

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL UNION FIRE :
INSURANCE CO. :
V. : CIV. NO. 3:93CV2504 (EBB)
EMPLOYEE STAFFING OF AMERICA, :
INC. and JOSEPH GALL :
:

NATIONAL COUNCIL ON COMPENSATION :
INSURANCE, ET AL :
V. : CIV. NO. 5:90CV246 (EBB)
JOSEPH GALL, ET AL :

REPORT AND RECOMMENDATION and
RULING ON DAMAGES

A conference was conducted on September 21, 2000 to discuss the status of both National Union Fire Ins. Co. v. Employee Staffing of America Inc., 3:93CV2504(EBB), and NCCI v. Gall, 5:90CV246(EBB), following the receipt of status reports filed in response to the Court's June 23, 2000 order [Doc. #165]. Present at the conference were Attorney David Burke for plaintiff National Union Fire Insurance Company ("National Union") and Attorney Frederick L. Bateman, Jr. for plaintiff National Council on Compensation Insurance ("NCCI"). Attorneys Chase Caro and Julie Kattan represented that they were appearing for defendants Employee Staffing of America, Inc., Joseph Gall, and intervenor-

defendant Thomas McLaughlin.¹ Attorney Peter Kelly, counsel of record for Thomas McLaughlin [Doc. #150], did not appear at the status conference.

The question of who is authorized to speak on behalf of the defendants and the intervenor-defendant, specifically ESA, has been an important issue in these cases to date. The Court concludes on the current record that this issue has not been resolved, but may nevertheless be moot.

The Civil Cases²

On March 3, 1999, this Court recommended a disposition of both pending civil actions,³ stating in relevant part,

It is clear, upon review of these papers, that counsel's uncertainty about ESA's ownership and the competing claims of Mr. McLaughlin have created a conflict which makes it impossible for ESA to be heard on the complaint or to prosecute its counterclaim at this time.

This case has been significantly delayed since its filing. . .by Joseph Gall's understandable preoccupation with the criminal investigation of which he was a

¹The docket reflects that Attorney Kattan has not filed an appearance on behalf of any of the defendants and Attorney Caro has not filed an appearance on behalf of defendant McLaughlin.

²National Union Fire Ins. Co. v. Employee Staffing of America, 3:93CV2504 (EBB) and NCCI v. Gall, 5:90CV246 (EBB).

³Summary judgment was granted to plaintiff in National Union Fire Ins. Co. v. Employee Staffing of America, 3:93CV2504 (EBB) [Doc. #160], and ESA's counterclaims in NCCI v. Gall, 5:90CV246 (EBB) [Doc. #667], was dismissed.

target and his subsequent prosecution. Plaintiff(s) should not bear the burden of waiting indefinitely for an adjudication of its claim, nor should the uncertainty of ownership be plaintiff's burden - or this court's - to resolve.

[Doc. #160 at 3; Doc. #667 at 3]. Plaintiffs' dispositive motions were granted "without prejudice to an application for reconsideration by counsel with authority to act for the corporation." The order directed, "Said application must be filed on or before April 15, 1999." Id. at 3-4. No application for reconsideration was filed and these dispositive rulings were "adopted, ratified and affirmed" by Judge Burns on October 26, 1999.

On January 3, 2000, ESA filed a Motion for Reconsideration in the NCCI case⁴ [Doc. #678; 5:90CV246(EBB)], seeking reconsideration of Judge Burns' October 26, 1999 endorsement adopting the Magistrate Judge's recommended ruling on the grounds that "[t]here is no longer any uncertainties regarding ESA's counsel." In support, ESA appended a copy of a letter dated December 21, 1999, from Attorney Peter Kelly, counsel for Thomas McLaughlin, that states,

Per our telephone conversation of this afternoon, this verifies that I have no

⁴A similar motion for reconsideration was filed on May 8, 2000 in the National Union case [Doc. #163], and granted on May 17, 2000, *nunc pro tunc*, before National Union had an opportunity to file a memorandum in opposition. Indeed, ESA did not file its Memorandum of Law in support of the National Union motion for reconsideration until June 30, 2000. [Doc. #166].

objection of [sic] your proceeding to represent the interest of ESA, with the understanding that the dispute between Joseph Gall and Thomas McLaughlin concerning ownership of ESA be presented to the court for resolution, if necessary, following a final judgment in these actions.

[Doc. #679, Ex. A, NCCI v. Gall, 5:90CV246 (EBB)].

Judge Burns granted the motion for reconsideration in the NCCI case by margin endorsement on February 29, 2000. [Doc. #682]. The effect of granting the motion for reconsideration was to reopen the recommended ruling, but it does not appear that, by granting the Motion for Reconsideration, Judge Burns was substantively reversing the recommended ruling. [See Doc. #682]. Thus, it remains to the magistrate judge to determine whether the materials submitted as part of the Motions for Reconsideration would warrant a change in the rulings on the underlying dispositive motions.

This magistrate judge concludes that they do not.

Mr. McLaughlin was given every opportunity to intervene and assert his interest in ESA by participating in the litigation of the motions pending in the civil cases. The time for doing so pursuant to the Court's order passed; neither McLaughlin nor Gall objected to the recommended ruling while it was pending before Judge Burns. In fact, McLaughlin appeared through counsel on September 24, 1998 [Doc. #150] **but filed nothing in response to any of the court's orders.**

With the motions for reconsideration, Atty. Caro offered no copies of corporate documents to support his claim that "ESA's entire stock interest and ownership rested with Mr. Gall and Mr. McLaughlin," [Doc. #679 at 3], a claim vigorously contested by the plaintiffs in light of Judge Nevas' turnover order in the criminal case [see pages 6-8, infra]. Nor does the letter from Attorney Kelly constitute corporate authorization for Attorney Caro to represent ESA. Indeed, no affidavits from either Gall or McLaughlin were filed to support any statements contained in the reconsideration memorandum. Atty. Caro merely relied on Atty. Kelly's letter to claim that there was "written authorization for Mr. Caro to act on behalf of Mr. McLaughlin's interest to pursue ESA's counterclaims in this case" Doc. #679 at 3. As the Kelly letter itself acknowledges that the dispute over ownership and representation which occasioned the magistrate judge's original ruling was never resolved, the only conclusion this Court can draw is that this non-evidentiary showing was inadequate to resolve the existing conflict as well as wholly untimely.

