, the Bronfmans Excused Frank Parlato of Any Obligation to Maintain One Niagara as Security.**
  - **The LOI restricted alienation only to the extent Parlato had an obligation to repay monies to the Bronfmans.**
    - It states: "CEO will not . . . dilute or dissipate said interest in One Niagara ***while same stands as security for the repayment*** of Draw."
  - **The Bronfmans' wrongful repudiation erased any such obligation.**
    - As noted, Parlato was damaged in excess of $1M, and the repudiation relieved future performance.
    - The LOI thus imposed no further restriction on the sale of Parlato's interest in One Niagara.

HSE

3 – Frank Parlato Was Free to Sell One Niagara Without Violating the LOI

- **Point B – Moreover, by Terminating the Contract, the Bronfmans Elected Not to Later Enforce the Restriction Against Alienating One Niagara.**
  - **The Bronfmans terminated the contract in March 2008.**
    - The Bronfman's elected to terminate the contract by letter dated March 14, 2008.
  - **That termination was an election not to later insist on performance.**
    - Under NY law, a party claiming material breach "must choose between two remedies: it can elect to terminate the contract or continue it." *Awards.com v. Kinko's, Inc.,* 42 A.D.3d 178, 188 (1st Dep't 2007), *aff'd by memorandum opinion,* 14 N.Y.3d 791 (2010).

3 – Frank Parlato Was Free to Sell One Niagara Without Violating the LOI

- Point B – (cont.)
  - **The Bronfmans thus elected to permit Parlato to sell his interests in One Niagara.**
    - The Bronfmans could not, on the one hand, insist on the termination of the contract and, on the other hand, insist on Frank Parlato's continued performance under the contract (*i.e.,* maintaining his interest).

3 – Frank Parlato Was Free to Sell One Niagara Without Violating the LOI

- In Summary –
  - **Frank Parlato was free to sell One Niagara for two separate and independent reasons.**
  - ***First,* when the Bronfmans wrongfully terminated him, they excused him of any obligation to repay the $1M and, therefore, any obligation to keep One Niagara as security.**
  - ***Second,* when the Bronfmans elected to terminate the contract, they elected to permit Parlato to sell One Niagara.**
    - This principle applies even if the Bronfmans' termination was not wrongful.
    - The termination discharged any duty not to sell One Niagara.
  - **For these reasons, too, the Government's theory fails.**

HSE

4 – The Government Cannot Show Fraudulent Intent.

Nor could the Government ever prove fraudulent intent.

- **The Government must show a specific intent to defraud and a lack of good faith, beyond a reasonable doubt:**
  - "Since an essential element of the crime charged is intent to defraud, it follows that **good faith** on the part of the defendant is **a complete defense** to a wire fraud."
  - "A defendant, however, has no burden to establish a defense of good faith."
  - "The **burden is on the Government to prove** fraudulent intent and the consequent **lack of good faith** beyond a reasonable doubt."

Government's Proposed Jury Instructions, *United States v. Tony Leon Smith,* 10-CR-6202 (CJS) (W.D.N.Y.) (filed Jan. 23, 2012) [Dkt. 45]

4 – The Government Cannot Show Fraudulent Intent.

- **Paul Grenga, who had negotiated the LOI, purchased Frank Parlato's interest in One Niagara.**
  - Paul Grenga was not acting as counsel for Frank Parlato when Grenga himself purchased WhiteStar.
- **Paul Grenga told Frank Parlato, in this context, that the Bronfmans had no viable claims against him.**
  - Grenga concluded that the Bronfmans had no viable claims against Parlato, that the Bronfmans in fact owed Parlato, and that there was no restriction on Parlato's ability to sell WhiteStar.
  - Grenga agreed to Parlato's request for indemnification of claims relating to the Bronfmans' $1M in the purchase agreement.
  - Grenga told Parlato, "I don't care," because any claim by the Bronfmans would be completely meritless.

HSE

4 – The Government Cannot Show Fraudulent Intent.

- **Jim Roscetti provided the same advice to Frank Parlato, as counsel.**
  - Jim Roscetti served as counsel to Frank Parlato on the deal.
  - He concurred in Paul Grenga's position – *i.e.*, that the Bronfmans, not Frank Parlato, were in breach, and that they owed him damages, not the other way around.
- **Jim Roscetti and Paul Grenga were right.**
  - As previously explained, the Bronfmans wrongfully repudiated the contract, damaged Parlato is excess of $1M, and elected not to seek performance.
- **In any event, these opinions establish good faith.**
- **And the Government cannot prove fraudulent intent.**

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5 – The Government Cannot Show A Scheme to Defraud.

- **Finally, a breach of contract is not a scheme to defraud.**
  - "A breach of contract does not amount to mail fraud." *United States v. D'Amato,* 39 F.3d 1249, 1261 n.8 (2d Cir. 1994); *see also United States v. Shellef,* 732 F. Supp. 2d 42, 69 (E.D.N.Y. 2010) ("***Defendant correctly states that he cannot be guilty of wire fraud merely for breaching a contract***."). *Cf. Puckett v. United States,* 556 U.S. 129, 137 (2009) (Scalia, J.) ("[T]here is nothing to support the proposition . . . that a mere breach of contract retroactively causes the other party's promise to have been coerced or induced by fraud.").
- **The sale of WhiteStar – even if in breach of the LOI, assuming, *arguendo*, that there was a LOI – could not amount to a scheme to defraud.**
- **For this reason, as well, this charge lacks any merit.**

Conclusion – No Valid Bronfman Charge

The Government thus cannot prove <u>any</u> of its allegations in support of its sole contemplated charge relating to the Bronfmans.

Conclusion – No Valid Bronfman Charge

- *The Government contends that Parlato was bound by the LOI;* **but the Government cannot show that the parties ever agreed to the LOI, and the Bronfmans swear they did not.**
- *The Government contends that Frank Parlato owes the Bronfmans $1M;* **but, under contract law, Parlato owes the Bronfmans nothing, and they owe him potentially millions.**
- *The Government contends that Frank Parlato wrongfully sold his interest in One Niagara;* **but, under contract law, Parlato was free to do so after the Bronfmans terminated the LOI.**
- *The Government contends that Frank Parlato alienated One Niagara to defraud the Bronfmans;* **but the lawyer who negotiated the LOI said the Bronfmans had no viable claim (and he was right).**
- *The Government asserts this purported breach of the LOI constitutes a scheme to defraud;* **but even a breach of contract does not amount to a scheme to defraud.**

Conclusion – No Valid Bronfman Charge

The Government should decline to prosecute charges related to the Bronfmans.