Local Rule 9(e) states that all motions for reconsideration "shall be filed and served within ten (10) days of the filing of the decision or order from which such relief is sought, and shall be accompanied by a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court overlooked in the initial decision or order." D. Conn. L. Civ.

R. 9(e). On November 24, 1999, twenty-nine days after the endorsement was filed, ESA filed a motion for extension of time within which to seek reconsideration of Judge Burns' October 26 endorsement ruling. ESA then sought three additional extensions of time to file its motion for reconsideration. See Doc. #675, filed December 21, 1999; Doc. #676, filed December 23, 1999; and Doc. #677, filed January 3, 2000. In support of these motions for extension of time, Mr. Caro stated that he had "to review the considerably large number of documents, and to consult with ESA's representative, Mr. Gall, who is currently incarcerated, and not ordinarily available to consult" However, when the motion for reconsideration was finally filed in January 2000, it offered no evidence of corporate ownership or any affidavit from Joseph Gall in support of the motion. The only supporting evidence consisted of the Kelly letter, which had been sent to Atty. Caro on December 21.

Disputed Ownership of ESA

Following Joseph Gall's criminal conviction⁵ on 24 charges of insurance fraud and tax fraud in November 1996, Judge Nevas entered an Order of Restitution, dated July 30, 1997, directing Gall to pay the victims of his criminal conduct (collectively the "victims") a total of \$13,717,630. Restitution was ordered as

⁵U.S. v. Joseph Gall, 3:95CR98 (AHN).

follows:

to National Council on Compensation Insurance
("NCCI"), \$5,147,254;

to American International Group⁶ ("AIG"), \$5,150,493; and
to American Policyholders' Insurance Company ("APIC"),
\$3,419,883.

All assets described in Gall's April 25, 1997 personal financial
statement [Doc. #315] were subject to the restitution order.

These included a 50 percent ownership in Gallmac, Inc.; 50
percent ownership in Employee Staffing of America, Inc. ("ESA")'
and 45 percent ownership in Laborforce of America, Inc. ("LFA").

[Doc. #299 2-3 and Ex. C (Gall's financial statement),
3:95CR98(AHN)]. Losses to the government resulting from the tax
fraud were not covered by the restitution order. U.S. v.
Stevens, 211 F.3d 1, 3 (2d Cir. 2000).

On July 7, 1998, Judge Nevas granted the victims' Motion for
Order for Transfer of Shares in Aid of Execution [Doc. #299],
ordered the immediate transfer of Gall's shares in Gallmac, Inc.,
Employee Staffing of America, Inc., and Laborforce of America,
Inc. to the victims, and directed Gall to take all legal measures
necessary to effectuate the transfers. [Doc. #315].

On August 10, 1998, Gall successfully moved for a stay of
the Court's July 7, 1998, Order for Transfer as well as a limited

⁶National Union Fire Insurance Company is a subsidiary of
AIG.

stay of the Court's July 30, 1997, Order of Restitution, pending appeal. [Doc. #322]. Gall sought a stay of the Restitution Order only to the extent it required him to transfer his shares of ESA and LFA to the victims. On April 17, 2000, the Court of Appeals affirmed the restitution order and affirmed the judgment of the district court with respect to all other issues on appeal. See U.S. v. Stevens, 211 F.3d 1 (2d Cir. 2000). To the date of the September 21 hearing, Joseph Gall had taken no steps to pay the ordered restitution or comply with Judge Nevas' order to transfer his assets to the victims.

At the September 21 status hearing, counsel for NCCI took the position that, pursuant to Judge Nevas' order, the victims are the owners of ESA. He represented that NCCI would not pursue "a counterclaim against [it]self once we own the stock." [Tr. at 6; see Doc. #168, 3:93CV2504; Doc. #685, 5:90CV246]. NCCI further requested that this Court take "judicial notice" that "all appeals have been exhausted as it relates to Mr. Gall. That would put us in a position of owning, *de facto*, at least, the stock of ESA." [Tr. at 12]. NCCI counsel also predicted that, upon execution of the restitution order and the turnover of ESA stock to the victims, "this case would probably . . . quickly go away upon entrance of those orders." [Tr. at 13].

All appeals have been exhausted in the criminal matter. As of March 26, 2001, no petition for a writ of certiorari was

pending before the United States Supreme Court filed by, or on behalf of, Joseph Gall.⁷

Recommended Ruling

In light of the foregoing history, and the clear mandate of Judge Nevas' restitution order, which required Joseph Gall to transfer his interest in ESA to the victims of his criminal activity, there continues to be a very real dispute over the current ownership of ESA and, consequently, the identity of the party or parties who have authority to engage and direct counsel to act on behalf of ESA in the two pending civil cases. Indeed, the affirmances of the restitution order and Joseph Gall's criminal conviction by the Court of Appeals since the earlier

⁷"[A] petition for a writ of certiorari technically is not an appeal." U.S. v. Snyder, 946 F.2d 1125, 1126 n.4 (5th Cir. 1991); see Netherland v. Gray, 519 U.S. 1301 (1996) (capital defendant who has not yet filed petition for certiorari in due course is not entitled as matter of right to stay of execution). Inquiry to the Office of the Clerk of the Supreme Court of the United States disclosed that, on August 17, 2000, the Clerk of the Supreme Court returned Gall's petition for writ of certiorari due to deficiencies in his pleadings and gave him 60 days, or up to October 16, 2000, to correct and resubmit his petition. [Kattan Let. 10/3/00, w/Encl.]. The Clerk of the Supreme Court indicated that Gall attempted to file a corrected petition for writ of certiorari on September 27, 2000. This petition was also returned and Gall was directed to file a corrected petition under the rules and resubmit his petition within thirty (30) days, or by November 26, 2000. The corrected petition was denied on January 8, 2001. Gall v. U.S., 121 S. Ct. 836 (2001). On or about February 2, 2001, Gall filed a petition for rehearing. On March 26, 2001, the Supreme Court denied Gall's petition for rehearing of the denial of his writ of certiorari. Gall v. U.S., 121 S. Ct. 1430 (2001).

recommended ruling on the dispositive motions have, in the absence of any further stay, removed all arguments about the validity of the Order for Transfer, at least vis a vis Joseph Gall.

Accordingly, the undersigned recommends that Judge Burns

(1) vacate the endorsement ruling dated May 17, 2000 [Doc. #163] in National Union Fire Ins. Co. v. Employee Staffing of America Inc., 3:93CV2504(EBB), which granted defendant ESA and Joseph Gall's Motion to Reconsider Endorsement and Adoption of Magistrate's Recommended Ruling dated March 3, 1999, and

(2) vacate the Order dated February 28, 2000 [Doc. #682] in NCCI v. Gall, 5:90CV246(EBB), rescinding the adoption of the magistrate judge's recommended ruling on the motion to dismiss. By taking the foregoing actions, the Court will reinstate its prior adoption of the recommended rulings granting summary judgment to the plaintiff in National Union and dismissing the ESA counterclaim in NCCI.

Alternatively, for the reasons stated in the prior recommended rulings [Doc. ##667, 160] and the foregoing Report, THE MAGISTRATE JUDGE RECOMMENDS that the Court grant summary judgment to the plaintiff in National Union and dismiss the ESA counterclaim in NCCI.

Adoption of either alternative will allow both these civil cases to be closed, once damages are determined. A

recommendation on entry of damages follows.⁸

⁸This recommendation on dispositive motions was originally filed on January 24, 2001 [5:90CV246, Doc. #689; 3:93CV2504, Doc. #171]. Judge Burns approved and adopted the recommended rulings in both NCCI, [Doc. #692], and National Union, [Doc. #174]. On March 8, 2001, Judge Burns vacated her order approving and adopting the recommended ruling [5:90CV246, Doc. #696; 3:93CV2504, Doc. #176], and referred these cases for a hearing on damages [5:90CV246, Doc. #697; 3:93CV2504, Doc. #177]. Judge Burns did not state her reason for vacating the order. This Court therefore refiles its report and recommendation with a finding on damages and recommends these files be closed if the report and recommendation are adopted, based on the assumption that orders closing the files and entering judgment for National Union and NCCI could only take effect upon the Court's acceptance of a damages finding.

Recommended Ruling on Damages

On April 18, 2001, a damages hearing was held.⁹ [5:90CV246, Doc. #711; 3:93CV2504, Doc. #191]. Present at the hearing were Attorney David Burke for plaintiff National Union, and Attorney Jeanine Dumont for plaintiff NCCI. Attorney Case Caro represented that he was appearing for defendants ESA, Joseph Gall and intervenor-defendant Thomas McLaughlin. Attorney Peter Kelly, counsel of record for Thomas McLaughlin [Doc. #150], did not appear for the damages hearing.¹⁰ At the damages hearing,

⁹Judge Burns referred these cases to conduct a damages hearing on March 8, 2001 [5:90CV246, Doc. #697; 3:93CV2504, Doc. #177]. On March 28, 2001, this Court entered a Scheduling Order setting a damages hearing for April 18, 2001 and a briefing deadline of April 13, 2001. [5:90CV246, Doc. #704; 3:93CV2504, Doc. #186]. Defendants' Motions to Adjourn the April 18, damages hearing [5:90CV246, Doc. #705; 3:93CV2504, Doc. #187], were denied. [5:90CV246, Doc. #707; 3:93CV2504, Doc. #189].

On April 15, 2001, defendant ESA filed a Memorandum for the Damages Hearing [5:90CV246, Doc. #713; 3:93CV2504, Doc. #196] and a Reply Memorandum to Plaintiff NCCI's Restated Memorandum of Law [5:90CV246, Doc. #714]. National Union filed a Memorandum of Law in Support of Plaintiff's Damages Claims [Doc. #191] and plaintiffs in NCCI filed a Memorandum Of Law Requesting This Court to Enter an Order Awarding the Plaintiffs Damages of \$5,147,254, Plus Interest [5:90CV246, Doc. #708] and a Restated Memorandum Of Law Requesting This Court to Enter an Order Awarding the Plaintiffs Damages of \$5,147,254, Plus Interest [5:90CV246, Doc. #710]. At the hearing, ESA requested one week to Wednesday, April 25, 2001, to file a response to National Union's Memorandum. No response was filed and no motion for extension of time was sought prior to expiration of the deadline. On May 17, 2001, ESA filed a Reply Memorandum to National Union's Memorandum of Law. [3:93CV2504, Doc. #194; 5:90CV246, Doc. #712]. On June 6, 2001, National Union filed a reply brief.

¹⁰Attorney Kelly filed Motions to Withdraw [5:90CV246, Doc. #711; 3:93CV2504, Doc. #191] that were pending at the time of the hearing.

Attorney Caro stated he did not have a corporate resolution authorizing him to act on behalf of the corporation, nor was he in possession of any documentation regarding the ownership of ESA. Attorney Caro stated he received a verbal authorization from both Gall and McLaughlin to act on behalf of the corporation. He further represented that McLaughlin has the corporate seal and books but did not bring these to court.

NCCI, 5:90CV246

On May 25, 1990, the NCCI plaintiffs instituted this action against ESA, Joseph Gall, Gloria Stevens, Thomas McLaughlin and other defendants seeking compensatory damages, injunctive relief, and attorneys' fees. [Doc. #1]. On or about March 3, 1999, the NCCI plaintiffs filed an Amended Complaint, [Doc. #665], alleging federal claims for Civil RICO (Counts I [18 U.S.C. §1962(b), use of controlling investments/securities to commit violation], II [18 U.S.C. §1962(b), use of unlawful debt or act to acquire interest or control and commit violation], III [18 U.S.C. §1962(c), employees or affiliates directing violations], & IV [18 U.S.C. §1962(d), conspiracy to commit (a),(b), or (c)]), and state law claims for statutory insurance fraud (Counts V, VI, VII), civil theft (Counts VIII, IX, X, XI, XII, XIII), fraud (Counts XIV, XV, XVI, XVII), and conspiracy to defraud (Counts XVIII, XIX, XX, XXI). Specifically, the NCCI plaintiffs alleged that the defendants made "materially false and inaccurate

representations in insurance applications" to "obtain workers compensation insurance under false pretenses and for a premium that was substantially less than the premium that would have been charged for such workers compensation insurance had defendants been truthful and accurate in the applications for workers compensation." ¶258 (a)-(b). On October 29, 1990, the defendants filed an amended answer and counterclaim. [Doc.#173].

On April 26, 1993, the Court granted plaintiffs' motion for reference to a special master for an evidentiary hearing regarding the "computation of workers' compensation premiums due." [Doc. #466, endorsement]. After fifteen months of discovery and several days of testimony in July 1994,¹¹ the parties entered into a Stipulation dated July 14, 1997 "that 9.7 million dollars represents the workers compensation insurance premiums due on the workers' compensation insurance premiums earned" by the plaintiffs, and the "workers' compensation premiums due on the workers' compensation insurance policies above is 5 million 147,254 dollars" [Doc. #536, Stip.]. Based on the Stipulation, the Special Master found that defendants ESA and LFA owed plaintiffs \$5,147,254, plus interest. The Stipulation was attached to the Special Master's Report and Recommendation dated October 25, 1994. [Doc. #536].

On November 14, 1994, plaintiffs moved for confirmation of

¹¹Case Caro was present as counsel for ESA and Gall. [Doc. #710, ¶4].

the Special Master's Report pursuant to Fed. R. Civ. P. 53(3). [Doc. #537]. ESA and LFA filed objections to the report and recommendation of the Special Master on November 29, 1994, [Doc. #544, 543] and December 16, 1994. [Doc. #547]. On March 3, 1995, Judge Burns overruled defendants' objections to the report and recommendation of the Special Master. [Doc. #544, endorsement].

On March 13, 1995, Attorney Chase Caro filed a Notice of Continued representation of defendants Joseph Gall, Gloria Stevens, ESA, LFA and other defendants. [Doc. #577].

National Union, 3:93CV2504

On December 17, 1993, National Union instituted this action against ESA and its president Joseph Gall. National Union's Complaint was in five counts, sounding in : (1) breach of contract; (2) misrepresentation; (3) breach of duty to disclose; (4) bad faith; and (5) violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-100, et seq.

The operative facts from which National Union's five causes of action arose concern a contract into which National Union entered with ESA, through its president, Joseph Gall, on or about July 25, 1990, [Doc. #1, ¶1]. Under the terms of this contract, National Union agreed to provide policies of worker's compensation insurance to ESA, pursuant to various terms and conditions, in exchange for ESA's payment of a premium. [Doc. #1, Count One, ¶¶1-28]. ESA was in default on this contract, and had therefore breached its contractual obligations to National Union.

As of December 17, 1993, ESA owed National Union \$4,420,698 pursuant to the contract.¹² [Doc. #1, ¶¶25-28].

The Program, and the premiums charged under the Program, were based in part on misrepresentations by ESA and Joseph Gall. [Doc. #1, Count Two, ¶¶29-35]. ESA and Gall refused to disclose to National Union ESA's financial and payroll records, which undermined National Union's ability to detect ESA's fraudulent activities. [Doc. #1, Count Three, ¶¶29-32]. ESA's conduct constituted a breach of implied covenant of good faith and fair dealing between ESA and National Union. [Doc. #1, Count Four, ¶29]. The actions of ESA and Gall also constituted unfair and deceptive acts and practices in the conduct of a trade or business, in violation of Conn. Gen. Stat. §42-110b ("CUTPA"). [Doc. #1, Count Five, ¶40]. ESA answered the complaint and filed a counterclaim against National Union for breach of contract. [Doc. #15, 19].

U.S. v. Gall, 3:95CR98

In June and July, 1995, indictments were returned and superseding indictments were filed against the principals of ESA and LFA. [Doc. #1, 2, 14]. Arrest warrants issued for Joseph Gall (owner, president, treasurer, and CEO of ESA and LFA) and Gloria Stevens (secretary and CFO of ESA and LFA). A summons

¹²The Restitution Order entered by Judge Nevas on April 4, 1997, has since fixed National Union's total damages at \$5,150.493.

issued for Tom McLaughlin. The indictments included allegations of federal conspiracy; mail fraud; wire fraud; and false statements. Specifically, the indictment charged that defendants:

Devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from workers' compensation insurance providers, client companies and state regulatory authorities.

[T]hat JOSEPH GALL and GLORIA STEVENS directed the submission of applications for workers' compensation insurance to various insurers in both voluntary and involuntary markets to acquire workers' compensation coverage for Employee Staffing of America, Inc. These applications misrepresented the insurance needs of ESA at the time of the application by significantly understating the numbers and types of employees and the associated payrolls for these employees, and by failing to disclose the location of the workers. By submitting false applications, ESA obtained workers' compensation from insurance companies at premium rates and were substantially lower than would have been otherwise available.

[Indict. ¶11].

A status conference was conducted on August 29, 1995, to discuss the impact of the pending criminal action on three related civil cases.¹³ [5:90CV246, Doc. #600; 3:93CV2504, Doc. #101]. At the conclusion of the status conference, the court directed the parties to show cause why further proceedings in the

¹³National Union Fire Insurance, Co. v. Employee Staffing of America, Inc., and Joseph Gall, Civ. No. B:90CV2504 (EBB); National Council on Compensation Insurance, Inc. v. Joseph Gall, Civ. No. B:90CV246 (EBB); and Labor Force of America, Inc. v. Employee Staffing of America, Inc., Civ. No. 3:93CV495 (EBB).

civil cases should not be stayed pending final resolution of the criminal matter, which named Joseph Gall, Gloria Stevens and Thomas McLaughlin as defendants. Input was also invited from the U.S. Attorney and criminal counsel.

On March 14, 1996, this Court stayed both the NCCI and National Union civil cases.¹⁴ The Court found that the civil cases were "substantially similar to the charges in the criminal indictment." [5:90CV246, Doc. #613 at 6; 3:93CV2504, Doc. #119 at 4]. The Court further held that

A review of the superseding indictment and the complaint together reveals that the wrongful conduct alleged in both cases encompasses actions taken by defendant Gall in his capacity as owner, president and chief executive officer through his company ESA. This conduct included Gall's alleged failure to pay the plaintiff insurance company for workers compensation coverage, his failure to disclose the nature of the employer-lessee's business and employees on the payroll, and various acts of concealment and misrepresentation which allegedly defrauded the insurance companies out of millions of dollars.

[5:90CV246, Doc. #613 at 8; 3:93CV2504, Doc. #119 at 7].

Further, in seeking an order staying further action in the civil cases, the Government suggested that "the costs of the civil litigation could exhaust assets from which orders of restitution to compensate the victims of the defendants' criminal

¹⁴The rulings on the motions to stay the civil proceedings were approved and adopted by Judge Burns on May 14, 1996. [5:90CV246, Doc. #613, endorsement; 3:93CV2504, Doc. #119, endorsement].

misconduct could be compensated, in the event of a conviction."
[See 5:90CV246, Doc. #609, Doc. #613 at 10; 3:93CV2504, Doc. #119
at 10].

On November 5, 1996, in a criminal trial against Joseph Gall relating to his activities with ESA, U.S. v. Joseph Gall, 3:95CR 98(AHN), the jury convicted Gall of the following: (1) conspiracy (Count 1, 18 U.S.C. §371); (2) mail fraud (Counts 2-9, 18 U.S.C. 1341,2); (3) wire fraud (Counts 10-18, 18 U.S.C. 1343,2); (4) false statements and reports (Counts 19-20, 18 U.S.C. §1014); (5) conspiracy to defraud the United States (Count 21, 18 U.S.C. §371); and (6) failure to file tax returns (Counts 22-24, (26 U.S.C. §7203).

On December 5, 1996, this Court notified the parties in NCCI [Doc. #626], and National Union [Doc. #133] of the conviction in U.S. v. Gall, and the sentencing date for defendants, and advised plaintiffs to contact the Probation Office for information on making claims for restitution.

On April 4, 1997, the criminal defendants were sentenced by Judge Nevas.¹⁵ Frederick Bateman, lead attorney in NCCI testified at the sentencing on behalf of his clients relating to

¹⁵Gall was sentenced to 110 months in prison, 5 years supervised release thereafter, and the imposition of financial disclosures. [3:95CR 98; Doc. ##153, 194, 199]. McLaughlin received probation and community service as well as a fine. [3:95CR 98; Doc. #165]. Gloria Stevens was sentenced to 30 months imprisonment, three years probation, and the imposition of financial disclosures. [3:95CR 98; Doc. ##192, 198].

the losses suffered due to the defendants' conduct. Attorney Bateman testified that the parties stipulated in the NCCI civil action to a damages figure of \$5,147,254. Richard Thomas, of National Union Fire Insurance Company, testified as to the losses to American International Group, the holding company for National Union, arising from the provision of Workmans' Compensation Insurance coverage by AIG to Mr. Gall and his companies, ESA and Labor Force of America, Inc. ("LFA"). He testified that National Union's losses were \$5,150,493. Gall was represented at the hearing by his criminal counsel, Attorney Robert Casale. Attorney Casale cross examined the representatives of the insurance companies. Attorney Chase Caro, Gall's civil counsel, was present in court during the hearing. [3:95CR98, Tr. 4/7/97 at 119].¹⁶

At the sentencing, Attorney Chase Caro testified on behalf of Joseph Gall regarding his representation of Gall, Stevens, LFA and ESA in the NCCI and National Union civil cases. In challenging the testimony by the representatives of NCCI and National Union, Attorney Caro referred to loss calculations prepared by Mr. Charles Gruber, an actuary, and provided to the Court in an affidavit. [Tr. 4/7/97 at 162 and 165]. Judge Nevas asked,

¹⁶John Myers from American Policy Holders Insurance also testified at the sentencing regarding his company's losses due to ESA and Joseph Gall's conduct.

COURT: And can this arithmetic be done with reference to the documents before the court now?

MR. CARO: Its done in Charley Gruber's affidavit, Your Honor.

THE COURT: Where? The problem is Mr. Gruber isn't here to be cross-examined.

MR. CASALE: We can get him in the next available date, its all right with us.

THE COURT: You've known about this date for a long time, Mr. Casale.

MR. CASALE: I know that.

[Tr. 4/7/97 at 165].

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COURT: But the words "I am informed" are contained in a lot of - for example, [Gruber] starts paragraph 18 by saying I am informed. He starts paragraph 20 by saying I am informed. How are we supposed to know who informed him and what they informed him?

MR. CARO: Your Honor I think is probably correct, it probably would be better to have Mr. Gruber testify on that.

COURT: How can the court make findings based on this affidavit where he says I am informed and the court, neither the court nor the prosecutors nor defense counsel have any idea what he's talking about or who he's talking about? Paragraph 13 says the same thing. "I am informed." Supposing it turns out he was informed by Mr. Gall, whose credibility is not very high? Supposing that is the case, his informant was Mr. Gall.

[Tr. 4/7/97 at 166-67].

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COURT: I can't give any credibility, Mr. Casale, to that affidavit.

MR. CASALE: Your Honor might consider allowing us some more time to get this fellow in?

COURT: No, you've had plenty of time. This date has been set for two months or longer. . . .

[Id. at 167]. With respect to the Order of Restitution, Judge Nevas found that the Court

did not have adequate . . . information on which to enter such an order at this time. Clearly an order of restitution is in order. I'm therefore going to direct and order that counsel for the Government and counsel for Mr. Gall meet together with Mr. Hassen from the probation department and attempt to arrive at an agreed upon figure and an agreed upon schedule of payment of restitution.

In conjunction with that order, the Court is ordering you, Mr. Gall, to provide through your attorney to the Government and to the probation officer complete and total financial disclosure, including financial statements, tax returns, and a complete disclosure of all interest that you have in any entity, whether it be an individual, whether it be a corporate entity, whether it be a limited partnership or any other form of ownership, you are to make a total and complete disclosure of that.

[Tr. 4/7/97 at 252].

On July 24, 1997, Judge Nevas held a follow-up hearing to determine the amount of the restitution. Mr. Gall was represented by Attorney Kurt Zimmerman at the hearing and Attorney Chase Caro was also present. Attorney Zimmerman argued,

My point on this, Your Honor, is that there are, as set forth in the affidavit of Attorney Chase Caro . . . he's here today, there are numerous civil litigation matters

pending in Federal Court, State Court, between the victims, Mr. Gall, and his companies which will resolve definitively the actual economic loss to the victims and I would ask the court to exercise its discretion and not embroil itself, the Probation Department and the U.S. Attorneys' office in attempting to do what this civil process will do.

[3:95CR98, Tr. 7/24/97 at 20].

After hearing this and other arguments offered by Gall, Judge Nevas made the following finding on the record.

[F]irst I've heard nothing today that would change my previous finding that the loss here totals [\$13,717,630]. That's [\$5,150,493] to [AIG]¹⁷; [\$3,419,883] to [APIC]; and the loss to [NCCI] is [\$5,147,254]. So that finding is reiterated.

[3:95CR98; Tr. 7/24/97 at 51-52].

It was further revealed at the hearing that, on April 30, 1997, a eight hundred thousand dollar (\$800,000) mortgage was executed on two properties in New York in which Gall held an ownership interest in favor of the law firm of Caro & Graifman, P.C., allegedly to satisfy legal fees incurred in the civil litigation.¹⁸ [3:95CR98, Tr. 7/24/97 at 56-58]. This discussion

¹⁷National Union is a subsidiary of AIG.

¹⁸The Court notes, without comment, that NCCI has filed a lawsuit against Caro & Graifman, P.C. and Joseph Gall, seeking a declaratory judgment and alleging fraudulent conveyance under the common law and Conn. Gen. Stat. §52-52a, et seq. See NCCI v. Caro & Graifman, P.C., 3:00CV1925(AHN).

Plaintiff there alleges, among other things, that "Caro's \$800,000 mortgage was executed and recorded just after Gall prepared and submitted his sworn Personal Financial Statement in

followed on the record:

COURT: Is that mortgage shown on this financial statement?

MR. ZIMMERMAN: Afterwards, Your Honor. It's not shown but it was just discussed...

COURT: Why wasn't it disclosed during this colloquy that we've been having for the last two hours?

(Long pause.)

MR. ZIMMERMAN: We went down the list of what's on the page and as of -

COURT: So if I didn't ask the right questions you weren't going to give me the information, is that it?

MR. ZIMMERMAN: I'm sorry, Your Honor, I was not aware of it or I would have. I had no knowledge of this whatsoever.

COURT: And is the attorney who's one of the attorneys on that mortgage sitting there in the courtroom?

connection with his conviction for massive fraud; but yet, Gall failed to disclose the \$800,000 liability or mortgage on his Personal Financial Statement." [3:00CV1925, Doc. #1 ¶12]. Plaintiff further contends that Gall's transfer was a fraudulent conveyance "to avoid paying the plaintiff's and/or to hinder plaintiffs' ability to collect from Gall under the Order of Restitution. Id. at ¶24. NCCI alleges that Caro & Graifman, "as transferee, was aware of the status of Gall's criminal proceedings, and the claims of the plaintiff herein, and further, Caro was aware that the United States Court was about to issue an Order of Restitution against Gall; Caro participated in the fraudulent transfer knowing that the transfer would deplete the assets of Gall available for payment of the Restitution Order to the plaintiffs herein." Id. ¶25.

Defendants have until July 30, 2001 to answer the complaint or file a Motion to Dismiss. There has been no appearance on behalf of Joseph Gall.

MR. ZIMMERMAN: Yes, Your Honor.

COURT: And he didn't disclose it to you or make it known to you?

MR. ZIMMERMAN: No.

COURT: He's been sitting here for two hours, he heard this conversation, he obviously knows what the court is trying to accomplish here this morning. Is he concealing it?

MR. ZIMMERMAN: Not on Mr. Gall or my behalf, Your Honor.

COURT: What's the attorney's name?

MR. ZIMMERMAN: Chase Caro.

COURT: You want to stand up please?

MR. CARO: Yes, Your Honor. I believe Mr. McLaughlin is fully aware of it. I think those are mortgages that are included in the mortgage amounts that were discussed. There were four different New York law firms that sued Mr. Gall and ESA and LFA for legal fees for those litigations. Actually 26. I represented Mr. Gall, ESA, LFA and Tom McLaughlin in suits against Soloman and -

COURT: So you're telling me you've got eight hundred thousand dollars in legal fees coming to you?

MR. CARO: We had - Schneck, Weltman, Sevamel, Solomon received two and a half million. We were at a million and a half, we settled for a half and we took eight hundred thousand. The other people have been paid except Soloman has one matter still outstanding where they are claiming other . . .

[Id. 57-60].

The Court's determination of restitution was memorialized in an order dated July 30, 1997 [3:95CR98, Doc. #229]. Judge Nevas

further found that

Notwithstanding the misleading written and verbal representations of Joseph Gall, which the Court views as a deliberate attempt by Mr. Gall to obscure his true financial status, the Court has determined that Mr. Gall presently has, and will have, ability to make full restitution.

[Doc. #229 at 1]. Subsequently, Judge Nevas denied Gall's motion to vacate the order of restitution. The Order of Restitution was affirmed by the Court of Appeals on April 17, 2000. U.S. v. Stevens, 211 F.3d 1 (2d. Cir. 2000).¹⁹

On April 20, 1998, the Creditors filed a Motion for Order for Transfer of Shares in Aid of Execution. [Doc. #299]. The motion was granted over objection on July 7, 1998. [Doc. #315].

On October 2, 1998, Judge Nevas granted Gall's Motion to Stay the order of execution and the Restitution Order (as to the transfer of shares in ESA and LFA only) pending Gall's appeal. [Doc. #322].

The Court of Appeals affirmed the Order of Restitution on

¹⁹In the motion to vacate and on appeal, Gall argued that "the restitution order [was] invalid because it was entered more than 90 days after his sentencing and because the district court failed to consider statutory factors governing restitution." U.S. v. Stevens, 211 F.3d 1 (2d. Cir. 2000); U.S. v. Gall, No. Crim. 3:95CR98, 1998WL387707 (D. Conn. 1998). The Court notes that Gall did not argue in either motion that it was improper for Judge Nevas to enter a restitution order because there were certain counterclaims and defenses in the civil matters that should have been resolved to "definitively" determine "the actual economic loss to the victims." [See 3:95CR98, Tr. 7/24/97 at 20-21]. Gall was represented by counsel on the motion to vacate and on appeal.

April 17, 2000. U.S. v. Stevens, 211 F.3d 1 (2d. Cir. 2001). On January 8, 2001, the United States Supreme Court denied Gall's petition for writ of certiorari. Gall v. U.S., 121 S. Ct. 836 (2001). Gall's petition for rehearing was denied on March 26, 2001. Gall v. U.S., 121 U.S. 1430 (2001). A Writ of Execution was issued by the District Court on April 4, 2001, commanding the seizure of the balance of Mr. Gall's inmate account toward satisfying the remaining restitution balance of \$13,183,320.83. [3:95CR98, Doc. #350].

The Civil Cases: NCCI and National Union

On July 15, 1998, this Court granted the NCCI plaintiffs and National Union's Motions to Lift Stay. [5:90CV246, Doc. #635; 3:93CV2504, Doc. #144].

On August 27, 1998, the NCCI plaintiffs renewed their Motion for Confirmation of the Special Master's Report [Doc. #645], and Joint Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment, [Doc. #641], and filed a Motion to Dismiss ESA's counterclaims [Doc. #643], and a Motion for Leave to File an Amended Complaint [Doc. #647].

On September 1, 1998, National Union moved for Summary Judgment on all counts of the civil complaint and on ESA's counterclaim. [Doc. #145].

As already set forth in this opinion, on March 3, 1999, this

Court recommended a disposition of both pending civil actions.²⁰ Judge Burns affirmed, ratified and adopted this ruling on October 26, 1999. [Doc. #667, endorsement; Doc. #160, endorsement]. On February 29, 2000, Judge Burns entered an order rescinding the endorsement affirming the March 3 recommended ruling. [5:90CV246; Doc. #682]. On May 17, 2000, Judge Burns granted defendants' Motion for Reconsideration of the endorsement order affirming the March 3 recommended ruling. [3:93CV2504, Doc. #163, endorsement]. On January 26, 2001, this Court filed a recommended ruling on defendants' Motion for Reconsideration. [5:90CV246, Doc. #689; 3:93CV2504, Doc. #171]. On February 29, 2001, Judge Burns affirmed, ratified and adopted the January 26, recommended ruling in both cases. [5:90CV246, Doc. #692; 3:93CV2504, Doc. #174]. On March 8, 2001, Judge Burns vacated her February 29 endorsement affirming and adopting, and referred the case back to this Judge for a hearing on damages. [5:90CV246, Doc. ##696,697; 3:93CV2504, Doc. ##176, 177]. A hearing on damages was held on April 18, 2001. [5:90CV246, Doc. #711; 3:93CV2504, Doc. #192].

DISCUSSION

²⁰Summary judgment was granted to plaintiff in National Union Fire Ins. Co. v. Employee Staffing of America, 3:93CV2504 (EBB) [Doc. #160], and ESA's counterclaims in NCCI v. Gall, 5:90CV246 (EBB) [Doc. #667], were dismissed. The Court further granted NCCI's motion for confirmation of the special master's report [Doc. #645, endorsement] and the motion to amend the complaint. [Doc. #647, endorsement].

It is undisputed that both civil cases have been resolved in favor of the plaintiffs. Liability has been determined. As the rulings indicate, the Court did not consider defendants' counterclaims or defenses on summary judgment in NCCI or National Union. As defendants had not, and currently have not, resolved the issue of legal representation, any attempts to raise these counterclaims or defenses in a effort to reduce or offset damages or challenge the amount of restitution ordered will not be considered. Indeed, ownership of ESA is still unresolved.²¹

Judge Burns has referred these matters for a recommended finding on damages. Plaintiffs in both NCCI and National Union argue that ESA and Gall are collaterally estopped from relitigating issues established by Gall's criminal conviction and the Restitution Order should be conclusive with regard to the damages in the civil cases under principles of res judicata.

The NCCI plaintiffs and National Union contend that the damages suffered by the plaintiffs in the civil cases are identical to the restitution amounts ordered by Judge Nevas against Joseph Gall in the criminal case. Gall was ordered to make restitution to NCCI in the amount of \$5,147,254 and to make

²¹Mr. Caro appeared at the damages hearing with no corporate authority to represent ESA and no corporate authorization or stock certificates or other documentation to establish that Gall and McLaughlin are the sole shareholders or what their ownership interest is in ESA. [4/18/01 Tr. at 3, 6]. During the civil litigation, defendants have been unable to produce ESA's corporate minute book or the stock certificates.

restitution to National Union in the amount of \$5,150,493.

Judge Nevas held extensive hearings to determine restitution on April 4, 1997 and on July 24, 1997. Attorney Chase Caro was present and testified at both hearings. [3:95CR98, 4/4/97 Tr. at 144-79; 7/24/97 Tr. at 58-63]. Plaintiffs argue, and the Court agrees, that this court can take judicial notice that the amount of damages was fully and fairly litigated at the restitution hearings in the criminal action. Gelb v. Massachusetts Mutual Life Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)(collateral estoppel is appropriate if the identical issue was actually litigated and was necessary to support a prior and final judgment, and if there was a full and fair opportunity to litigate). Our legal system holds "that an issue determined in one proceeding normally may not be reexamined." Id.

Plaintiffs for NCCI and National Union maintain that the losses incurred due to defendants' criminal conduct are identical to the damages sought in the civil cases. They also assert that they would present the same testimony and evidence in support of damages in the civil actions. Defendants do not dispute this.

At the sentencing hearing on April 4, 1997, Attorney Frederick Bateman, lead counsel in the NCCI civil case, testified on the amount of losses suffered by NCCI due to the criminal defendants' conduct. [3:95CR98, 4/4/97 Tr. at 5-71]. Mr. Bateman's calculation of losses was based on the stipulation on

damages dated July 14, 1994, attached to the finding by the Special Master entered on October 25, 1994, in the NCCI civil matter. [5:90CV246, Doc. #536].²² Mr. Bateman testified that the NCCI plaintiffs were damaged in the amount of \$5,147,254.

ESA states that it "does not seek to go back on the Stipulation it entered into before the Special Master on July 14, 1994. . . ." Rather, ESA argues that "because Judge Burns vacated the order adopting this Court's recommendation on the Motion for Summary Judgment and on the counterclaims, it appears that damage issues on the counterclaims should be considered for the first time." [5:90CV246, Doc. #714 at 1-2]. ESA also argued at the damages hearing that the stipulation did not waive or prohibit defendants from raising counterclaims and defenses, that it was non-binding so that defendants could argue set-offs and downward departures. [4/18/01 Tr. at 19-21]. Attorney Caro raised this same argument at the sentencing before Judge Nevas. [3:95CR98, 4/4/97 Tr. at 157-160]. The Court finds that defendants had a fair full opportunity to raise this argument before Judge Nevas. As the record reflects, defense counsel failed to raise this argument in their motion to vacate the order of restitution and on appeal.

²²Defendants did not object to the Special Master's report within 15 days as required under D. Conn. L. Civ. R. 28(f). Rule 28(f) states that "[t]he absence of a timely objection shall be sufficient grounds to confirm the master's report." Plaintiff's motion for confirmation of the Special Master's report was granted over objection on March 3, 1999. [5:90CV246, Doc. #645].

At the sentencing hearing, Richard L. Thomas, an employee of Nation Union, testified to the losses suffered by National Union in the amount of \$5,150,493. [3:95CR98, 4/4/97 Tr. at 72-121].²³ Attorney Caro testified that Charles Gruber's affidavit showed that the damages figure was significantly lower. Judge Nevas ruled that Mr. Gruber's affidavit lacked credibility and denied defendants' request to continue the hearing to permit Mr. Gruber to testify. [See 3:95CR98, 4/4/97 Tr. at 165-167]. At the damages hearing on April 18, 2001, Attorney Caro argued again that Mr. Gruber's testimony was necessary but, nevertheless, Mr. Caro failed to bring Mr. Gruber to the damages hearing to testify. [4/18/01 Tr. at 18, 27-30]. The Court finds that defendants had a full and fair opportunity to call Mr. Gruber to testify and to make this argument before Judge Nevas and before the undersigned.²⁴ [See 4/18/01 Tr. at 22-23].

Plaintiffs for NCCI and National Union argue that the order of restitution "should also result in an identical preclusive

²³The Court notes that Attorney Caro's statement that he did not hear Richard Thomas' testimony at the restitution hearing is mistaken. See 3:95CR98, 4/4/97 Tr. at 119, 144-45; 4/18/01 Tr. at 21].

²⁴National Union correctly pointed out at the hearing that, although Mr. Gruber testified on behalf of defendants in the NCCI case in 1994, there was "no evidence at all that Mr. Gruber has anything to say about National Union. There never has been any evidence that he had anything to say about National Union. There's no affidavit from him. There's no testimony about National Union, . . . and [Attorney Caro] shouldn't be allowed to suddenly bring this guy out of the woodwork at the final hour here. . . ." [4/18/01 Tr. at 29].

effect on defendant ESA because of the privity that exists between ESA and the two purported owners of ESA, Joseph Gall and Thomas McLaughlin." [5:90CV246 at 18; 3:93CV2504, Doc. #191 at 12]. "ESA has never contested that ESA was in privity with Joseph Gall or Thomas McLaughlin." [5:90CV246, Doc. #714; 3:93CV2504, Doc. #194; 4/18/01 Tr. at 19]. Accordingly, damages will also enter against ESA.

This Court takes judicial notice of the evidence and witnesses presented before Judge Nevas at the sentencing and restitution hearings and the Court's prior determination of restitution. The determination of restitution is "valid, final and on the merits." 18 Charles Alan Wright, Arthur R. Miller & Edward Cooper, *Federal Practice and Procedure: Jurisdiction* §4427 (2001). Defendants had a full and fair opportunity to litigate damages at the sentencing and restitution hearings. Plaintiff's witnesses were subject to cross-examination by defense counsel; defendants' civil attorney was present and testified. Defendant Gall filed a motion to vacate the restitution order, and appealed. U.S. v. Gall, 211 F.3d 1 (2d Cir. 2000), cert. denied, 121 S.Ct. 836, reh'g denied, 121 S.Ct. 1430 (2001). Plaintiffs have not sought to present any new witnesses or evidence in support of their claim for damages in these civil cases. Finally, defendants do not dispute that ESA was in privity with Gall and McLaughlin. The damages findings of Judge Nevas on restitution are binding on the parties in these civil actions. Defendants are

barred by the doctrine of res judicata from relitigating damages that have already been decided in the criminal proceeding.

CONCLUSION

Accordingly, the Magistrate Judge recommends that judgment shall enter in favor of the plaintiff in National Union Fire Ins. Co. v. Employee Staffing of America Inc., 3:93CV2504(EBB), in the amount of \$5,150,493, and in favor of the plaintiffs in NCCI v. Gall, 5:90CV246(EBB), in the amount of \$5,147,254.

Plaintiff's Motion for Order Awarding Damages in the Amount of \$5,147,254 [**5:90CV246, Doc. #708**] is **GRANTED**. Plaintiff's Motion for Order Awarding Damages [**5:90CV246, Doc. #710**] is **GRANTED** in the amount of \$5,147,254.

IT IS FURTHER RECOMMENDED that the NCCI plaintiffs and National Union seek an order in aid of execution of the restitution order in United States v. Gall, 3:95CR98(AHN), from Judge Nevas. Any conflicting claims to the ownership of the stock in ESA existing between Joseph Gall and Thomas McLaughlin can be presented to Judge Nevas and litigated in that forum.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and

6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989)(per curiam); F.D.I.C. v.

Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

ENTERED at Bridgeport this ____ day of June 2001.

HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE