No. 06-

In The
Supreme Court of the United States

MONTANA BOARD OF INVESTMENTS,

Petitioner,

v.

DEUTSCHE BANK SECURITIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court overrule its decision in *Nevada v. Hall*, 440 U.S. 410 (1979) and reverse a New York Court of Appeals decision holding in a breach of contract case that a Montana state agency's sovereign immunity did not deprive the New York state courts of jurisdiction to hear the case?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Montana Board of Investments ("MBOI"), an agency of the state of Montana, respectfully prays that the Supreme Court issue a writ of certiorari to review the judgment and opinion of the New York Court of Appeals, entered June 6, 2006.

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals is reported at *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 7 N.Y.3d 65, 850 N.E.2d 1140 (2006) (hereafter "*Deutsche II*"). App. 1. The opinion of the Appellate Division of the New York Supreme Court is reported at *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 21 A.D.3d 90, 797 N.Y.S.2d 439 (N.Y. App. Div. 2005) ("hereafter *Deutsche I*"). App. 14. The unreported opinion of the Supreme Court of the State of New York for the County of New York is set forth in the Appendix at 25. The unreported order of New York Court of Appeals Chief Judge Kaye in chambers denying MBOI's request for stay is set forth in the Appendix at 38. The unreported order of the New York Supreme Court, Appellate Division, granting leave to appeal, is set forth in the Appendix at 39.

JURISDICTION

The Judgment of the New York Court of Appeals was entered June 6, 2006, App. 13, and no rehearing was sought. This petition is therefore timely. This Court has jurisdiction under 28 U.S.C. § 1257 because the judgment

of the New York Court of Appeals calls into question rights or privileges of the Petitioner arising under the Constitution of the United States.

The decision of the New York Court of Appeals is a final judgment. It expresses the final determination by the courts of New York regarding their jurisdiction to hear this claim against MBOI, an agency of the state of Montana, rejecting MBOI's jurisdictional defenses based on sovereign immunity. Although under the decision further proceedings with respect to damages are contemplated in the New York courts, the decision constitutes a final judgment for purposes of this Court's jurisdiction. *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-50 (1963) (despite need for further proceedings in lower court, Georgia Supreme Court determination of state court jurisdiction to issue preliminary injunction held final for purposes of petition for certiorari arguing that state court lacked jurisdiction and that NLRB's jurisdiction exclusive.) Moreover, since the New York courts have found MBOI liable and remanded for proceedings related solely to damages, the federal issue will come to this Court eventually since "[n]othing that could happen in the course of the [damage trial], short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), *citing Radio Station WOW v. Johnson*, 326 U.S. 120, 123-24 (1945) (judgment final where federal issue finally resolved and matter remanded for accounting which could not obviate need to decide the federal question).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the provisions of the Eleventh Amendment to the United States Constitution, Article II, § 18 and Article VIII, § 13 of the Montana Constitution, Montana Code Annotated §§ 17-6-201, 17-6-203, 18-1-401, and New York Court of Claims Act §§ 8 and 9. The pertinent portions of these provisions and statutes are set forth in the appendix.

STATEMENT OF THE CASE

1. Factual Background

The Montana Constitution requires the legislature to provide a unified investment program for all state funds. Mont. Const. art. VIII, § 13, App. 41. The legislature responded to this mandate by creating the MBOI as an agency of the state and vesting it with responsibility to manage the unified program. Mont. Code Ann. § 17-6-201(1). App. 42. MBOI manages an investment portfolio for agencies of the state including the university system, the public school trust, state retirement and insurance systems, natural resource trust funds, and other funds. Mont. Code Ann. § 17-6-203. App. 42-43.

On the morning of March 25, 2002, Stephen Williams, a trader for Respondent Deutsche Bank Securities, Inc. ("Deutsche"), contacted Robert Bugni, one of MBOI's investment managers, through the Bloomberg email message service, soliciting a trade or an outright purchase of certain Pennzoil Bonds MBOI held as an investment. After an exchange of email messages, the parties agreed to an outright purchase at the price proposed by Deutsche.

App. 49-51; *Deutsche II*, 7 N.Y.3d at 69-70, App. 2-3; *Deutsche I*, 797 N.Y.S.2d at 441-42, App. 15-16.

When Bugni arrived at his office the following morning a coworker informed him that following the close of business the previous day a public announcement was made that Shell had contracted to acquire Pennzoil. App. 51-52. Bugni believed that Deutsche had induced the sale of the bonds on insider information of the impending announcement, based on the facts that (1) the Pennzoil bonds were rated as "junk" quality bonds on March 25, 2002, (2) Williams had offered more than fair value for the Pennzoil bonds to induce the sale, (3) while Bugni had engaged in minor trading with Williams previously, he had not been in contact with Williams for many months prior to receiving the email message the previous morning, and (4) the acquisition would significantly increase the value of MBOI's Pennzoil bonds, value that would accrue to Deutsche or a client for whom Deutsche was trading rather than MBOI if the transaction were completed. Accordingly, Bugni promptly emailed Williams notifying him of Bugni's belief that the trade was fraudulent and broke the trade. App. 52-53. Deutsche subsequently filed this action in a New York state court alleging that MBOI breached its contract to sell the bonds and seeking damages for the breach.

2. Presentation and Resolution of Federal Claims Below

Well in advance of the deadline for close of discovery, and before MBOI had the opportunity to take any depositions, Deutsche moved for summary judgment as to liability, supported by affidavits from Williams and Keith

Lombardo, Williams' supervisor. App. 60, 64. In both affidavits, Deutsche's witnesses denied any foreknowledge of the pending acquisition of Pennzoil prior to the trade with MBOI, and denied that they were acting on behalf of any other customer in seeking to acquire MBOI's bonds. App. 62, 65, 67, 70. Despite the facts (1) that a dispute as to the adequacy of Deutsche's responses to written discovery existed, and (2) that MBOI had been given the opportunity to depose neither affiants Williams and Lombardo nor any of Deutsche's other witnesses, Deutsche responded to MBOI's motion to compel discovery by cross-moving for a protective order staying all further discovery pending resolution of its summary judgment motion. App. 26.

MBOI raised the defenses of sovereign immunity and comity, in addition to its insider trading defense, in its answer to the complaint in the trial court. App. 74-75. In response to Deutsche's motion for partial summary judgment, MBOI filed a brief and sworn statements and cross-moved for summary judgment in its favor based on the defenses of sovereign immunity and comity as well as the absence of personal jurisdiction due to MBOI's insufficient contacts with the forum state. App. 80; *Deutsche I*, 797 N.Y.S.2d at 442, App. 17. In its briefs supporting its cross-motion for summary judgment MBOI argued both that Montana's sovereign immunity precluded jurisdiction of this matter in the New York courts and, in the alternative, that the New York courts should respect Montana's sovereign immunity as a matter of comity. App. 93-104, 107-12. MBOI also argued that Deutsche's summary judgment motion was premature since discovery had not been completed. App. 88-92.

Following the completion of briefing and oral argument the trial court granted MBOI's motion, holding that

the New York courts lacked personal jurisdiction over MBOI. App. 29-36. The court held that its ruling rendered all other pending motions and arguments, including Deutsche's motions for summary judgment and for stay of discovery and MBOI's cross-motion for summary judgment based on sovereign immunity and comity, to be moot. App. 37.

Deutsche appealed to the Appellate Division of the Supreme Court of New York, First Department, arguing that the trial court had erred in granting MBOI's motion and that Deutsche should be granted partial summary judgment as to liability. *Deutsche I*, 797 N.Y.S.2d at 441, App. 15. MBOI briefed its sovereign immunity and comity defenses as possible alternative grounds for affirmance of the dismissal. App. 114-29. MBOI also objected to Deutsche's assertion that it was entitled to summary judgment, pointing out that MBOI had not been allowed to depose Williams, Lombardo, or any other of Deutsche's witnesses. App. 129-34. The Appellate Division reversed the trial court's judgment in favor of MBOI, rejecting the personal jurisdiction defense and the defenses of sovereign immunity and comity. *Deutsche I*, 797 N.Y.S.2d at 442-44 (personal jurisdiction), 444-45 (sovereign immunity and comity). App. 17-22. The Appellate Division further held MBOI was not entitled to take the depositions of Williams and Lombardo, and that, based on the affidavits alone, MBOI had shown no material factual issue or justification for depositions and Deutsche was entitled to judgment on liability. *Deutsche I*, 797 N.Y.S.2d at 444-45, App. 22-23.

On leave granted by the Appellate Division, App. 39, MBOI appealed to the Court of Appeals of the State of New York. Again, MBOI briefed and argued its defenses of sovereign immunity and comity. App. 138-71, 182-93. In

pressing its sovereign immunity claim, MBOI acknowledged that the Court of Appeals was bound to follow this Court's decision in *Hall* but informed the court of its intention to brief the issue to preserve it for later review in this Court. App. 139 ("Montana recognizes that to the extent the Supreme Court has resolved the sovereign immunity issue adversely to the State's position on federal constitutional grounds in [*Hall*], this Court is bound by that determination. However, Montana must present the issue in this forum to be assured that it is adequately preserved for further Supreme Court review. . . .") MBOI also continued to press its objection to the entry of summary judgment without having been allowed full discovery. App. 171-79, 193-97.

In affirming the Appellate Division, the Court of Appeals recognized MBOI's acknowledgment that it did not ask the Court of Appeals to disregard *Hall*, and accordingly gave no significant consideration to the question of whether the Constitution required New York to respect Montana's sovereign immunity. *Deutsche II*, 7 N.Y.3d at 72, App. 6 ("Before this Court, MBOI does not seriously press its claim of sovereign immunity, recognizing the controlling authority of *Nevada v Hall* (440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 [1979] [states do not have immunity from suit in the courts of other states])").

With respect to comity, the court relied exclusively on its prior decision in *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726 (1980), one of the first cases following the decision in *Hall* to consider the interstate comity question as it applies to state immunity from suit. The Court of Appeals first reiterated the view expressed in *Ehrlich-Bober* that a state's limited waiver of sovereign immunity for purposes of actions in its

own courts is "in the nature of a restriction on venue serving that state's administrative convenience, rather than a limitation on liability serving an essential governmental interest." *Deutsche II*, 7 N.Y.3d at 73, App. 7, *citing Ehrlich-Bober*, 404 N.E.2d at 730-31. The court then held that Montana's interest, thus characterized, was outweighed by "New York's interest in protecting its residents as well as its preeminence as a commercial and financial capital." *Id*. Concluding that this interest has fostered "a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here," *id.*, *quoting Ehrlich-Bober*, 404 N.E.2d at 730-31, the court held that New York courts would not recognize Montana's sovereign immunity as a matter of comity. *Id.*, App. 7-8.

The court also upheld the Appellate Division's holding that MBOI was liable on Deutsche's breach of contract claim and rejected MBOI's argument that entry of judgment was premature because MBOI had been deprived of the opportunity to cross-examine on deposition the witnesses whose affidavits provided the factual basis for the judgment. *Id.* at 73-74, App. 8-9. Judge Read dissented on this issue, pointing out that under federal practice such a ruling in an insider trading case could be entered only after "full discovery." *Id.* at 75-76, *citing SEC v. de Castilla*, 184 F. Supp. 2d 365, 376 (S.D.N.Y. 2002); *SEC v. Hahn Truong*, 98 F. Supp. 2d 1086, 1098 (N.D. Cal. 2000); and *Azurite Corp. v. Amster & Co.*, 844 F. Supp. 929 (S.D.N.Y. 1994), *aff'd*, 52 F.3d 15 (2d Cir. 1995), App. 10-11. Judge Read concluded that the respect due to Montana under the comity doctrine should require the New York courts to afford the benefit of the doubt to MBOI on its claim that

deposition discovery should be allowed. 7 N.Y.3d at 76-77, App. 12.

REASONS FOR GRANTING THE WRIT

Nevada v. Hall's Analysis Of State Sovereign Immunity Is Inconsistent With Subsequent Decisions Of The Court On This Issue. The Court Should Grant The Writ To Resolve This Conflict By Overruling *Nevada v. Hall*.

1. In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court determined as a matter of first impression that a state's sovereign immunity did not prevent it from being sued in the courts of another state. The fact that it took 190 years for this seemingly fundamental issue to reach the Court, *see Hall*, 410 U.S. at 414 ("Despite its importance, the question whether a State may claim immunity from suit in the courts of another State has never been addressed by this Court") is perhaps attributable to the common, perhaps universal, assumption prior to *Hall* that a state could not be sued without its consent in any court save where it has chosen to surrender its immunity as part of the Constitution. *See, e.g., id.* at 417 (recognizing assumption that states are immune from suit in other state courts).

Hall based its holding on the now discredited view that the only sovereign immunity states enjoy under the Constitution is the immunity expressly recognized in the Eleventh Amendment that prevents extension of the judicial power under Article III to actions brought against a state. 440 U.S. at 420-21 ("Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power,

provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case."); *id*. at 424 (Full Faith and Credit Clause does not require California to recognize Nevada's sovereign immunity); *id.* at 425-27 (no such implicit constitutional requirement). As explained below, this Court's later decisions have repeatedly recognized that state sovereign immunity exists as part of the federal constitutional plan, and that it protects states from suits in the absence of their consent, expressed as state policy, agreed to in the plan of the convention, or agreed to in amendments to the Constitution. The Court should grant the petition to resolve the conflict between the Court's more recent cases and *Hall*'s anomalous jurisprudence.

2. *Nevada v. Hall* arose from an automobile accident in California in which an employee of the University of Nevada, a state agency, was at fault. The plaintiffs filed their action against the university in a California court. The university initially moved successfully to quash service of process on the ground that it was not amenable to suit in California because of its sovereign immunity, a ruling that the California Supreme Court reversed. *Hall v. University of Nevada*, 8 Cal.3d 522, 503 P.2d 1363 (1972), *cert. denied*, 414 U.S. 820 (1973).

On remand the university argued that the California courts were obligated by the Full Faith and Credit Clause to apply a Nevada statute that limited the damages for which it might be held liable to $25,000. The trial court rejected that argument and a California jury awarded more than a million dollars in damages, which the California courts sustained on appeal, rejecting the university's Full Faith and Credit argument. *Hall v. University of Nevada*, 74 Cal.App.3d 280 (1977). After review of both

the sovereign immunity and Full Faith and Credit issues, this Court affirmed the judgment, holding that Nevada was not protected by its sovereign immunity from suit in California's courts, and that the Full Faith and Credit Clause did not require California to apply Nevada's statutory damage limits.

This Court's decision in *Hall* rests on the premise that the sovereign immunity of the states is not a matter of constitutional concern, except as such immunity may have entered the Constitution's text through the adoption of the Eleventh Amendment. The Court first reviewed the law of sovereign immunity, concluding that the immunity of one sovereign existed in the courts of another only as a matter of the forum sovereign's forbearance. Such forbearance was, the Court noted, the norm at the time the Constitution was ratified, citing the Court's decision in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) as an example of a case in which the courts of the United States recognized "the common usage among nations in which every sovereign was understood to have waived its exclusive territorial jurisdiction over visiting sovereigns, or their representatives, in certain classes of cases." 440 U.S. at 417. The Court therefore observed:

> The opinion in *The Schooner Exchange* makes clear that if California and Nevada were independent and completely sovereign nations, Nevada's claim of immunity from suit in California's courts would be answered by reference to the law of California. It is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts.

Id. The Court held, however, that this common understanding bound the state of California now only insofar as California chose to respect it as a matter of California law under the doctrine of comity.

The Court based its sovereign immunity holding on the view that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-19. Rather, the discussion at the time of ratification was over whether a state could be sued in the newly created federal courts, a point on which the Constitution as drafted was apparently deficient, given this Court's holding in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793) that a federal court could proceed with such a case, and the prompt proposal and ratification of the Eleventh Amendment to overrule the *Chisholm* decision. Since the constitutional text is devoid of reference to the sovereign immunity of a state in another state's courts, however, the Court held that the Constitution by its own force did not compel California to respect Nevada's immunity from suit. 440 U.S. at 420-21.

The dissenting opinions of Justices Blackmun and Rehnquist, joined by the Chief Justice, took a much different view, one that has turned out to be the majority view, with respect to the source and contours of state sovereign immunity. Justice Blackmun took direct issue with the Court's assumption "that the sovereign-immunity doctrine has no *constitutional* source." *Id.* at 428 (Blackmun, J., dissenting) (emphasis in the original). Instead, he "would find that source not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism." *Id.* at 430. He

summarized his view succinctly. If the framers assumed the immunity of the states in federal court, "how much more must they have reprehended the notion of a State's being haled before the courts of a sister State. The concept of sovereign immunity prevailed at the time of the Constitutional Convention. It is, for me, sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.* at 431.

Justice Rehnquist agreed that the absence of specific mention of state sovereign immunity in the Constitution could not be dispositive:

> Any document – particularly a constitution – is built on certain postulates or assumptions; it draws on shared experience and common understanding. * * * [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan – the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning.

Id. at 433 (Rehnquist, J., dissenting).

Justice Rehnquist then embarked on a historical examination of state sovereign immunity doctrine in an analysis that foreshadowed the Court's current jurisprudence. He highlighted significant historical evidence that immunity from suit was a fundamental aspect of state sovereignty, including references to passages in the Federalist and the

ratification debates of the Constitutional Convention indicating that a sovereign can never be called before a court without its consent. *Id.* at 436, *quoting, e.g., The Federalist No. 81* at 508 (Hamilton) (Lodge ed. 1908) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . .") (emphasis in the original). He then pointed to a number of cases in which the Court itself had proceeded from the same assumption. *Id.* at 437-38, *quoting, e.g. Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission.") (emphasis added). From this evidence, Justice Rehnquist concluded that the states retained their sovereign immunity even in the courts of another state. *Id.* at 443.

3. In decisions subsequent to *Hall* this Court has abandoned *Hall*'s fundamental premise. The Court's jurisprudence now recognizes that a state's immunity from suit without its consent is present in the Constitution as part of the plan of the convention, and that it continues to exist as a matter of federal constitutional law in all of the contours in which it existed in 1789 except to the extent that the states have waived immunity in the plan of the convention or by subsequent amendment to the Constitution. While several decisions undercut *Hall*, two conflict most directly with its premise.

In *Alden v. Maine,* 527 U.S. 706 (1999), the Court considered the question of whether Congress had the constitutional power to subject an unconsenting state to suit in its own courts under the Fair Labor Standards Act. Since the text of the Constitution is silent as to the existence of the sovereign immunity of a state in its own courts, the case allowed the Court to address directly the premise that the Constitution's dealing with state sovereign immunity began and ended with the text of the Eleventh Amendment.

The Court's opinion confronts the issue and rejects *Hall*'s premise virtually in its first paragraph:

> We have . . . sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, ***the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.***

527 U.S. at 713 (emphasis added). The Court's opinion, following the outline of then-Justice Rehnquist's dissent in *Hall*, explains the historical evidence showing that the founding generation assumed the sovereign immunity of the states would survive in the new Constitution, *id.* at

715-24, and the Court's prior holdings that had confirmed their assumption, *id.* at 727-30. The Court reasoned from these premises that the Constitution did not permit Congress under its Article I powers to authorize suits against a state in its own courts. *Id*. at 754.

In reaching its decision, the Court considered and distinguished *Hall.* Deutsche argued below that the Court's treatment of *Hall* in *Alden* constituted a reaffirmance of *Hall*, but a review of the discussion in *Alden* shows that this argument is incorrect. The Court found that *Hall* explicitly posited that a state's claim of sovereign immunity in its own courts presented a distinctly different question from its immunity in the courts of another sovereign. 527 U.S. at 738, *citing Hall*, 440 U.S. at 415-16. Thus, the Court was able to conclude that Maine was immune from suit not because *Hall* was correctly decided but rather because *Hall* decided a completely different question.

The Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) further eroded *Hall*'s foundation. In that case the Court considered whether South Carolina's sovereign immunity protected it from having to answer a complaint seeking injunctive relief and damages brought against the State Ports Authority, an agency of the state, before a federal administrative body. The Court held the action barred by South Carolina's sovereign immunity, again rejecting at the outset the idea that state sovereign immunity was extra-constitutional:

> States . . . entered the Union "with their sovereignty intact." An integral component of that "residuary and inviolable sovereignty," retained by the States is their immunity from private suits.

* * *

> States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government. Nevertheless, the Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity."

535 U.S. at 752 (citations omitted). The Court then specifically addressed and rejected the foundation supporting *Hall*, reiterating that "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.* at 753. Rather, "this Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Id.* at 754.

Since the framers could not have envisioned the existence of federal adjudicative agencies, the Court found direct historical evidence of the role of state sovereign immunity in administrative tribunals to be lacking. *Id.* at 755. Therefore, the Court relied on the "presumption – first explicitly stated in *Hans v. Louisiana*, [134 U.S. 1, 18 (1890)] – that the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Id.* Since the similarities between a civil court trial and adjudication of a contested administrative case before a federal administrative law judge were "overwhelming," *id.* at 756-59, the Court held that the state was protected by

sovereign immunity from compelled participation in the administrative contested case.

The Court also found that subjecting states to an unconsented action before an administrative agency to be inconsistent with the purposes of state sovereign immunity:

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.
>
> * * *
>
> Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.

535 U.S. at 760-61.

4. In the concluding paragraphs of its sovereign immunity analysis, 527 U.S. at 755-56, *Alden* lays out the analytical framework that now guides this Court's state sovereign immunity jurisprudence. First, "sovereign immunity bars suits only in the absence of consent. Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits." 527 U.S. at 755.

Thus, a state may choose, as a matter of its own policy, to consent to be sued. Second, "The States have consented . . . to some suits pursuant to the plan of the Convention. . . . In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Id.*, *citing Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) (collecting cases). This Court's recent decision in *Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006), holding that the states consented in the plan of the convention to suit in bankruptcy court on claims for money, provides another example of state consent to suit in the plan of the convention. Third, states may consent to suit by ratifying amendments to the Constitution, such as the Fourteenth Amendment, that confer authority on Congress to abrogate a state's immunity. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976); *Alden*, 527 U.S. at 756.

Montana has not consented to be sued in any courts except its own on claims for breach of contract. Mont. Code Ann. § 18-1-401 ("The district courts of the state of Montana shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim or dispute arising out of any express contract entered into with the state of Montana or any agency, board, or officer thereof."); *Leaseamerica Corp. v. Montana*, 191 Mont. 462, 468-69, 625 P.2d 68, 71 (1981) (general waiver of state sovereign immunity in article II, § 18 of the Montana Constitution inapplicable to contract claims); *see Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (a state's sovereign immunity "encompasses not merely *whether* it may be sued, but *where* it may be sued.") (emphasis the Court's). Further, the plan of the convention contains no such consent by the states collectively. To the

contrary, as *Hall* itself concedes, at the time of the convention and literally until *Hall* was decided it had been the common assumption that an action against a state in the courts of another state would have been barred by sovereign immunity. *See, e.g., Paulus v. South Dakota*, 58 N.D. 643, 647-49, 227 N.W. 52, 54-55 (1929) (sovereign immunity bars suits against South Dakota in North Dakota court); *Ehrlich-Bober*, 404 N.E.2d at 729 (prior to *Hall* "it was long thought that a State could not be sued by the citizens of a sister State except in its own courts.") As the Court held in *Federal Maritime Commission*, state immunity from suits not contemplated at the time of the framing of the Constitution is presumed. This Court has therefore concluded that on such historical evidence the immunity of the states, and not its waiver, inheres in the constitutional plan.

Accordingly, *Hall*'s holding simply cannot be squared with the Court's subsequent cases. Under the analysis of this Court's more recent cases, MBOI's plea of sovereign immunity should have been respected by the courts of New York as a constitutional command. The Court should grant the writ and overrule *Hall* to resolve this conflict.

5. Principles of stare decisis do not strongly support the continued vitality of *Hall*. While the Court adheres to the rule that a matter once decided should remain decided, it has recognized that stare decisis is not "an inexorable command" and that situations exist in which deviation from this principle is warranted. *See Payne v. Tennessee*, 501 U.S. 808, 827 and n.1 (1991) (collecting cases). First, the Court has recognized that decisions interpreting the Constitution, rather than interpreting a statute, may more readily be revisited given the absence of other practical avenues to correct or modify the Court's holding on such

matters. *Id.* Application of stare decisis is yet more relaxed where the challenged rule is "a procedural rule . . . which does not serve as a guide to lawful behavior," and " [i]t is reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Second, the Court sometimes examines the extent to which its prior decision has fostered confusion or inconsistent application in the lower courts. *Id.* Third, and most importantly for purposes of this case, the Court has repeatedly recognized that it may become necessary to overrule a precedent when its subsequent cases undermine the prior decision's rationale to such an extent as to make its reasoning untenable. *Ring v. Arizona*, 536 U.S. 584, 609 (2002), *overruling Walton v. Arizona*, 497 U.S. 639 (1990) ("[W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton*. . . .") Each of these factors supports a reconsideration of *Hall* in this case.

a. While Deutsche's cause of action sounds in contract, the question in this case arises under the federal Constitution. If the rule in *Hall* is to be changed, only this Court can do so short of an amendment to the Constitution. Accordingly, this case falls in the category of cases in which the Court has frequently observed that stare decisis principles are less binding. *Payne*, 501 U.S. at 827, *quoting Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting) (in such cases "correction through legislative action is practically impossible.")

b. *Hall*'s relegation of state sovereign immunity claims in cases brought in the courts of another state to the whims of the forum state under the doctrine of comity has spawned significant litigation in lower courts leading

to inconsistent decisions. More than 150 state cases have cited *Hall*, with mixed results. This case provides a good example. Like Montana, New York has waived its immunity from suit, but only if the suit is brought in New York. New York has gone a step further, establishing a specialized court, the Court of Claims, and vesting it with exclusive jurisdiction to hear such cases. N.Y. Ct. Claims Act, §§ 8, 9, App. 45-46; *see Morell v. Balasubramanian*, 70 N.Y.2d 297, 300, 514 N.E.2d 1101 (1987) ("Since the adoption of the Court of Claims Act . . . the State has been subject to suit for damages, but only in the Court of Claims").

In this situation, other state courts have viewed the legislative policy of the forum state with respect to ***its*** sovereign immunity as the relevant policy for purposes of comity analysis. *See, e.g., Beard v. Viene,* 826 P.2d 990, 996 (Okla. 1992) (Oklahoma's waiver policy "unequivocally constitutes the public policy of the state" for purposes of defendant state's sovereign immunity claim); *Hernandez v. City of Salt Lake,* 686 P.2d 251, 253 (Nev. 1984) (same); *Mianecki v. District Court,* 658 P.2d 422 (Nev. 1983) (same). This Court approved a similar approach in affirming California's denial of Nevada's sovereign immunity and Full Faith and Credit claims in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 499 (2003) ("The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis."). Ironically, the New York courts have done likewise in other contexts. *Crair v. Brookdale Hospital Medical Center*, 94 N.Y.2d 524, 528-30, 728 N.E.2d 974, 976-78 (2000) (distinguishing *Ehrlich-Bober* and holding Virginia and Maryland notice of claim statutes applicable in tort claim

filed in New York because New York provides a similar notice statute for claims against the state of New York.)

In this case, however, New York has ignored its own statutory policy with respect to sovereign immunity in favor of an ill-defined interest "in protecting its residents as well as its preeminence as a commercial and financial capital." *Deutsche II*, 7 N.Y.3d at 73, App. 7; *Ehrlich-Bober*, 404 N.E.2d at 731 (asserting interest "in maintaining and fostering [New York's] undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world.") Its decision is quite arbitrary. Since *Hall* was decided, there appear to have been a total of three cases brought before New York's appellate courts in which a state has been sued on a financial transaction by a New York plaintiff – *Ehrlich-Bober*, this case, and a third case, *Salomon Brothers, Inc. v. West Virginia State Board of Investments*, 575 N.Y.S.2d 993, *aff'd*, 168 A.D.2d 384, 563 N.Y.S.2d 714 (N.Y. App. Div. 1990), in which the New York courts distinguished *Ehrlich-Bober* and dismissed a proceeding in a New York court in deference to, among other things, an action originally filed in a West Virginia state court. It strains credulity to suggest that Wall Street would collapse, or even wobble, if New York were to decide to apply its own sovereign immunity policy and recognize Montana's sovereign immunity plea here.

Relegation of state sovereign immunity to the unbridled discretion of the forum state also invites the kind of unfairness visited on Montana here by the decision of the New York courts to find Montana liable after, in effect, a bench trial by affidavit following incomplete discovery. *See Deutsche II*, 7 N.Y.3d at 76-77, App. 12 (Read, J., dissenting) (comity should require New York to at least allow

discovery before holding MBOI liable). States may not rely on the protections of the Due Process Clause, and in the absence of some clear constitutional standard, the principles of comity provide no helpful limits to protect states from the unfair actions of their sister states. *See Hall,* 440 U.S. at 426, *quoting Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519, 590 (1838) ("[W]hen . . . the interest or policy of any state requires it to rule, it has but to declare its will, and the legal presumption (of respect for sister states) is at once at an end."); *id.* ("Nothing in the Federal Constitution authorizes or obligates this Court to frustrate [California's] policy out of enforced respect for the sovereignty of Nevada."); *cf. Franchise Tax Board*, 538 U.S. at 499 (the Constitution does not compel the forum state to weigh the effect of its assertion of jurisdiction on the ability of the defendant state to perform "core sovereign functions.")

Thus, state courts are practically unconstrained in their comity decisions and this Court and the state courts remain "truly adrift on uncharted waters," *Hall*, 440 U.S. at 443 (Rehnquist, J., dissenting). There is no reason to think that the application of the comity rule will become more clear, consistent, or fair in the next twenty-five years than it has in the past twenty-five. The "degree of confusion following a splintered decision . . . is itself a reason for reexamining [a] decision." *Nichols v. United States*, 511 U.S. 738, 746 (1994). The vague comity principles left to govern under *Hall* provide no workable standard for state courts. Stare decisis does not preclude reexamination of such a decision.

c. Stare decisis should ultimately yield here because *Hall* has become an obvious outlier in the Court's sovereign immunity jurisprudence. The Court's standard for application of stare decisis in such cases is set forth in

Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989):

> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision.

Cf. Dickerson v. United States, 530 U.S. 428, 443 (2000) (citing *Patterson* standard in reconsidering constitutional decision in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

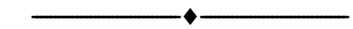
This standard applies precisely to *Hall*. Since *Hall*, it has now become clear as a matter of federal constitutional law that an unconsenting state may not be sued in federal court, *see Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in its own courts under *Alden*, or in a federal administrative agency under *Federal Maritime Commission*. *See also Montana v. Gilham*, 133 F.3d 1133, 1135-38 (9th Cir. 1998) (sovereign immunity protects state from unconsented suit in tribal court). While a state may now be sued in bankruptcy court under *Central Virginia Community College*, the Court allowed the suit only after finding, upon a rigorous historical analysis, that the states consented to such suits through the plan of the convention.

Hall made no such finding with respect to the issue presented here, nor could it have in light of its concession that state sovereign immunity would have been commonly thought by the framers to be a good defense to an action in

another state's courts. If the question were presented as a matter of first impression today, it seems clear that a completely different analysis would govern, one in which the absence of evidence sufficient to overcome the presumption of sovereign immunity would dictate a favorable outcome for the defendant state.

In *Franchise Tax Board*, nineteen states, joined by Puerto Rico, urged the Court to reexamine and overrule *Hall*. *Franchise Tax Board of California v. Hyatt*, No. 02-42, Brief of Amici Curiae States of Florida et al. The Court declined their request, not because, as Deutsche erroneously argued below, the Court wished to reaffirm *Hall,* but rather because the petitioner, California, did not choose to join in their request. 538 U.S. at 497; *see Franchise Tax Board*, Transcript of Oral Argument, 2003 U.S. Trans Lexis 12 at *2-3, *5, *12, *16-17 (California counsel declines to suggest overruling *Hall*). This case squarely presents the issue reserved in *Franchise Tax Board*.

Paraphrasing *Ring*, 584 U.S. at 609, *Hall* and the Court's subsequent cases are irreconcilable; the Court's sovereign immunity jurisprudence cannot be home to both. The Court should overrule *Hall*.



CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the writ issue.

Respectfully submitted,

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August 28, 2006

State of New York

Court of Appeals

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1 No. 71

Deutsche Bank Securities, Inc.,
Respondent,

v.

Montana Board of Investments,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Herbert C. Ross, Jr. and Chris D. Tweeten, for appellant.

Larry H. Krantz, for respondent.

KAYE, CHIEF JUDGE:

This appeal concerns a March 25, 2002 bond transaction between plaintiff Deutsche Bank Securities, Inc. (DBSI) and defendant Montana Board of Investments (MBOI). DBSI, a Delaware Corporation with its headquarters in New York, is (among other things) engaged in trading securities for its own account and for clients. MBOI is a Montana state agency charged with managing an investment program for public funds, the public retirement system and state compensation insurance fund assets. In the 13 months prior to the transaction at issue here, DBSI and MBOI had engaged in approximately eight other bond transactions with a face value totaling over $100 million. These transactions were principally negotiated between Stephen Williams, a director in the Global Market Sales Division of DBSI in New York, and Robert Bugni, Senior Investment Officer-Fixed Income with MBOI in Montana.

On the morning of March 25, 2002, from New York City, Williams contacted Bugni to ask if MBOI was interested in swapping its Pennzoil-Quaker State Company 2009 bonds for DBSI's Toys R Us bonds, or selling the Pennzoil bonds to DBSI for a stated price. Williams communicated with Bugni electronically through the Bloomberg Messaging System, an instant messaging service provided to Bloomberg subscribers. Bugni responded that MBOI was not interested in the swap proposal. Williams countered that the Pennzoil bid looked good but Bugni replied that the bonds "will get a lot tighter" (increase in price) and MBOI wanted to hold onto them. Williams ended the exchange with a simple "THX" (thanks).

Approximately ten minutes later, Bugni, knowing that Williams was in New York, sent him a new instant message asking whether the price originally quoted by Williams applied only to the swap, or if it would be the same for a cash purchase. Bugni indicated that MBOI had $15 million of Pennzoil bonds it might be interested in selling. Williams replied that DBSI would like to purchase $5 million of the bonds outright and could probably "trade the balance with one phone call." Bugni countered with a request that Williams investigate whether all $15 million could be sold at the price he quoted. After a DBSI colleague contacted some of his clients and found that DBSI had a sufficient market for all $15 million, Williams replied to Bugni that DBSI would purchase all $15 million at his quoted price, with a settlement date of March 28, 2002. Bugni agreed, and Williams sent a trade ticket and confirmation of the deal.

Hours after the parties concluded their agreement, on the evening of March 25, 2002, Shell Oil publicly announced

that it had agreed to acquire Pennzoil-Quaker State Company, an announcement that would potentially increase the value of the bonds. The following day, MBOI advised DBSI that it was breaking the trade because it believed the buyer had inside information and the trade was "unethical & probably illegal." As a result of MBOI's cancellation, DBSI purchased the Pennzoil bonds elsewhere, paying an additional $1.6 million.

DBSI then commenced this action in Supreme Court, New York County, alleging breach of contract, and MBOI answered. After limited discovery, DBSI sought summary judgment as to liability as well as dismissal of MBOI's affirmative defenses. MBOI cross-moved for dismissal of the action based on its affirmative defenses of lack of personal jurisdiction, sovereign immunity and comity. Supreme Court granted MBOI's cross-motion to dismiss the complaint for lack of personal jurisdiction and denied DBSI's motion for partial summary judgment. The Appellate Division in a comprehensive opinion unanimously reversed, dismissing MBOI's affirmative defenses and granting DBSI's motion for partial summary judgment as to liability.[1] We now affirm.

Discussion

MBOI contends that there is insufficient basis for the exercise of long-arm jurisdiction and thus the case must be dismissed for lack of personal jurisdiction. Additionally, MBOI urges that dismissal is mandated by principles of

[1] The Appellate Division granted MBOI leave to appeal, certifying to us the following "Was the order of this Court, which reversed the order of Supreme Court, properly made?"

sovereign immunity and comity, and that in any event summary judgment is inappropriate because of triable issues of fact and a need for further discovery. We reject each contention.

Personal Jurisdiction

New York's long-arm statute provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]). By this "'single act statute' . . . proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.,* 71 NY2d 460, 467 [1988]).

As we noted in *Kreutter,* the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it. Thus, we held that "[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in that State" (*id.* at 466). We have in the past recognized 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions (*see e.g. Parke-Bernet*

Galleries, Inc. v Franklyn, 26 NY2d 13 [1970]; *Ehrlich-Bober & Co., Inc. v University of Houston,* 49 NY2d 574 [1980]), and we do so again here.

MBOI should reasonably have expected to defend its actions in New York. As distinct from an out-of-state individual investor making a telephone call to a stock-broker in New York (*see L.F. Rothschild, Unterberg, Towbin v McTamney,* 59 NY2d 651 [1983]), MBOI is a sophisticated institutional trader that entered New York to transact business here by knowingly initiating and pursuing a negotiation with a DBSI employee in New York that culminated in the sale of $15 million in bonds. Negotiating substantial transactions such as this one was a major aspect of MBOI's mission – "part of its principal reason for being" (21 AD3d 90, 95 [2005]). Further, over the preceding 13 months, MBOI had engaged in approximately eight other bond transactions with DBSI's employee in New York, availing itself of the benefits of conducting business here, and thus had sufficient contacts with New York to authorize our courts to exercise jurisdiction over its person.[2] As Professor Siegel has observed, where a defendant "deals directly with the broker's New York office by phone or mail [or email] in a number of transactions instead of dealing with the broker at the broker's local office outside New York, long arm jurisdiction may be upheld" (Siegel, NY Prac § 86, at 152 [4th ed]).

[2] Although we do not consider whether MBOI is "doing business" in New York such that it was "present" here (*see* CPLR 301), we note that, in the year preceding the transaction at issue, MBOI purchased approximately $471 million worth of securities directly from the New York offices of various entities in the securities industry.

In short, when the requirements of due process are met, as they are here, a sophisticated institutional trader knowingly entering our state – whether electronically or otherwise – to negotiate and conclude a substantial transaction is within the embrace of the New York long-arm statute.

Sovereign Immunity and Comity

Before this Court, MBOI does not seriously press its claim of sovereign immunity, recognizing the controlling authority of *Nevada v Hall* (440 US 410 [1979] [states do not have immunity from suit in the courts of other states]). Rather, MBOI asks that, as a matter of comity, we honor its request for immunity from suit here.

Within its own borders, the State of Montana has waived immunity for breach of contract claims (Mont Code Ann § 18-1-404[1][a]), but specified that such claims can be brought only in the district courts of Montana (Mont Code Ann § 18-1-401). MBOI argues that New York should voluntarily defer to the Montana statute and dismiss this action. Our Court, however, has already rejected this argument in a strikingly similar case, *Ehrlich-Bober,* and we see no reason to depart from that precedent.

In *Ehrlich-Bober,* plaintiff, a New York City dealer in municipal and government securities, brought suit in New York state court against the University of Houston, a public institution and agency of the State of Texas, for breach of two reverse repurchase agreements. The University of Houston argued that the case should be dismissed on comity grounds because the relevant Texas statute, permitting suit against the University of Houston, provided that

such suits could be brought only in two specified Texas counties.

In holding that the case should not be dismissed, we explained that comity is not a mandate, but rather a voluntary decision to defer to the policy of another state. We began by comparing the foreign legislation to our own public policy, determining that the Texas law was in the nature of a restriction on venue serving that state's administrative convenience, rather than a limitation on liability serving an essential governmental interest. Contrasting this administrative convenience with New York's interest in protecting its residents as well as its preeminence as a commercial and financial capital, we concluded that our state has "a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here" (*Ehrlich-Bober,* 49 NY2d at 581). Indeed, the ability to access a local forum applying a well-established, commercially sophisticated body of law is certainly as important to New York businesses as are our extensive financial and communications resources.

Here, Montana's legislation serves essentially the same purpose as the Texas statute in *Ehrlich-Bober* – to limit venue rather than liability – and New York's identified interests remain at least as compelling today as in 1980. Thus, we decline to defer to the Montana statute vesting exclusive jurisdiction in the district courts of Montana. We continue to hold that where, as here, a lawsuit arises from a commercial transaction in which another state, or its agent, has knowingly projected itself into New York to take advantage of our financial markets, New York courts should not dismiss the action as a matter of comity. Where a more fundamental governmental interest of another jurisdiction is implicated against a less

compelling New York policy, or where there is no material conflict between the two, our courts of course remain open to reasonable deference to the law of another jurisdiction as a matter of mutual respect and interstate harmony.

Summary Judgment

MBOI argues that partial summary judgment on liability was improperly granted because it presented circumstantial evidence of insider trading raising triable issues of fact and meriting additional discovery.

MBOI, however, has offered no evidence to support its claim of insider trading – its claim begins and ends with the timing of the transaction. The parties' previous trading experience demonstrates that it was not unusual for several months to pass between transactions; that the parties had not traded in the previous six months is thus not proof that on March 25, 2002 DBSI had inside information. Similarly, the record belies any allegation that DBSI pressured MBOI into the transaction. When Bugni expressed his disinterest in the swap, Williams replied "THX" and walked away. Clearly, MBOI bears responsibility for the transaction at issue. Finally, the record does not support MBOI's claim that DBSI agreed to pay a premium for the Pennzoil bonds. On the date of the trade, MBOI itself believed that the bonds would "get a lot tighter," suggesting that DBSI was not overvaluing the bonds or paying a premium to acquire them. Indeed, in the days prior to the public announcement, DBSI sold Pennzoil bonds at a price greater than it agreed to pay MBOI in the trade at issue. Thus, no inference of illegality can be drawn from the agreed-upon price.

The timing of the trade as "evidence" of impropriety does not of itself create a triable issue of fact regarding illegal conduct by DBSI, particularly in light of the affidavits of the DBSI employees who worked on the transaction swearing no foreknowledge of the Shell-Pennzoil announcement. Because MBOI failed to provide any evidentiary basis for its claim, we conclude that the Appellate Division properly granted summary judgment to DBSI, and that the Appellate Division did not abuse its discretion in rejecting MBOI's request for additional discovery.[3] The Appellate Division reasonably concluded that such discovery was unlikely to be productive. To order discovery based solely on a coincidence in timing would be to sanction a dubious quest for a defense.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

READ, J. (DISSENTING IN PART):

Defendant Montana Board of Investments (MBOI) claims that plaintiff Deutsche Bank Securities, Inc. (DBSI) and/or its client traded the Pennzoil Quaker State Company 2009 bonds based on material non-public information, a concededly valid defense to DBSI's breach of

[3] While disagreeing with the Appellate Division, the dissent cannot demonstrate that the court's decision to deny additional discovery was an abuse of discretion (*see* CPLR 3212[f]). MBOI, in short, has not raised the "doubt" that would entitle it to the benefit of full (or fuller) discovery. This is not, as the dissent suggests, a question of comity (dissent, p 4). Comity does not include favoritism in the application of our discovery rules when another state is involved in litigation here.

contract claim. The majority concludes, however, that MBOI presented no evidence of insider trading, apart from a "coincidence in timing," and thus the Appellate Division did not abuse its discretion in rejecting MBOI's request for additional discovery (majority op at 10). I respectfully dissent.

To establish its insider trading defense, MBOI must demonstrate that

> "(1) the tipper possessed material nonpublic information regarding a publicly trade [sic] company; (2) the tipper disclosed this information to the tippee [DBSI] (3) the tippee traded in securities while in possession of the information; (4) the tippee knew or should have known that the tipper had violated a fiduciary duty by providing the information to the tippee; and (5) the tippee benefitted from the disclosure of the information by the tipper"

(*SEC v Franco,* 253 F Supp 2d 720, 726 [SDNY 2003]).

In *SEC v de Castilla* (184 F Supp 2d 365, 376 [SDNY 2002]), the SEC opposed the defendants' motion for summary judgment on insider trading claims. The SEC had no "direct" evidence of the existence of "inside information," but was relying on "the circumstances, the timing, and the nature of the relationships." The court described the case as follows:

> "Prior to the tender offer announced on January 24, 2000, the market had started to move, with trading increasing 110% on January 19 over the previous day's volume and more than doubling over the next two days. Whether this movement resulted from inside information, market perception, or shrewd judgment was the issue

> presented to the SEC. Certainly the circumstantial evidence warranted the investigation. Only after full discovery could [defendant's] knowledge, or lack of it, be determined"

(*id.*).

While the court in *de Castilla* granted summary judgment to the defendants because there was direct evidence that they could not have had inside information at the time of the attacked purchases, this does not detract from the message of the case. Insider trading claims often rely on circumstantial evidence and require "full discovery" (*see also SEC v Hahn Truong,* 98 F Supp 2d 1086, 1098 [SDNY 2000] ["The summary judgment tool filters out cases in which plaintiffs rely entirely upon conclusory assertions and speculative allegations to state a claim for relief. After a respectable period of time for discovery through interrogatories, requests for admissions, requests for the production of documents, and depositions, reliance upon pure speculation is unacceptable. Plaintiffs are required to garner either direct or circumstantial evidence to back up their legal claims" [quotation marks and citation omitted]; *Azurite Corp. v. Amster & Co.,* 844 F Supp 929 [SDNY 1994] [dismissing insider trading claims only after allowing full discovery], *affd* 52 F3d 15 [2d Cir 1995]).

Although "the timing of the trade as 'evidence' of impropriety does not of itself create a triable issue of fact regarding illegal conduct by DBSI" (majority op at 10), MBOI does not rely solely on timing. MBOI presented evidence showing that the price DBSI offered for MBOI's Pennzoil bonds on March 25, 2002 – $94.669 per $100 face value – was above the fair market value for these junk bonds. Specifically, the Bloomberg Professional service's

estimate of fair market value did not exceed $91.81 per $100 face value during the period January 25, 2002 through March 25, 2005.

Moreover, MBOI did not simply invent the insider trading defense after DBSI sued for breach of contract. On March 26, 2002, MBOI immediately informed DBSI that "[Y]ou need to break the trade – the buyer had inside information" and that the trade was therefore "unethical & probably illegal." MBOI certainly may have been mistaken, but it has never had an adequate opportunity to investigate its legitimate suspicions through discovery [*see e.g. Jered Contr. Corp. v New York City Trans. Auth.* [22 NY2d 187, 194 [1968] ["It is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted"]). This is because DBSI did not respond fully to MBOI's interrogatories, and moved for summary judgment while MBOI's demand for depositions was pending.

While comity does not require us to dismiss this claim, comity *does* call upon us to afford the benefit of the doubt to MBOI, a sister state's agency charged with oversight over state pension and other state funds. Based, among other things, on DBSI's representation that it could "trade the balance [of Pennzoil bonds] with one phone call," MBOI believes that DBSI was buying, at least in part, for a client. If DBSI was, indeed, trading for a client, it was clearly premature to dismiss MBOI's insider trading defense based on the affidavits of DBSI's employee and former employee, who could only (and unsurprisingly did) deny their own advance knowledge of Shell Oil Company's acquisition of Pennzoil. In short, MBOI deserves the opportunity, at the very least, to depose these two witnesses and

to obtain meaningful responses to its outstanding discovery demands.

* * * * * * * * * * * * * * * *

Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Kaye. Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and R.S. Smith concur. Judge Read dissents in part in an opinion.

Decided June 6, 2006

JUN 14 2005

SUPREME COURT, APPELLATE DIVISION

First Department, January 2005

David Friedman, J.P.
George D. Marlow
Eugene Nardelli
John W. Sweeny, Jr.
James M. Catterson, JJ.

5185-
5185A

x

Deutsche Bank Securities, Inc.,
Plaintiff-Appellant,

-against-

Montana Board of Investments,
Defendant-Respondent.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered December 19, 2003, which granted defendant's cross motion for summary judgment and denied plaintiff's motion to dismiss certain affirmative defenses and for partial summary judgment; and judgment, same court and Justice, entered January 30, 2004, which dismissed the complaint.

Krantz & Berman LLP, New York (Larry H. Krantz and Wendy Gerstmann of counsel), for appellant.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Herbert C. Ross, Jr. of counsel), for respondent.

MARLOW, J.

Plaintiff Deutsche Bank Securities, Inc. is a Delaware corporation with its principal place of business in New York County. Defendant Montana Board of Investments is a governmental agency organized under the laws of the State of Montana, for the purpose of investing public funds, with its principal place of business in Helena.

In this breach of contract action, we are asked to resolve three issues. First, as a threshold matter, whether this action must be dismissed, as defendant contends, because its New York activities, including the instant transaction, are insufficient to confer in personam jurisdiction on our state courts. Second, assuming jurisdiction, whether the complaint should be dismissed based on the doctrine of sovereign immunity and as a matter of comity. Finally, plaintiff asks this Court to dismiss the affirmative defenses attacking the court's exercise of jurisdiction, and, further, for partial summary judgment on the affirmative defense claiming plaintiff engaged in insider trading.

For the reasons which follow, we find that defendant's activities have subjected it to, and that it is not immune from, New York's jurisdiction and that plaintiff is entitled to partial summary judgment as to liability on its breach of contract claim.

On the morning of March 25, 2002, plaintiff's Director in the Global Market Sales Division contacted defendant's Senior Investment Officer-Fixed Income and offered to swap defendant's Pennzoil Quaker State Company 2009 bonds for plaintiff's Toys R Us bonds or purchase from defendant the Pennzoil bonds at a certain price. The two communicated through the Bloomberg Messaging System which provides instant messaging between subscribers of

the Bloomberg service for the purpose of negotiating and completing trades and dispensing other financial information. During the message exchanges, plaintiff's director was located in New York, and defendant's investment officer was located in Montana.

The two exchanged several messages that morning. Initially, defendant's investment officer indicated he was not interested in a swap, but plaintiff's director responded that the deal "looks good." Defendant's investment officer stated he wanted to hold onto the Pennzoil bonds, and plaintiff's director thanked him. Ten minutes later, defendant's investment officer sent a message to plaintiff's director and re-commenced negotiations by asking whether the quoted price applied only to the swap or if the price would be the same for a cash purchase, and, defendant's investment officer stated that, if so, defendant had $15 million in Pennzoil bonds to sell plaintiff. After conferring with his trader, plaintiff's director responded that plaintiff would pay the agreed price: $5 million outright and plaintiff would be able to trade the balance with one phone call. Defendant's investment officer countered with a request that plaintiff see if all $15 million could be sold at a specified price. After plaintiff's director was informed by his trader that there was a market for all $15 million, he sent defendant's investment officer a message saying that he was interested in purchasing all $15 million at a specific price with a specific settlement date. Defendant's investment officer agreed to the terms, and plaintiff's director sent a trade ticket and confirmation of the deal.

On the evening following the sale, it was publicly announced that Shell Oil entered an agreement to acquire Pennzoil, an event which could affect the value of the Pennzoil bonds. The next day, defendant's investment

officer advised plaintiff's director that defendant was going to break the trade based on its investment officer's belief that plaintiff had traded on insider information. Plaintiff's director and trader claim that neither had any advance knowledge of the Shell/Pennzoil accord.

After defendant refused to honor the deal, plaintiff purchased the bonds elsewhere at an additional cost. Thereafter, in September 2002, plaintiff commenced this action for damages based on defendant's breach of the agreement to sell the Pennzoil bonds. Defendant answered and asserted affirmative defenses of, inter alia, lack of personal jurisdiction, sovereign immunity, and comity. In addition, defendant asserted an affirmative defense of insider information.

After some limited discovery, plaintiff moved for summary judgment as to liability and to dismiss defendant's affirmative defenses. Defendant cross-moved to dismiss the complaint based on lack of personal jurisdiction, sovereign immunity, and as a matter of comity. The motion court granted defendant's cross motion to dismiss the complaint for lack of personal jurisdiction and denied plaintiff's motion for partial summary judgment, implicitly denying plaintiff's motion to dismiss certain affirmative defenses.

We reverse. CPLR 302(a)(1) permits a New York court to exercise personal jurisdiction over a nondomiciliary if the nondomiciliary conducts "purposeful activities" within the state and the claim against the nondomiciliary involves a transaction bearing a "substantial relationship" to those activities (*see Talbot v. Johnson Newspaper Corp.,* 71 NY2d 827, 829 [1988]; *McGowan v. Smith,* 52 NY2d 268, 272 [1981]). This "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction,

even though a defendant never enters New York" as long as the requisite purposeful activities and the connection between the activities and the transaction are shown (*Kreutter v. McFadden Oil Corp.,* 71 NY2d 460, 467 [1988]).

If a court determines that a defendant has transacted business pursuant to CPLR 302(a)(1), then it must further ascertain whether the exercise of jurisdiction comports with due process (*see LaMarca v. Pak-Mor Mfg. Co.,* 95 NY2d 210, 216 [2000]). Due process is not offended "[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there . . . even if not 'present' in that State" (*Kreutter,* 71 NY2d at 466, citing *McGee* [*v.*] *Intl. Life Ins. Co.,* 355 US 220 [1957]). In order to satisfy the minimum contacts requirement, it is essential that there be "some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protection of its laws" (*Hanson v. Denckla,* 357 US 235, 253 [1958]).

While electronic communications, telephone calls or letters, in and of themselves, are generally not enough to establish jurisdiction (*see Liberatore v. Calvino,* 293 AD2d 217, 220 [2002]; *Granat v. Bochner,* 268 AD2d 365 [2000]), they may be sufficient if used by the defendant deliberately to project itself into business transactions occurring within New York State (*see Ehrlich-Bober & Co. v. Univ. of Houston,* 49 NY2d 574 [1980]; *Parke-Bernet Galleries, Inc. v. Franklyn,* 26 NY2d 13 [1970]; *Courtroom Television Network v. Focus Media, Inc.,* 264 AD2d 351 [1999]).

We find under the particular facts of this case that defendant cannot evade transactional jurisdiction by simply claiming that he did not initiate the deal and that he was nowhere near New York when the deal was consummated. Instead, the facts show that defendant's investment officer is a sophisticated trader/investor who successfully negotiated the terms of a multi-million dollar bond transaction on behalf of his employer – a government entity which administers a unified investment program for public funds, public retirement systems, and state compensation insurance fund assets.

Although plaintiff originally initiated contact, defendant rejected the Pennzoil for Toys R Us swap and ended the negotiations. However, 10 minutes later, it was defendant's investment officer who called plaintiff's director and initiated negotiations anew. The record clearly shows that from this point forward defendant's investment officer engaged in very purposeful activity by negotiating a cash deal instead of a swap. Defendant's officer's clear intent in this phase of the parties' negotiations was to complete the security transaction, a goal achieved presumably to his satisfaction as the terms were not challenged at the time the deal was finalized or upon its confirmation.

Defendant is not a mere out-of-state consumer who made a few phone calls to his broker in New York to purchase stock and then reneged (*cf. LF Rothschild, Unterberg, Towbin v. McTamney,* 89 AD2d 540 [1982], *affd* 59 NY2d 651 [1983]). Rather, negotiating major transactions such as the one at bar is a principal aspect of defendant's mission, i.e., part of its principal reason for being. Although the motion court agreed that the service agreement provided to defendant by Bloomberg was furnished to defendant in Montana, it is this service, regardless of

where it is furnished, which enabled defendant to conduct this transaction, in addition to others, with traders in New York City. Indeed, "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase" (*Hanson v. Denckla,* 357 US at 250-251). This increase is justified by the recognition that "[w]ith the growth of national markets for commercial trade and technological advances in communication and travel systems, . . . an enormous volume of business may be transacted within a State without a party ever entering it" (*Kreutter,* 71 NY2d at 466). Thus, due process is not offended where a nondomiciliary "avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there" (*id.*).

We cannot countenance defendant's argument that merely because plaintiff initially approached defendant through modern technology – which enabled defendant to very purposefully conduct a $15 million deal in Montana with a bank in New York – defendant should be allowed to evade jurisdiction because that very technology can technically be viewed as only furnishing services in Montana. Here, the requisite contacts occurred through the Bloomberg Messaging System which allowed defendant very purposefully to negotiate a bond deal with this New York plaintiff without having actually to set foot in New York (*see Courtroom Television Network, supra* [nondomiciliary who takes advantage of New York's unique resources in the entertainment industry has purposefully availed itself of benefits of conducting business within state such that long-arm jurisdiction may be invoked where cause of action arises from that transaction]; *Kulas*

v. Adachi, KK, 1997 US Dist LEXIS 6868, *20-*21, 1997 WL 256957, *7 [SD NY, May 16, 1997] [where communication clearly shows defendant intended to project itself into ongoing New York commerce, such as where defendant directly conducts securities transactions or market activity in New York by phone, do New York courts sustain jurisdiction based only on those communications]). Indeed, "[d]efendant was more than a passive buyer of a New York product or service; it played a 'crucial role' in creating the substance of the transaction" (*Courtroom Television Network,* 264 AD2d at 353). Accordingly, we find that defendant transacted business in this state and that the claim at bar arises from that business activity.

We also reject defendant's contention that, if it is subject to personal jurisdiction, it is nevertheless immune from suit in New York by dint of the doctrine of sovereign immunity and as a matter of comity. The Court of Appeals has recognized that New York has an "interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world" (*Ehrlich-Bober,* 49 NY2d at 581). Thus, there is "a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here" (*id.*). Accordingly, "where an action concerns a wholly commercial transaction centered in New York, and it is one of which the New York courts would otherwise properly have jurisdiction, they are not precluded from the exercise of that jurisdiction by an assertion of governmental immunity as a matter of comity" (*id.* at 582). This analysis is equally applicable to the facts at bar (*see also Morrison v. Budget Rent A Car Sys., Inc.,* 230 AD2d 253 [1997]). Accordingly, the motion court

should have dismissed defendant's affirmative defenses relating to sovereign immunity and comity.

Having dispensed with the threshold procedural issues, we now turn to the substantive question, whether plaintiff is entitled to partial summary judgment on the issue of liability. Plaintiff sustained its burden of proof on the motion by demonstrating that the parties finalized the Pennzoil bonds deal which defendant refused to honor and by submitting affidavits of its director and trader that they had no advance knowledge of the Shell/Pennzoil takeover. Although defendant admits it has no direct evidence that plaintiff had prior knowledge of Shell's contract to acquire Pennzoil, it nonetheless maintains that the timing of this transaction itself raises an issue of fact, or, at the very least, requires further discovery. This reasoning, while at first blush seductive, is upon reflection, circular and easily rejected (*see Azurite Corp. Ltd. v. Amster & Co.,* 844 F Supp 929 [SD NY 1994], *affd* 52 F3d 15 [1995]). "Suspicious trading by itself cannot suffice to warrant an inference that an alleged tipper . . . traded on the basis of material non-public information" (*Securities & Exchange Comm. v. Truong,* 98 F Supp 2d 1086, 1097 [ND Cal 2000]; *see also Securities & Exchange Comm. v. de Castilla,* 184 F Supp 2d 365, 376 [SD NY 2002] [mere existence of scintilla of evidence insufficient; there must be evidence on which a jury could find insider trading]).

Defendant requests further discovery to establish its claim of insider trading. Defendant theorizes that plaintiff must have known of the Shell/Pennzoil takeover and that there must exist more information establishing that plaintiff is lying. However, defendant's "deductive reasoning is supported by no facts," only the bare supposition that plaintiff must have known of the Shell/Pennzoil deal

in light of the timing of its offer to defendant (*Froid v. Berner,* 649 F Supp 1418, 1425 [DC NJ 1986]). That conclusion is wholly speculative and thus insufficient to justify imposing the burden of further discovery (*id.*). Accordingly, the motion court should have dismissed defendant's affirmative defenses based on insider trading and granted plaintiff partial summary judgment as to liability.

Accordingly, the judgment of the Supreme Court, New York County (Richard B. Lowe III, J.), entered January 30, 2004, dismissing the complaint for lack of personal jurisdiction and bringing up for review an order, same court and Justice, entered December 19, 2003, which, to the extent appealed from as limited by the briefs, granted defendant's cross motion for summary judgment for lack of personal jurisdiction and denied plaintiff's motion to dismiss certain affirmative defenses and for partial summary judgment as to liability, should be reversed, on the law, without costs, defendant's cross motion denied, the complaint reinstated, plaintiff's motion to dismiss defendant's affirmative defenses of personal jurisdiction, sovereign immunity, comity, and insider trading and for partial summary judgment as to liability granted, and the matter remanded for further proceedings. Appeal from aforesaid order should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

THIS CONSTITUTES THE DECISION AND
ORDER OF THE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 14, 2005

/s/ Catherine O'Hagan Wolfe
CLERK

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III PART 56
Justice

Deutsche Bank Securities, Inc.	INDEX NO.	603200/02
	MOTION DATE	10/1/03
-v-	MOTION SEQ. NO.	002
Montana Board of Investments.	MOTION CAL. NO.	

The following papers, numbered 1 to ___ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	
Answering Affidavits – Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with the attached memorandum decision

Dated: 12/9/03 /s/ Richard B. Lowe III
RICHARD B. LOWE III
J.S.C.

Check one:
☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

---------- x

DEUTSCHE BANK
SECURITIES, INC.,

Plaintiff,

–against– Index No. 603200/02

MONTANA BOARD
OF INVESTMENTS,

Defendant.

---------- x

Hon. Richard B. Lowe, III

In motion sequence number 002, plaintiff Deutsche Bank Securities, Inc. (Deutsche Bank) moves, pursuant to CPLR 3212, for an order granting summary judgment as to liability in its favor and against defendant Montana Board of Investments (MBI), and dismissing MBI's affirmative defenses. MBI cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the action based on lack of personal jurisdiction and sovereign immunity.

In motion sequence number 003, MBI moves, by order to show cause, for an order, pursuant to CPLR 3124, compelling immediate compliance by plaintiff with defendant's discovery demands. Deutsche Bank cross-moves for an order: (1) pursuant to CPLR 3103, granting a protective order with respect to certain discovery requested by MBI; and (2) pursuant to CPLR 3214 (b), staying all discovery pending a determination of plaintiffs motion for summary judgment.

These motions are consolidated for disposition.

Background

Deutsche Bank is a Delaware corporation with its principal place of business located in New York, New York. MBI is a subdivision of the Montana Department of Commerce. It is a governmental entity organized under the laws of the State of Montana, with its principal place of business in Helena, Montana. MBI is engaged in the business of purchasing and selling securities.

Deutsche Bank commenced this action to recover damages arising from MBI's alleged breach of a contract to sell certain securities to Deutsche Bank. On March 25, 2002, a Deutsche Bank representative located in New York contacted MBI's representative located in Montana to offer to enter into an agreement to swap certain corporate bonds issued by Pennzoil Quaker State Company (Pennzoil) for certain other bonds, or to purchase the Pennzoil Bonds. The Deutsche Bank representative and the MBI representative exchanged the following messages through Bloomberg messaging service:

> [Deutsche Bank:] PENNZOIL . . . YOU MIGHT NOT LIKE THE SWAP, BUT THE BID LOOKS MIGHTY GOOD: I CAN PAY +235 FOR PZL 6 3/4 '09 V 10YR. BA2/BB+ NEG/NEG LACK OF NEW ISSUE IN THE HIGH YIELD MARKET AND ONE BIG BUYER BROUGHT THESE BONDS HERE. I CAN SHOW A LOT OF SWAPS OUT OF THESE: HOW ABOUT
>
> CS: PZL '09 +235 Ba2/BB NEG/NEG
>
> CB: TOY '11 +325 Baa3/BBB+* – STABLE/
>
> [MBI:] PENNZOIL-SWAP DON'T FOLLOW TOY

> [Deutsche Bank] Reply: YOU DO HAVE TO ADMIT THAT THE PENNZOIL BID LOOKS GOOD.
>
> [MBI] Reply: THEY WILL GET A LOT TIGHTER SO NOT LOOKING TO SELL OR SWAP
>
> [Deutsche Bank] Reply: THX
>
> [MBI:] PENNZOIL 2009 IS +235 BID ON SWAP ONLY OR DOES THIS BID WORK FOR CASH? IF SO, FOR WHAT SIZE? WE OWN $15MM.
>
> [Deutsche Bank] Reply: WE WOULD PAY +235 VS 10 YR FOR 5MM OUTRIGHT, AND SHOULD BE ABLE TO TRADE THE BALANCE WITH ONE PHONE CALL.
>
> [MBI] Reply: SEE IF YOU CAN SELL ALL $15MM @ 7.75%
>
> [Deutsche Bank] Reply: AM WORKING.
>
> [Deutsche Bank] BOB – I WOULD LIKE TO BUY 15MM PENNZOIL 6.75 OF 4/1/09 AT A 7.75% = 94.669 FOR 3/28 SETTLE. THANKS
>
> [MBI] Reply: WORKS FOR US
>
> [Deutsche Bank] Reply: HEY, THAT'S GREAT. I CAN USE SOME THIRTY YEARS TOO, IF THIS DOESN'T CLEAN YOU OUT. WILL SEND YOU A B-BERG TICKET.

Affidavit of Stephen M. Williams, Exhibits A-D. The parties entered into an agreement to purchase from MBI $15 million face value of corporate bonds issued by Pennzoil at a total purchase price of $14,698,162.50. The parties agreed to settle the trade by March 28, 2002. Deutsche Bank maintains that on March 26, 2002, MBI

stated that MBI was "going to 'break' the trade," because it suspected that the buyer traded based on some insider information. Deutsche Bank contends that it had to purchase the Pennzoil bonds elsewhere, and was forced to pay approximately $1,615,895 more than the price at which MBI agreed to sell.

MBI asserted affirmative defenses based on allegations that the contract was not enforceable because Deutsche Bank acted on insider information, that this court lacks personal and subject matter jurisdiction, and that this action is barred under the doctrines of sovereign immunity and comity and the Montana statute.

Analysis

In order to defeat MBI's motion to dismiss for lack of jurisdiction, Deutsche Bank must come forward with some evidence showing that jurisdiction could exist. *Mandel v Busch Entertainment Corp.,* 215 AD2d 455, 620 (2d Dept 1995). Deutsche Bank asserts that this court has long arm jurisdiction over MBI. Pursuant to CPLR 302 (a) (1), New York's long-arm statute, New York courts may exercise personal jurisdiction over any non-domiciliary who transacts any business within the state, even if the business activity is limited to a single transaction, so long as that business activity was purposeful and related to the subject matter of the lawsuit. *Firegreen Ltd. v Claxton,* 160 AD2d 409, 410-11 (1st Dept 1990). Whether a particular business activity is deemed to be purposeful, is determined from the totality of the circumstances. *Multi-Modal Intl., Inc. v Anglia North Am., Inc.,* 227 AD2d 600, 600 (2d Dept 1996).

Deutsche Bank argues that MBI conducted purposeful activity within the state. The Deutsche Bank representative

located in New York contacted the MBI representative located in Montana with an offer to swap the Pennzoil Bonds for certain other bonds. MBI's representative rejected this offer, and proposed to sell the Pennzoil Bonds to Deutsche Bank, which Deutsche Bank agreed to purchase. While it is correct that MBI initially rejected Deutsche Bank's offer to swap the securities, and then approximately 15 minutes later negotiated the sale of the Pennzoil Bonds, the important factor for this inquiry is that Deutsche Bank was the one that initiated negotiations with respect to the transaction by contacting the MBI representative in Montana. This negotiation was effectuated through the electronic means of the Bloomberg messaging service. It is undisputed that MBI's representative located in Montana exchanged a number of messages via the Bloomberg messaging service with the representative of Deutsche Bank located in New York. It is also undisputed that MBI's representative knew that Deutsche Bank's representative was located in New York.

New York courts have held that, without more, mere communications via electronic means in the course of contract negotiations between an out-of-state defendant and a New York party are not sufficient to confer jurisdiction of a New York court over the out-of-state defendant. *Barington Capital Group, L.P. v Arsenault,* 281 AD2d 166, 166 (1st Dept 2001) (Five telephone calls by a California resident to a New York plaintiff in order to place orders for the purchase of stock were not sufficient to confer jurisdiction over a California resident); *Granat v Bochner,* 268 AD2d 365, 365 (1st Dept 2000); *L.F. Rothschild, Unterberg, Towbin v McTamney,* 89 AD2d 540, 540 (1st Dept 1982), *affd* 59 NY2d 651 (1983) (Telephone calls by a Pennsylvania resident to plaintiff at its New York office in order to

negotiate the purchase of shares did not constitute purposeful activity for purposes of conferring personal jurisdiction over the Pennsylvania resident).

The following cases relied on by Deutsche Bank, *Kreutter v McFadden Oil Corp.,* (71 NY2d 460 [1988]), *Camel Inv. Ltd. v Transocean Capital* (195 AD2d 533 [2d Dept 1993]) and *China Union Lines, Ltd. v American Mar. Underwriters, Inc.,* (454 F Supp 198 [SD NY 1978]) are distinguishable, because in these cases, out-of-state defendants acted through agents located in New York. There are no allegations that MBI acted in this transaction through a New York agent.

Deutsche Bank argues that it had an ongoing relationship with MBI. MBI states that in the past three years, it engaged in eight securities transactions with Deutsche Bank on five separate occasions. Affirmation of Larry H. Krantz, Exhibit D, at 13. While the aggregate par value of the securities traded in these transactions was $110 million, Stephen H. Williams, the director of global marketing services of Deutsche Bank, describes that he "had done minor trading in the past" with MBI. Affidavit of Stephen H. Williams, ¶ 11. Deutsche Bank correctly argues that the determination depends on the totality of surrounding circumstances, relying on *Schomann Intl. Corp. v Northern Wireless, Ltd.* (35 F Supp 2d 205 [ND NY 1999]). In *Schomann,* defendant, an Iowa corporation, entered into an engineering consulting agreement with a New York telecommunications company, with respect to its acquisition and installation of a cellular telecommunications system in the Republic of Georgia. There, all communications were limited to telephone calls, correspondence, and faxes sent from defendant located in Iowa to the New York plaintiff. The Court held that the duration and the type of

services under the contract evinced an ongoing contractual relationship, and found that, "when viewed prospectively, the contract contemplated a continued business relationship between Defendants and a New York corporation during the completion of the project, which did not involve 'temporary, random, or tenuous relationships with [New York]'" *Schomann,* 35 F Supp 2d at 209 (internal citation omitted).

In the case before this court, even though the parties engaged in transactions on several occasions during the period of more than one year preceding the transaction at issue, it appears that their relationship was random and tenuous. Unlike in *Schomann,* there is nothing that indicates the existence of a forward-looking, ongoing contractual relationship arising from the transaction at issue. Instead, the transaction between the parties was an isolated, complete transaction which did not involve an ongoing performance of services over a period of time, and did not necessitate any subsequent transaction. Also, in *Schomann,* the parties provided for a New York choice of law in the consulting agreement, and the out-of-state defendant prepared and forwarded numerous purchase orders for equipment and invoices to plaintiffs in New York, and made payments drawn on its New York bank account. There is no choice of law provision in this case. Deutsche Bank submits a copy of MBI's corporate resolution in which MBI resolved to open a cash account with Deutsche Bank. Affirmation of Larry H. Krantz, Exhibit A. However, it appears that, despite this resolution, MBI did not open the account with Deutsche Bank. Affidavit of Carroll V. South, ¶ 6. Instead, MBI states that it maintains accounts with a bank located in Massachusetts, and

that all of the amounts for purchase and sale of securities are wired directly from or to that account. *Id*.

Furthermore, even if MBI had an account in New York, a mere existence of a bank account "without any other indicia or evidence to explain its essence, may not form the basis for long-arm jurisdiction under CPLR 302." *Ehrlich-Bober & Co., Inc. v University of Houston,* 49 NY2d 574, 578 (1980) (internal quotations and citation omitted). In *Ehrlich-Bober,* defendant University of Houston, a Texas governmental entity, engaged in 22 separate transactions to purchase and sell securities in the aggregate value of $44 million in a period between November 1976 and March 1977. While these transactions were usually entered into by telephone calls from defendant to plaintiff's New York office, defendant's representative visited plaintiff's office in New York several times, and during one of these visits placed an order to purchase securities while in plaintiff's New York office. Also, the purchase price was delivered to a correspondent bank account in New York, and the bank in New York delivered securities to defendant. The court in *Ehrlich-Bober* found that these facts were sufficient to establish long-arm jurisdiction of the New York court. In contrast, MBI engaged in eight transactions on five separate occasions over a prolonged period of time, MBI's representatives never entered New York to transact business, and MBI maintained its bank account in Massachusetts, and not New York.

Deutsche Bank also relies on *Parke-Bernet Galleries, Inc. v Franklyn* (26 NY2d 13 [1970]). In *Parke-Bernet,* an out-of-state defendant participated in an auction through an open telephone line with an employee of plaintiff informing the defendant in California of the bids being

made, and in turn relaying defendant's bids to the auctioneer who announced them to others in the auction room. The Court held that there was sufficient evidence to indicate either that defendant participated in the bidding through plaintiff's employee as its agent, or that defendant's activity far exceeded the simple placing of an order by telephone because defendant projected himself into the auction room in order to compete in the auction, and the business that he transacted affected others present in the auction room, as well as plaintiff. *Parke-Bernet*, 26 NY2d at 18. The circumstances of the case before this court indicate that MBI did not act through an agent in New York. Also, there are no special circumstances indicating that MBI's communication via Bloomberg Messaging was something more than a simple negotiation for sale of securities, or that it affected anyone other than the parties to the agreement, so as to warrant a finding that MBI projected itself into New York for purposes of transacting business. Thus, Deutsche Bank has failed to show that this court has long arm jurisdiction over MBI.

Deutsche Bank also argues that this court has jurisdiction pursuant to CPLR 301, because MBI is doing business in New York. New York courts may exercise jurisdiction over a non-domiciliary defendant, pursuant to CPLR 301, if the defendant has sufficiently engaged in a continuous and systematic course of doing business in New York that would warrant finding its presence within the state. *Holness v Maritime Overseas Corp.,* 251 AD2d 220, 222 (1st Dept 1998). The inquiry is whether the defendant has a permanent and continuous presence in the state. *Id*; *Yurman Designs, Inc. v A.R. Morris Jewelers, L.L.C.,* 41 F Supp 2d 453, 457 (SD NY 1999). In order to determine presence, courts look at a number of factors,

including: the existence of a bank account or other property, solicitation of business, the existence of an office, and the presence of employees or agents in New York. *Yurman,* 41 F Supp 2d at 457. The relevant facts are defendant's activities at the time of the commencement of the proceeding. *Yurman,* 41 F Supp 2d at 458, n 2. As previously stated, MBI maintains a bank account in Massachusetts. There are no allegations that MBI has any property in New York, or that it is present in the state through the existence of an office, employees, or agents. Deutsche Bank submits a copy of a list maintained by MBI, entitled Active Trading List, containing contact information for certain traders and sales representatives, and a copy of another list containing contact information for broker/dealers. Affirmation of Larry H. Krantz, Exhibit D. Some of these contacts are identified as located in New York. This is a mere compilation of contact information, and is not sufficient to show that MBI engages in a systematic and continuous course of conducting business in New York. MBI states that less than 3% of MBI's purchases of securities was done with New York offices of its counter parties. Affidavit of Carroll V. South, ¶ 3. These transactions with New York counter parties were entered into through electronic means of communication from MBI's office in Montana, and are performed through a correspondence bank account in Massachusetts. *Id*, ¶¶ 3 and 6. Deutsche Bank also states that MBI also purchased services from Bloomberg in New York and Moody's Investors Service. Affirmation of Larry H. Krantz, Exhibits B and C. These agreements, however, are for services to be provided to MBI, and it appears that the services contracted for are furnished to MBI in Montana. Affidavit of Carroll V. South, ¶ 5. Therefore, Deutsche Bank has failed to show that MBI is engaged in systematic and continuing conduct

in New York that constitutes doing business within the state for purposes of jurisdiction of this court. Thus, MBI's cross motion for summary judgment dismissing the action for lack of personal jurisdiction is granted.

MBI also argues that this action must be dismissed under the doctrine of sovereign immunity because, according to section 18-1.401 of the Montana Code, an action against the State of Montana may be maintained only in Montana courts. However, because this action is dismissed for lack of personal jurisdiction over MBI, the court does not need to address this argument at this time.

Conclusion

The motion by Deutsche Bank for summary judgment on liability against MBI is denied, and the cross motion dismissing the action for lack of personal jurisdiction is granted. The motion and the cross motion in motion sequence number 003 are denied as moot.

Accordingly, it is hereby

ORDERED that the motion by plaintiff Deutsche Bank Securities, Inc. for an order granting summary judgment is denied; and it is further

ORDERED that the cross motion by defendant Montana Board of Investments for summary judgment dismissing the action based on lack of personal jurisdiction is granted and the action is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion by Montana Board of Investments for an order compelling immediate compliance by plaintiff with its discovery demands, and the cross motion by Deutsche Bank Securities, Inc. for a protective order and stay of discovery are denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 11, 2003 ENTER:

/s/ Richard B. Lowe III
J.S.C.
RICHARD B. LOWE III

State of New York

Court of Appeals

BEFORE: Chief Judge Judith S. Kaye

Deutsche Bank Securities, Inc.,
Respondent,

v.

Montana Board of Investments,
Appellant.

The Court having issued an opinion in the above-captioned case on June 6, 2006; and

Appellant Montana Board of Investments having represented that it intends to petition the Supreme Court of the United States for a writ of certiorari and having moved for a stay of the proceedings in the action pursuant to 28 USC § 2101(f) pending determination of its anticipated petition for a writ of certiorari;

Upon the papers filed, and after due deliberation, it is ORDERED that appellant's motion be and the same hereby is denied.

/s/ Judith S. Kaye
Hon. Judith S. Kaye
Chief Judge, Court of Appeals

Dated at Albany, New York
June 26, 2006

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on November 22, 2005.

Present – Hon. David Friedman, Justice Presiding,
George D. Marlow
Eugene Nardelli
John W. Sweeny, Jr.
James M. Catterson, Justices.

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Deutsche Bank Securities, Inc.,

Plaintiff-Appellant,

M-3405
Index No. 601803/03

-against-

Montana Board of Investments,

Defendant-Respondent.

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Defendant-respondent having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on June 14, 2005 (Appeal Nos. 5185/5185A),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of this Court, which reversed the order of Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

/s/ Catherine O'Hagau Wolfe
Clerk.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article II, § 18 of the Montana Constitution provides:

> **State subject to suit.** The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

Article VIII, § 13 of the Montana Constitution provides, in pertinent part:

> **Investment of public funds and public retirement system and state compensation insurance fund assets.** (1) The legislature shall provide for a unified investment program for public funds and public retirement system and state compensation insurance fund assets and provide rules therefor, including supervision of investment of surplus funds of all counties, cities, towns, and other local governmental entities. Each fund forming a part of the unified investment program shall be separately identified. Except as provided in subsections (3) and (4), no public funds shall be invested in private corporate capital stock. The investment program shall

be audited at least annually and a report thereof submitted to the governor and legislature.

* * *

Mont. Code Ann. § 17-6-201 provides:

> **Unified investment program – general provisions.** (1) The unified investment program directed by Article VIII, section 13, of the Montana constitution to be provided for public funds must be administered by the board of investments. . . .
>
> * * *

Mont. Code Ann. § 17-6-203 provides:

> **Separate investment funds.** Separate investment funds must be maintained as follows:
>
> (1) the permanent funds, including all public school funds and funds of the Montana university system and other state institutions of learning referred to in Article X, sections 2 and 10, of the Montana constitution. The principal and any part of the principal of each fund constituting the Montana permanent fund type are subject to deposit at any time when due under the statutory provisions applicable to the fund and according to the provisions of the gift, donation, grant, legacy, bequest, or devise through or from which the particular fund arises.
>
> (2) a separate investment fund, which may not be held jointly with other funds, for money pertaining to each retirement or insurance system maintained by the state. . . .

(3) a pooled investment fund, including all other accounts within the treasury fund structure established by 17-2-102;

(4) the fish and wildlife mitigation trust fund established by 87-1-611;

(5) a fund consisting of gifts, donations, grants, legacies, bequests, devises, and other contributions made or given for a specific purpose or under conditions expressed in the gift, donation, grant, legacy, bequest, devise, or contribution to be observed by the state of Montana. If a gift, donation, grant, legacy, bequest, devise, or contribution permits investment and is not otherwise restricted by its terms, it may be treated jointly with other gifts, donations, grants, legacies, bequests, devises, or contributions.

(6) a fund consisting of coal severance taxes allocated to the coal severance tax trust fund under Article IX, section 5, of the Montana constitution. The principal of the coal severance tax trust fund is permanent. If the legislature appropriates any part of the principal of the coal severance tax trust fund by a vote of three-fourths of the members of each house, the appropriation or investment may create a gain or loss in the principal.

(7) a Montana tobacco settlement trust fund established in accordance with Article XII, section 4, of the Montana constitution and Title 17, chapter 6, part 6; and

(8) additional investment funds that are expressly required by law or that the board of investments determines are necessary to fulfill fiduciary responsibilities of the state

with respect to funds from a particular source.

Mont. Code Ann. § 18-1-401 provides:

> **Jurisdiction.** The district courts of the state of Montana shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim or dispute arising out of any express contract entered into with the state of Montana or any agency, board, or officer thereof.

Mont. Code Ann. § 18-1-404 provides:

> Liability of state – interest – costs. (1)(a) The state of Montana is liable in respect to any contract entered into in the same manner and to the same extent as a private individual under like circumstances, except the state of Montana is not liable for punitive damages.
>
> (b) The state of Montana is liable for interest from the date on which the payment on the contract became due. This liability is retroactive, within the meaning of 1-2-109, and applies to any contract in effect or an action pending on a contract on or after May 1, 1997. If the contract is subject to a good faith dispute brought before a government agency or before a court, the interest rate is 10% simple interest each year, whether due before or after a decision by the government agency or court. If the contract does not specify when interest is payable before a decision, interest must be paid at the time provided in 17-8-242(2). If the contract is not subject to a good faith dispute brought before a government agency or

before a court, the interest rate is governed by 17-8-242.

(2) Costs may be allowed as provided in 25-10-711. In all other cases, costs must be allowed in all courts to the successful claimant to the same extent as if the state of Montana were a private litigant. The costs must include attorney fees. The liability for attorney fees is retroactive, within the meaning of 1-2-109, and applies to any contract in effect or an action pending on a contract on or after May 1, 1997.

(3) This section (does not apply to a contract governed by Title 19.

N. Y. Ct. Claims Act, § 8 provides:

Waiver of immunity from liability

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.

N. Y. Ct. Claims Act, § 9 provides, in pertinent part:

Jurisdiction and powers of the court

The court shall have jurisdiction:

* * *

2. To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article. For the purposes of this act only, a real property tax lien shall be deemed to be an interest in real property.

* * *

4. To render judgment in favor of the claimant or the state for such sum as should be paid by or to the state.

* * *

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X

DEUTSCHE BANK SECURITIES, INC.

Plaintiff,

vs.

MONTANA BOARD OF INVESTMENTS,

Defendant.

Index No. 603200/02

IAS Part 56
(Hon. Richard B. Lowe III, J.S.C.)

X

AFFIDAVIT OF ROBERT T. BUGNI IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION

COUNTY OF LEWIS & CLARK)
ss:.
STATE OF MONTANA)

ROBERT T. BUGNI, being duly sworn, deposes and says:

1. I am Senior Investment Officer-Fixed Income of the defendant in the above-entitled action, Montana Board of Investments ("MBOI"). I have been employed by MBOI since 1980, and have held my current position with MBOI since 1987. I have knowledge of the facts set forth below, and make this affidavit (a) in opposition to the motion of plaintiff Deutsche Bank Securities, Inc. ("Deutsche") for summary judgment and (b) in support of MBOI's motion for summary judgment on (i) its affirmative defense that

this Court lacks jurisdiction over MBOI by reason of the fact that MBOI did not transact the business giving rise to this action in the State of New York and (ii) its defense that MBOI, a governmental agency of the State of Montana, should not be subject to unconsented suit in the Court of the State of New York by reason of sovereign immunity. There are numerous factual questions which Deutsche has never answered, which relate to what knowledge Deutsche or for whomever it was acting on March 25, 2002 had in advance about the announcement, made after the close of business on the day of the transaction in issue, that Shell Oil Company had contracted to buy the issuer of the bonds. At the same time, it is undisputed, as set forth herein, that MBOI never set foot in the State of New York in connection with the transaction in issue.

The Background Facts

2. MBOI is part of, and an agency of, the Government of the State of Montana. MBOI was created by Montana state statute and has the sole authority to invest state funds in accordance with state law and Montana's Constitution. MBOI is comprised of nine members appointed by Montana's Governor to staggered four-year terms. MBOI employs a Chief Investment Officer, an Executive Director, and other staff authorized by the legislature of the State of Montana. I am, and have been since my hiring by MBOI in 1980, a member of MBOI's investment staff.

3. MBOI had conducted only a few transactions with Deutsche over the three years prior to the transaction in issue. On each occasion, I handled the transaction for

MBOI. Neither I nor any other employee or representative of MBOI ever entered the State of New York in connection with those transactions or the transaction in issue in this action. MBOI has no office or employees posted in the State of New York, and has never had either an office or employee with offices in the State of New York. My office is, and has been since I began working at MBOI, in Helena, Montana. MBOI never consented to this action being commenced and prosecuted in any court of the State of New York.

The Transaction in Issue

4. The transaction in issue arose as follows. On March 25, 2002 without any advance word from Deutsche, I received a Bloomberg e-mail message on my computer screen in my office in Montana from Stephen Williams, who I understood to be an employee of either Deutsche Bank AG or Deutsche, although I do not appreciate any distinction there maybe between the two. I do not recall receiving any communication from Mr. Williams for many months before then. Mr. Williams proposed either to exchange bonds issued by Toys R Us for bonds held by MBOI, which were issued by Pennzoil-Quaker State Company ("Pennzoil"), specifically bonds issued by Pennzoil due April 1, 2009, or to purchase the latter. A copy of his first March 25, 2002 Bloomberg e-mail message to me, concerning such bonds, is annexed hereto as Exhibit 1 (see also Exhibit A to Williams Aff.). I had never before been contacted by Mr. Williams or any other employee of Deutsche Bank AG or Deutsche in regard to Pennzoil bonds. By Bloomberg e-mail, I replied that MBOI does not follow Toys R Us. Annexed hereto as Exhibit 2 is a copy of that e-mail from me.

5. I was also unclear from Mr. William's message whether Deutsche was more interested in the Toys R Us/Pennzoil swap, or whether he was mainly interested in purchasing Pennzoil bonds outright. Mr. Williams implicitly answered that question several minutes later when he sent me a message in which he tried to convince me that the cash bid on the 2009 Pennzoil bonds in his initial message was worth considering. Specifically, he stated in his reply e-mail on March 25, 2002, "You do have to admit that the Pennzoil bid looks good" (see copy of this e-mail, annexed hereto as Exhibit 3 hereto; see also Exh. B to Williams Aff.). Shortly thereafter (at 8:26 a.m. Mountain time), I sent Mr. Williams a message seeking to clarify whether Mr. Williams would buy MBOI's Pennzoil 2009 bonds for cash rather than a swap for Toys R Us bonds, and, if so, how much (see copy of the e-mail annexed as Exhibit 4 hereto; see also Exh. C to Williams Aff.). At that time, I indicated that MBOI held $15 million in face value of 2009 Pennzoil bonds in its portfolio. Mr. Williams indicated by reply e-mail that he "should be able to trade the balance with one phone call" (see copy of that e-mail annexed as Exhibit 5 hereto), and I asked him by e-mail to see if he would be able to sell all of MBOI's 2009 Pennzoil bonds at a 7.75% yield. (see copy of my e-mail, annexed as Exhibit 6 hereto).

6. Shortly thereafter, again on March 25, 2002, Mr. Williams offered, by Bloomberg e-mail message, to buy all $15,000,000 in par value of MBOI's Pennzoil 2009 bonds at $94.669 per $100 of par value (see Exhibit 7 hereto). I sent the following Bloomberg message in reply, "Works for us". (see Exhibit 8 hereto). Mr. Williams then sought to determine whether we would sell him another issue of Pennzoil bonds that MBOI held as follows: "I can use some thirty

years too, if this doesn't clean you out." (see Exh. E to Williams Aff.). I replied shortly thereafter by Bloomberg e-mail on March 25, 2002 that "[MBOI] don't [sic] own long PZL [Pennzoil]. Only own $10mm 2005 issue." (Williams Aff. at Exh. E). We did not enter into any transaction in connection with the 2005 Pennzoil bonds.

7. Subsequently, at 11:14 a.m. on March 25, 2002, Mr. Williams sent to me a Bloomberg e-mail message entitled "Trade Ticket" for the Pennzoil 2009 bonds held by MBOI (see Exhibit 9 hereto; see also Exh. G to Williams Aff.), stating that settlement of the trade would occur on March 28, 2002. Mr. Williams identified himself in the Bloomberg Message as employed by Deutsche Bank AG rather than Deutsche. The Bloomberg Message read in pertinent part, ":Stephen Williams>Deutsche Bank AG". In fact, the first Bloomberg message that I received from him on the morning of March 25, 2002 also identified Mr. Williams as with Deutsche Bank AG (see Exhibit 1 hereto; see also Exh. A to Williams Aff.). All of the e-mails described above were sent in the morning of March 25, 2002.

8. As of March 25 and 26, 2002, the Pennzoil 2009 bonds owned by MBOI were held for it by Depository Trust Corporation.

9. When I arrived at the offices of MBOI in Helena, Montana on the morning of March 26, 2002, I was advised by MBOI's fixed income analyst that he had just read, that morning, that it had been announced after the close of business on March 25, 2002 that Shell Oil Company ("Shell") had entered into a contract to acquire Pennzoil. Neither I nor, based on my inquiries, any other staff member of MBOI was, before March 26, 2002, aware of any such contract to acquire Pennzoil. The information

given to me on the morning of March 26, 2002 by the MBOI analyst about the announcement was highly material information to me because it would undoubtedly mean that the market value of the Pennzoil bonds that were the subject of the prior day's transaction with Mr. Williams would increase based on that news and based on Shell's subsequent acquisition of Pennzoil. The price that Mr. Williams had offered for MBOI's Pennzoil 2009 bonds on March 25, 2002, i.e., $94.669 per $100 face value, was well above the fair market value for them on that date. Specifically, Bloomberg's estimate of the fair market value of 2009 Pennzoil 2009 bonds was never more than $91.81 per $100 face value during the period January 28, 2002 through March 25, 2002 (see Exhibit 10 hereto). Mr. Williams had offered a significant premium for what were on March 25, 2002 junk grade bonds.

10. Given that (a) Mr. Williams' inquiry to us about acquiring Pennzoil bonds on March 25, 2002 came "out-of-the blue" without any prior inquiry, (b) I had not received any communication from Mr. Williams for many months, (c) Mr. Williams offered an above market price for what were regarded during business hours on March 25, 2002 as junk bonds, and (d) the pubic announcement of the contract to acquire Pennzoil occurred just after the close of business on March 25, 2002, I was convinced that there was advance knowledge on the part of the purchaser of the bonds, or the person for whom it was acting, of the announcement that would be made after the close of business on March 25, 2002 of Shell's contract to acquire Pennzoil.

Accordingly, I sent a Bloomberg e-mail message to Mr. Williams promptly in the morning on March 26, 2002, advising that "[y]ou need to break the trade – The Buyer had inside information!" A copy of that message which was

sent to Mr. Williams at 7:59 a.m., Montana time, on March 26, 2002, is annexed hereto as Exhibit 11. In a subsequent e-mail sent by me at 8:44 a.m., on March 26, 2002, to Mr. Williams, a copy of which is annexed hereto as Exhibit 12, I stated and asked as follows:

"Just Cancel the Trade:

- Trade is unethical & probably illegal
- There was news pending and bidder new [sic] in advance & had prior knowledge of this news
- Bid was too good to be true on spread
- There was no transparency

Who was the bidder?"

11. Mr. Williams never responded to that question. His failure to identify for whom he had been acting on March 25, 2002 reinforced my conclusions about the transaction. In fact, Mr. Williams quickly advised me by Bloomberg e-mail at 10:13 a.m. on March 26, 2002 that he "referred this item to our compliance/ legal department". (Exh. 13 hereto). Even after I received that message, I replied to him at 10:19 am. on the same date, "Who is on the buy side of our trade?" (see Exh. 14 hereto). Mr. Williams replied shortly thereafter at 10:52 a.m., "Bob – This is out of my hands now. Our respective compliance/legal departments have to speak." (Exh. 15 hereto).

12. All my communications with Mr. Williams regarding Pennzoil bonds and the March 25, 2002 transaction, and all my communications with him on March 26, 2002 were conducted only by e-mail through the Bloomberg e-mail system. I was in my office in Montana,

and Mr. Williams was wherever his terminal was located. I have only been to New York once in my life, for a conference approximately 10 years ago.

13. There is no question that, as of the business day on March 25, 2002 and for many months prior to that, the Pennzoil 2009 bonds were rated as low grade or junk bonds. In Standard & Poor's October 31, 2001 edition of its Credit Week Publication (see copy of relevant article annexed as Exhibit 16 hereto), Standard & Poor's, a well respected rating service for debt securities such as corporate bonds, reported that it rated Pennzoil's corporate credit (referred, on the first page of the article, as "Corp credit rtg"), which was understood to cover its outstanding bonds, as "BB+/Negative/__". On the second page of the report, Standard & Poor's advised that "OUTLOOK: NEGATIVE" and explained "PQS's [i.e., Pennzoil's] inability to show some improvement in credit measures over the next six to 12 months could lead to a lower rating." Standard & Poor's BB+/Negative/" rating of Pennzoil corporate bonds is understood in the corporate bond trading industry as indicative of a junk bond. Moody's Investor Service, another widely accepted bond rating service, also had a negative outlook on Pennzoil.

14. On March 26, 2002, after I first informed Mr. Williams by Bloomberg e-mail that the trade must be broken, I found that Moody's announced that it "had placed the ratings of Pennzoil-Quaker State Company . . . under review for possible upgrade, following the announcement by the company of a board-approved agreement under which Shell Oil Company (rated Aal) will acquire Pennzoil-Quaker State at a price of $22.00 per share in cash." Annexed hereto as Exhibit 17 is a copy of Moody's March 26, 2002 announcement. In that announcement,

Moody's stated that its current rating for the Pennzoil 2009 bonds, which was among those Pennzoil bonds under review for upgrade, was Ba2, which is understood in the corporate bond trading industry as a low-grade or junk level bond rating. The Aal rating then assigned by Moody's to Shell was a highly favorable credit rating.

15. Consistent with the news of the announcement that Shell had contracted to acquire Pennzoil, the value of Pennzoil's 2009 bonds increased after March 25, 2002. In fact, following the acquisition of Pennzoil by Shell, Pennzoil made a tender offer to the holders of various of its bonds – including its 2009 bonds – on or about October 2002 and offered to pay about $123.20 for each $100 of par value of the 2009 bonds according to a formula. Annexed hereto as Exhibit 18 is a press release by Pennzoil reported on the PR Newswire on October 28, 2002 on that tender offer. The amount that Mr. Williams offered for the bonds on March 25, 2002, i.e., $94.669 per $100 face value, was $28.533 per $100 of par value of bonds *less* than the offer made subsequently by Pennzoil in October 2002.

16. MBOI has an obligation to the State of Montana to make prudent, fully informed decisions regarding its investments. I regarded it as prudent to advise Mr. Williams that the trade was to be broken under all the circumstances known to me on March 26, 2002, which were: (1) the timing of Mr. Williams' inquires [sic] to me just before the announcement later that day of the contract to acquire Pennzoil, (2) the fact that I had not heard anything from him for many months, (3) that he offered an above market price for what was a junk bond on March 25, 2002, and (4) that he quickly referred the matter out of his hands on March 26, 2002 and, despite my two inquiries,

never advised me on whose behalf he had been acting on March 25, 2002.

17. Mr. Lombardo, who identifies himself as a trader at Deutsche on March 25, 2002, annexes to his affidavit in support of Deutsche's motion as Exhibit A a copy of what he identifies as a March 25, 2002 Bloomberg e-mail message that he sent that morning to sales staff at Deutsche, including Mr. Williams, encouraging them to purchase Pennzoil 2009 bonds. That e-mail is earlier in time than the first e-mail from Mr. Williams to me on that day. In the copy annexed to Mr. Lombardo's affidavit, Deutsche or its counsel removed or redacted certain information. In any event, Mr. Lombardo states in the e-mail, as to Pennzoil 2009 bonds, that "[l]ack of new issue in the high yield market and one big buyer brought these bonds here." [emphasis added]. In the lingo of the bond trading industry, the terminology "one big buyer brought them here" means that a single large purchaser of Pennzoil 2009 bonds asked Deutsche to locate those bonds for sale to him or her. However, I never received any responses to my requests for Mr. Williams to identify the buyer of or bidder for MBOI's Pennzoil bonds. Furthermore, I understand that Deutsche has refused in this action to identify any person who purchased Pennzoil bonds though [sic] it. At this point, we do not know the identity of any such person, including the "one big buyer", and what that person knew in advance of the announcement that Shell had contracted to acquire Pennzoil.

Material Factual Questions
Never Answered by Deutsche

18. Even now, in his affidavit, Mr. Lombardo, who was purportedly giving Mr. Williams directions on March 25, 2002: (a) does not clearly state why there was such an interest in regard to Pennzoil bonds on March 25, 2002, (b) does not identify the "one bigger buyer" of Pennzoil bonds through Deutsche, (c) does not state whether it was the "one bigger buyer" who purportedly agreed to acquire all or part of $5,000,000 in par value of MBOI's $15,000,000 in *par* value of Pennzoil 2009 bonds on March 25, 2002, and (d) does not state whether that "one big buyer" ever told Mr. Lombardo or anyone else at Deutsche about why the buyer was interested in acquiring Pennzoil 2009 bonds. In fact, Deutsche itself nowhere answers these questions.

19. In my view, a number of other significant questions still remain about this matter. I understand that Deutsche has resisted MBOI's efforts, through the discovery process, to get answers to these questions. If Deutsche is truly as "clean" as it suggests it is, Deutsche should answer the following in discovery:

- Who was the "one big buyer" that "brought these bonds here?" Apparently this "one big buyer" had pushed the spread down to a level that Deutsche was bidding +235 basis points off the 10-year U.S. Treasury Note for a junk bond. In my experience as a corporate bond investor since 1987, this type of above market value offer is not normal or rational behavior, unless the buyer had non-public knowledge, and needs to be explained.

- What did the "one big buyer" know, and if that buyer knew something about the Shell/Pennzoil acquisition in advance of the public announcement, did Deutsche come into possession of that information?
- Who was the buyer of the $1 million in par value of Pennzoil 2009 bonds that DB sold on March 22, 2002 at a price of $95.25 per $100 in face value. (See Exhibit 19 hereto, a document produced by Deutsche, at DB 036). Was it the "one big buyer?"
- Was Deutsche long or short on the Pennzoil 2009 bonds prior to bidding for MBOI's 2009 bonds at a price of $94.669 per $100 of par value?
- Who was the buyer or buyers of the $6.575 million of par value that Deutsche sold on March 25, 2002 at a price of $96 per $100 of par value of Pennzoil 2009 bonds? (see Exhibit 19 hereto at DB 036). Was it the "one big buyer?" Did the buyer have any relationship with Deutsche?

20. Unless and until MBOI receives answers to these and other relevant questions, it will have been deprived of fulfilling its duty to the People of Montana to determine what Deutsche or its ultimate buyer knew at the time of the transaction at issue, and will have been unfairly denied answers in discovery to its reasonable questions.

WHEREFORE, it is respectfully requested that Deutsche's motion for summary judgment be denied, and that MBOI's cross-motion for summary judgment dismissing the complaint in this action be granted.

/s/ Robert T. Bugni
ROBERT T. BUGNI

Sworn to before me this
20th day of August, 2003

/s/ Roberta F. Diaz
Notary Public

[SEAL]	ROBERTA F. DIAZ Notary Public for the State of Montana Residing at Wolf Creek, Montana My Commission Expires January 10, 2006

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

DEUTSCHE BANK SECURITIES, INC. Plaintiff, -against- MONTANA BOARD OF INVESTMENTS, Defendant.	Index No. 603200/02 **AFFIDAVIT OF KEITH LOMBARDO IN SUPPORT OF DEUTSCHE BANK SECURITIES INC.'S MOTION FOR SUMMARY JUDGMENT**

Keith Lombardo, being duly sworn deposes and says:

1. I was formerly employed by Deutsche Bank Securities Inc., f/k/a Deutsche Bank Alex. Brown Inc., ("Deutsche Bank"), as a trader primarily in the area of investment grade industrial bonds. I was the trader involved in the agreement with the Montana Board of Investments ("MBOI") for the sale and purchase of the Pennzoil Bonds at issue in this action. I have personal knowledge of the matters set forth herein and submit this affidavit in support of Deutsche Bank's Motion for Summary Judgment.

2. I am currently employed by Credit Lyonnaise located at 1301 Avenue of the Americas, New York, New York.

3. As a trader at Deutsche Bank I generated ideas for the purchase and sale of industrial bonds. Among the industrial bonds I followed fairly regularly at Deutsche

Bank were bonds issued by the Pennzoil Quaker State Corporation.

4. Over the course of 2001 and 2002, Pennzoil Bonds had been steadily downgraded as to their credit rating. I believed that this development created a potential trading opportunity for Deutsche Bank as certain holders of the bonds, who were not inclined to hold such risky securities, might be willing to swap them for higher rated bonds, at a swap price favorable to Deutsche Bank. Accordingly, on March 25, 2002, I suggested to our sales team that it explore with its customers who held Pennzoil bonds whether they were interested in a swap for a higher rated bond, specifically, bonds issued by Toys R Us, which bonds were already owned by Deutsche Bank. Such trading ideas are a routine and commonplace part of my job.

5. As is customary, I sent the idea out to salespeople at Deutsche Bank via Bloomberg Screen. I did this early in the morning. See Exhibit A.

6. Several hours later, Stephen Williams, a salesperson at my desk, advised me that he had a customer interested in selling outright for cash $15 million worth of specified Pennzoil Bonds at specified terms. I was satisfied with the terms and authorized him to purchase $5 million of the bonds at the terms specified by his customer.

7. He communicated with the customer and advised me that the customer wanted to sell all or none of the $15 million bonds and asked me if Deutsche Bank had interest in buying all of them.

8. I determined that Deutsche Bank had interest in some but not all of the bonds. To see if there was other interest in the bonds, I sent a message out to certain

customers of Deutsche Bank via Bloomberg. That message is set forth as Exhibit B, and offered $5 million of specified Pennzoil Bonds at a price slightly higher than the price specified by Williams' customer. Such inquiries are commonplace in my job, and are designed to see if there is a potential for a profit on a particular sale or swap of bonds.

9. After sending out the message set forth in Exhibit B, I found a third party interested in buying $5 million of the Pennzoil bonds on the terms Deutsche Bank offered. See Exhibit C.

10. I responded by entering into an agreement with that third party for Deutsche Bank to sell $5 million worth of specified Pennzoil Bonds at the specified price. See Exhibit D.

11. Once I entered into that agreement with the third party, I yelled over to Williams "you're done." In the industry "you're done" means that I, on behalf of Deutsche Bank, was authorizing Williams to purchase, on behalf of Deutsche Bank, the full $15 million in Pennzoil Bonds from MBOI, at the terms specified by MBOI.

12. At no time during the process of making these trades to either buy or sell Pennzoil Bonds, did I have any knowledge whatsoever, inside or otherwise, about any impending acquisition of Pennzoil by Shell Oil Company. Nor did I have any other information whatsoever about Pennzoil, other than what was readily available to the public. I did not learn about the impending acquisition of Pennzoil by Shell Oil Company until it was announced publicly, late the same day.

/s/ Keith Lombardo
Keith Lombardo

Sworn to before me this
29th day of July 2003

/s/ [ILLEGIBLE] E. BERMAN
Notary Public

[ILLEGIBLE] E. BERMAN
Notary Public, State of New York
No. 4974270
Qualified in Westchester County
Commission Expires November 13, 2004 6

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

DEUTSCHE BANK SECURITIES, INC. Plaintiff, -against- MONTANA BOARD OF INVESTMENTS, Defendant.	Index No. 603200/02 **AFFIDAVIT OF STEPHEN WILLIAMS IN SUPPORT OF DEUTSCHE BANK SECURITIES INC.'S MOTION FOR SUMMARY JUDGMENT**

Stephen M. Williams, being duly sworn deposes and says:

1. I am employed by Deutsche Bank Securities Inc., f/k/a Deutsche Bank Alex Brown Inc., ("Deutsche Bank"). My title is Director in the Global Markets Sales Division.

2. I was the salesperson at Deutsche Bank involved in the purchase of certain bonds of Pennzoil-Quaker State Company ("Pennzoil Bonds") from the Montana Board of Investments ("MBOI"), which sale is at issue in this action. I have personal knowledge of the matters set forth herein and submit this affidavit in support of Deutsche Bank's Motion for Summary Judgment.

3. I have been advised that Deutsche Bank has sued MBOI for breaking its contract to sell Pennzoil Bonds to Deutsche Bank. I am further advised that MBOI admits that it entered into a contract to sell the bonds and admits that it did not deliver the bonds to Deutsche Bank as it

had agreed to do. I am further advised that MBOI claims that it was entitled to break the contract because it claims that Deutsche Bank, at the time of the trade, had advance, inside information about an impending public announcement that Shell Oil Company had entered or would enter into a contract to acquire Pennzoil-Quaker State Company. This allegation is absolutely false.

4. I was one of two individuals involved in the Pennzoil Bond trade deal between Deutsche Bank and MBOI. The other was Keith Lombardo.

5. At no time prior to, or during the course of the trade negotiations with MBOI, did I have any knowledge or information whatsoever, nor had I heard any rumors or discussion, about any possibility that Shell Oil Company had entered, or would enter, into a contract to acquire Pennzoil-Quaker State Company. Nor did Keith Lombardo have any such knowledge, as set forth in his affidavit that I am advised is part of this motion. Accordingly, MBOI's defense has no factual basis and should be rejected. Indeed, this baseless allegation is simply MBOI's attempt to renege on a trade with which it is no longer satisfied.

Background

6. My job responsibility as a salesperson for Deutsche Bank is to sell securities to, or purchase securities from, institutional investors such as insurance companies, pension funds, or, in as in this case, state funds. As a salesperson, I have no independent authority to commit capital of the firm. Rather, in soliciting trades from my customers I rely on authority I receive from Deutsche Bank's traders about trades that are acceptable to Deutsche Bank and the terms of such trades. Based on the

information and authority provided by a Deutsche Bank trader, I present buying or selling opportunities to my customers.

7. Traders, on the other hand, have the authority to commit capital of the firm. They are agents of Deutsche Bank with power to authorize the buying or selling of positions in various stocks, bonds and notes.

8. Those of us who work in the Global Markets division enter into trades on behalf of Deutsche Bank's own account. In other words, we do not act as agents for a buyer or a seller. Rather, we buy and sell as a principal, and attempt to earn a profit based on the "spread" between our buying price and our selling price. Thus, although we may at times be simultaneously buying and selling a particular bond, we are acting as principal on both sides of the transaction, rather than as agent for either the buyer or the seller. Accordingly, we assume the risk of delivery of the bond to the buyer. We also assume the risk of payment to the seller. We do not receive a commission from either the buyer or the seller, but earn a profit solely on the difference between the buying and selling price.

9. Communication in our business is often accomplished through a technology known as The Bloomberg Messaging System. The Bloomberg Messaging System operates like any other electronic mail system where participants can communicate in real time on what is known as a "Bloomberg Screen."

Events of March 25, 2002 – First Series of Communications

10. On March 25, 2002, I received a message, on my Bloomberg Screen, from Keith Lombardo, who was at that time a trader in my Division. He sat at my desk area as well. The message authorized the trade of bonds Deutsche Bank held in "Toys R Us" for Pennzoil Bonds, at specified terms. Receipt of messages like these are ordinary and commonplace in our business. Participants in our business receive hundreds, possibly thousands of such messages daily. Traders often develop ideas for sales which are then communicated to salespersons, such as me, to bring to their institutional customers to the extent the salesperson deems appropriate.

11. When I reviewed the message concerning Pennzoil Bonds, I recalled that MBOI, with whom I had done minor trading in the past, held Pennzoil Bonds. I thought they might be interested in Lombardo's idea of a swap of "Toys R Us" bonds for Pennzoil bonds. I modified Lombardo's message to tailor it to MBOI and sent it, via Bloomberg Messaging, to Robert Bugni, my contact at MBOI. I was aware, from my dealings with MBOI in the past that MBOI held Pennzoil bonds.

12. At that time I had no information whatsoever concerning the possible acquisition of Pennzoil. Nor did I acquire such knowledge at any time during the ensuing transaction. I was merely taking a recommendation that a trader proposed and placing it in the market to see if my customer was interested.

13. My message to Mr. Bugni proposed doing a swap between Pennzoil Bonds and Toy R Us Bonds, on the terms set forth in Exhibit A.

14. Mr. Bugni electronically responded "don't follow Toy," as set forth in Exhibit B. In this industry that means that he didn't have any interest in Toys R Us Bonds because it is not a company that MBOI follows.

15. I responded, as set forth in Exhibit B, "you do have to admit that the Pennzoil Bid looks good."

16. Bugni responded that MBOI thought the Pennzoil bond would get a lot tighter (in other words would do better in the future) so he was not looking to swap Pennzoil Bonds at this time. See Exhibit B.

17. This being one of hundreds of similar type communications in which I engage over the course of a week, I assumed that the deal wasn't going to happen and there would be no further communication on the subject. I had no particular interest in pushing the sale if my customer wasn't interested in it.

Events of March 25, 2002 – Second Series of Communications; The Transaction is Completed

18. Approximately 10 minutes later, however, Bugni resumed contact with me via Bloomberg Screen. As set forth in Exhibit C, he questioned whether Deutsche Bank was only interested in a bond swap or whether it might also be interested in buying the Pennzoil bonds outright for cash. He advised me that MBOI had $15 million in specified Pennzoil Bonds that it was looking to sell.

19. Since salespeople do not make these kinds of decisions, I communicated with Keith Lombardo about the request. Based on Lombardo's authorization, I advised Bugni that we would be interested in a cash deal and that Deutsche Bank would be interested in purchasing $5

million in Pennzoil bonds, at specified terms. I also advised him that Deutsche Bank might be able to buy the balance of the $15 million in bonds "with one phone call." Exhibit C.

20. Bugni responded that I should see if I could sell the whole $15 million held by MBOI, at specified terms. Exhibit C. I passed that information on to Keith Lombardo.

21. Shortly thereafter, Lombardo, who sits in my area, yelled over "you're done," meaning I had authority to enter into the $15 million transaction proposed by MBOI.

22. After getting this authorization from Lombardo, I again communicated with Bugni via Bloomberg Screen. In that communication I formally offered to buy $15 million in Pennzoil bonds from MBOI, at the terms it had designated, with a settlement date of March 28, 2002. See Exhibit D.

23. Bugni responded by saying "works for us," meaning that our offer was accepted. Exhibit D. I responded to Bugni that I would send a "Bloomberg Ticket" confirming the trade, as is customary. He then provided me with the contact person at MBOI who would be settling the trade, and the specific account information as to where the bonds were held at MBOI. This information was necessary to carry out the settlement process. Exhibit D.

24. After confirming that deal, I went on to advise Bugni that Deutsche Bank was also interested in "some thirty years too," meaning some 30 year Pennzoil Bonds. See Exhibit E. Lombardo had advised me of that in the interim.

25. Bugni responded that MBOI did not "own long Pennzoil" (meaning MBOI did not have 30 year bonds) but did have $10 million in a 2005 bond issue. See Exhibit E.

26. However, after checking with Lombardo, I responded that Deutsche Bank was not interested in purchasing the 2005 Pennzoil Bonds, but would try to find a buyer if MBOI was interested in selling at the proposed terms. Exhibit F.

27. Later that day I sent to Bugni a trade ticket (Exhibit G) and the confirmations for the purchase of $15 million in Pennzoil '09 Bonds. Exhibit H.

Shell Announces the Acquisition of Pennzoil and MBOI Reneges on the Contract

28. On the evening of March 25, 2002, while watching the financial news, I learned that Shell Oil Company had announced its intention to acquire Pennzoil. I had no prior knowledge of this announcement whatsoever. However, it is commonplace in this line of work for financial news of one sort or another to affect the price of bonds and the values of trades.

29. On March 26, 2003, I received a message via Bloomberg from Bob Bugni advising me that "you need to break the trade – the buyer had inside information." See Exhibit I.

30. I replied to Bugni that I was trying to contact him by phone, but couldn't reach him. See Exhibit I.

31. Bugni responded that I should just "cancel the trade" claiming that it was "unethical and probably illegal." Exhibit I.

32. I knew MBOI's claim had no factual basis. However, in accordance with Deutsche Bank's internal procedures, I immediately referred this matter to the Legal/Compliance Department to handle the situation and had no further communication with Mr. Bugni on the subject. Exhibit J.

33. For the reasons set forth above, MBOI had no legitimate basis on which to break the trade. Deutsche Bank had no inside information and is entitled to receive the benefit of the trade it honestly negotiated and to which MBOI agreed.

/s/ Stephen Williams
Stephen Williams

Sworn to before me this
24 day of July 2003

/s/ Aurea Gomez
Notary Public

AUREA GOMEZ
NOTARY PUBLIC, STATE OF NEW YORK
NO. #01GO6035963
QUALIFIED IN QUEENS COUNTY
COMM. EXP. 1/10/2006

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

x

DEUTSCHE BANK SECURITIES, INC.,

Plaintiff,

vs.

MONTANA BOARD OF INVESTMENTS,

Defendant.

x

Index No. 603200/02

ANSWER

Defendant Montana Board of Investments ("MBOI"), by its counsel, Olshan Grundman Frome Rosenzweig & Wolosky LLP, as and for MOBI's Answer to the Complaint filed by plaintiff Deutsche Bank Securities, Inc. ("Plaintiff") in the above-entitled action, alleges as follows:

1. MBOI admits, upon information and belief, the allegations in paragraph 1 of the Complaint.

2. With respect to the allegations contained in paragraph 2 of the Complaint, MBOI admits that it is a part of the Department of Commerce of the State of Montana, that MBOI is part of, and an agency of the government of the State of Montana, that MBOI has its principal offices at 2401 Colonial Drive, 3rd Floor, Helena, Montana 59601, and that MBOI, *inter alia*, engages in the purchase and sale of securities, and MBOI otherwise denies having knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the Complaint.

3. Denies the allegations contained in paragraph 3 of the Complaint, except admits that, on March 25, 2002, a person, through a message reflecting the name Deutsche Bank AG, offered to buy certain bonds issued by Pennzoil-Quaker State Oil Company from MBOI on the terms set forth in that certain message dated March 25, 2002 and respectfully refers the Court to that message for the terms set forth therein.

4. With respect to the allegations contained in paragraph 4 of the Complaint, MBOI admits that it agreed on March 25, 2002 to sell certain bonds issued by Pennzoil-Quaker State Company on certain terms, denies that the transaction whereby, in response to the message referred to in paragraph 3 in this Answer, MBOI agreed on March 25, 2002 to sell certain bonds issued by Pennzoil-Quaker State Company (hereinafter referred to as the "Subject Transaction") was an enforceable contract, denies having knowledge or information sufficient to form a belief as to whether the entity which was a party to the Subject Transaction with MBOI was Plaintiff or Deutsche Bank AG, and affirmatively alleges that the Subject Transaction was either void or voidable at MBOI's election, which in the latter case it so elected.

5. MBOI denies the allegations in paragraph 5 of the Complaint, except admits that on March 26, 2002 it informed Plaintiff and Deutsche Bank AG, that "you need to break the trade" and that MBOI intended not to consummate the Subject Transaction because of MBOI's belief that it was void or voidable, which in the latter case it so elected.

6. MBOI denies the allegations in paragraph 6 of the Complaint, and MBOI affirmatively alleges that it was

under no obligation to consummate the Subject Transaction for the reasons set forth in paragraphs 4 and 5 herein and in the Seventh and Eighth Affirmative Defenses set forth herein.

7. With respect to the allegations contained in paragraph 7 of the Complaint, MBOI denies that, under the circumstances, it had any commitment to Plaintiff, and otherwise MBOI denies having knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Complaint.

8. With respect to the allegations contained in paragraph 8 of the Complaint, MBOI repeats and realleges its above responses to paragraphs 1 through 7 of the Complaint as if fully set forth herein.

9. MBOI denies the allegations in paragraph 9 of the Complaint.

10. MBOI denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint as, *inter alia*, said paragraph alleges a legal conclusion.

11. MBOI denies having knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Complaint.

12. MBOI denies the allegations in paragraphs 12 and 13 of the Complaint.

AS A FIRST AFFIRMATIVE DEFENSE

13. Under Montana law, actions against state agencies such as MBOI are subject to the exclusive jurisdiction of the district courts of the State of Montana. This

Court should respect the exclusive jurisdiction of the Montana courts on the basis of comity, in the interest of harmonious interstate relations, and in order to give full faith and credit to applicable Montana law.

AS A SECOND AFFIRMATIVE DEFENSE

14. The judgment sought by Plaintiff in this action will adversely affect, and interfere with ability of the State of Montana to discharge its sovereign responsibilities. Accordingly, MBOI, as an agency of the State of Montana, is immune from suit in the Courts of the State of New York.

AS A THIRD AFFIRMATIVE DEFENSE

15. Irrespective of the affects and interference identified in paragraph 14 herein, MBOI, as an agency of the State of Montana, possesses immunity from unconsented suit in the courts of the State of New York (or any other state), which immunity is an essential and constitutionally-implicit component of the State of Montana's status as a State of the Union.

AS A FOURTH AFFIRMATIVE DEFENSE

16. At all times relevant herein, MBOI was not doing business in the State of New York, and, as a consequence thereof, this Court lacks personal jurisdiction over MBOI.

AS A FIFTH AFFIRMATIVE DEFENSE

17. The Subject Transaction at issue in this action did not constitute either (a) the transaction of business in,

or (b) a contract to supply goods or services in the State of New York for purposes of CPLR § 302(a)(1), and, as a consequence thereof, this Court lacks personal jurisdiction over MBOI.

AS A SIXTH AFFIRMATIVE DEFENSE

18. This Court lacks personal jurisdiction over MBOI.

AS A SEVENTH AFFIRMATIVE DEFENSE

19. Upon information and belief, the alleged agreement between MBOI and the Plaintiff was in violation of public policy, and is thus unenforceable.

AS AN EIGHTH AFFIRMATIVE DEFENSE

20. Upon information and belief, before the Subject Transaction occurred, Plaintiff and/or the third party, if any, for whose account Plaintiff was acting had received advance, inside information (i) about an impending public announcement that Shell Oil Company ("Shell") had entered into a contract to acquire Pennzoil-Quaker State Company ("Pennzoil") or (ii) that Shell would enter into, or had entered into, such a contract.

21. Upon information and belief, at the time of the Subject Transaction, as a result of the advance, inside knowledge alleged in paragraph 20 above, Plaintiff and such third party, if any, were under a duty to abstain from trading in securities, including any bonds, issued by Pennzoil.

22. In violation of their obligations under the securities laws of the Untied States, including Section 10(b) of the Securities Exchange Act of 1934 and Rule l0b-5 promulgated thereunder, and in violation of applicable New York State law, including the Martin Act, Plaintiff and such third party, if any, induced the Subject Transaction.

23. At the time Plaintiff induced the Subject Transaction, MBOI was unaware that there would be a public announcement later on March 25, 2002 of an agreement by Shell to acquire Pennzoil and was unaware of any such agreement. As a result of that public announcement, the value of the Pennzoil bonds which were the subject of the Subject Transaction increased following the public announcement.

24. Under the circumstances, under applicable federal and state law, MBOI was entitled to void and cancel the Subject Transaction, and Plaintiff is barred from trying to enforce the Subject Transaction or seeking any recovery with respect to it.

AS A NINTH AFFIRMATIVE DEFENSE

25. MBOI repeats and realleges the allegations in paragraph 23 of this Answer.

26. Upon information and belief, at the time of the Subject Transaction, Plaintiff and/or the third party, if any, for whose account Plaintiff was acting had advance, non-public information (i) about an impending public announcement that Shell had entered into a contract to acquire Pennzoil or (ii) that Shell would enter into, or had entered into, such a contract.

27. As a result of the superior knowledge that Plaintiff and/or the third party, if any, for whose account Plaintiff was acting, Plaintiff was under an obligation to disclose that information to MBOI or abstain from seeking to purchase any Pennzoil bonds from MBOI, and Plaintiff breached that obligation.

28. As a result of the foregoing, Plaintiff is barred from trying to enforce the Subject Transaction or seeking any recovery with respect to it.

AS A TENTH AFFIRMATIVE DEFENSE

29. MBOI repeats and realleges the allegations in paragraph 23 of this Answer as though fully set forth herein.

30. Assuming, *arguendo,* that Plaintiff or the third party, if any, for whose account Plaintiff was acting did not have the information described in paragraph 26 above at the time of the Subject Transaction, Plaintiff is barred from enforcing the Subject Transaction or seeking recovery with respect to it under the doctrine of mutual mistake.

AS AN ELEVENTH AFFIRMATIVE DEFENSE

31. MBOI repeats and realleges the allegations in paragraphs 23 and 26 in this Complaint.

32. Plaintiff is barred from seeking enforcement of the Subject Transaction or any recovery with respect to it by the doctrine of unilateral mistake.

AS A TWELFTH AFFIRMATIVE DEFENSE

33. Assuming, *arguendo,* Plaintiff suffered any compensable damages, Plaintiff failed to mitigate or adequately mitigate its damages.

WHEREFORE, Defendant MBOI requests judgment as follows:

1. Dismissing Plaintiff's Complaint with prejudice;

2. Denying Plaintiff's request for interest, costs and expenses; and

3. Granting MBOI such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October 23, 2002

OLSHAN GRUNDMAN FROME ROSENZWEIG & WOLOSKY LLP
Attorneys for Defendant
Montana Board of Investments

By: /s/ Herbert C. Ross, Jr.
Herbert C. Ross, Jr.
505 Park Avenue
New York, New York 10022
Telephone No.: (212) 753-7200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DEUTSCHE BANK SECURITIES, INC., Plaintiff, vs. MONTANA BOARD OF INVESTMENTS, Defendant.	:	Index No. 603200/02 (IAS Part 56, Justice Richard B. Lowe III)

NOTICE OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT

PLEASE TAKE NOTICE that, upon the complaint and answer in the above-entitled action, copies of which are annexed as, respectively, Exhibits A and B to the Affirmation of Herbert C. Ross, dated August 20, 2003; upon said affirmation of Herbert C. Ross, and the exhibits thereto; and upon the affidavit of Robert T. Bugni, sworn to August 20, 2003, and the exhibits thereto, which are also submitted in opposition to Plaintiff's motion for summary judgment; and upon "Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment", and all prior proceedings had herein, Defendant will cross-move this Court upon the return date of Plaintiff's motion for summary judgment at Room 130, at the New York County Courthouse, 60 Centre Street, New York, New York 10007, on September 16, 2003 at 9:30 a.m., or as soon thereafter as counsel may be heard

for an order, pursuant to CPLR 3212, dismissing the complaint in this action in its entirety because (a), despite Plaintiff's bald allegation otherwise, Defendant did not transact the business giving rise to this action in the State of New York, and this Court thereby lacks jurisdiction over the person of Defendant, and (b) Defendant, as an agency of the government of the State of Montana, is immune from this unconsented suit in the State of New York, and such other and further relief for Defendant as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to stipulation of the attorneys for the parties hereto, Plaintiff is to serve any papers in opposition to the cross-motion by hand on the undersigned attorneys for Defendant no later than the close of business on September 10, 2003.

The above-entitled action is for alleged breach of contract.

A preliminary conference has been held.

Dated: New York, New York
August 20, 2003

OLSHAN GRUNDMAN FROME
ROSENZWEIG & WOLOSKY LLP

By: /s/ Herbert C. Ross
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X

DEUTSCHE BANK SECURITIES, INC.,

Plaintiff,

vs.

MONTANA BOARD OF INVESTMENTS,

Defendant.

Index No. 603200/02

IAS Part 56
(Hon. Richard B. Lowe III, J.S.C.)

X

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This memorandum is submitted, on behalf of Defendant Montana Board of Investments ("MBOI"), (a) in opposition to Plaintiff's motion for summary judgment and (b) in support of MBOI's cross-motion for an order pursuant to CPLR 3212, dismissing the complaint and this action because of (i) the State of Montana's sovereign immunity from unconsented suit outside of Montana, and (ii) MBOI, an agency of the government of the State of Montana, did not transact the business giving rise to this action in the State of New York, as alleged by Deutsche, and thereby the Court lacks personal jurisdiction over MBOI.

The summary judgment motion of Plaintiff Deutsche Bank Securities, Inc. ("Deutsche") should be denied as (1) genuine issues of material fact, requiring trial, preclude grant of the motion both with respect to liability on

Deutsche's breach of contract claim, and MBOI's affirmative defenses, some of which Deutsche nowhere addresses on its motion, (2) under CPLR 3212(f), MBOI should be given the opportunity to take deposition discovery and have more complete responses to its interrogatories and notice for discovery and inspection of documents, and (3) Deutsche through its delays and timing of its motion has obviously tried to prevent that deposition discovery from being taken and considered on this motion. Indeed, Deutsche's motion is premature: (1) the Preliminary Conference Order's final date for depositions of party witnesses is October 30, 2003 whereas this motion was served on July 31, 2003, and (b) only one week before this motion was served on MBOI's counsel, it received a delayed letter from Deutsche's counsel, rejecting many of the demands in a June 19, 2003 letter from MBOI's counsel, detailing and demanding cure of the deficiencies in Deutsche's responses to MBOI's interrogatories and notice for discovery and inspection of documents.

Summary judgment should be granted in MBOI's favor because sovereign immunity of a foreign state and one of its agencies, such as MBOI, demands that this action be in Montana rather than in New York, and because the only basis for personal jurisdiction asserted over MBOI is the transaction of business in this State, but that ground has no basis under the facts and First Department law.

THE FACTUAL BACKGROUND

The Court is respectfully referred to the affidavit of Robert T. Bugni, Senior Investment Officer-Fixed Income of MBOI, sworn to August 20, 2003 ("Bugni Aff."), and the

affirmation of Herbert C. Ross, Jr., dated August 20, 2003 ("Ross Aff."), for the facts pertinent to Deutsche's motion and MBOI's cross-motion. The following is a brief synopsis of the facts for the Court's convenience.[1]

MBOI is an agency of the government of the State of Montana, created pursuant to Montana state statute. (Bugni Aff. at ¶2). MBOI's invests the funds of the State of Montana. *Id.* In the morning of March 25, 2002, Stephen Williams, who identifies himself in his affidavit as an employee of Deutsche (Williams Aff. at ¶1), contacted, though e-mail message over the

* * *

> 16. Mr. Lombardo states at paragraph 4 in his affidavit that he had been following Pennzoil bonds, and without any apparent prior notice to Deutsche sales team, he, on March 25, 2002, "suggested to our sales team that it explore with its customers who held Pennzoil bonds whether they were interested in a swap for a higher rated bond". However, in what he identifies as his e-mail message to the sale team on the morning of March 25, 2002, he states that "one big buyer brought these bonds here..", meaning that a big buyer from Deutsche was purchasing Pennzoil 2009 bonds. Thus, Mr. Lombardo omits from his affidavit the fact that he was motivated by a big

[1] Citations to the affidavits and affirmation submitted by Deutsche in support of its motion are abbreviated herein as follows: the affidavit of Stephen Williams, sworn to July 24, 2003, is referred to as the "Williams Aff.", the affidavit of Keith Lombardo, sworn to July 29, 2003, is referred to as the "Lombardo Aff.", the affidavit of Emily Clark, sworn to July 31, 2003, is referred to as the "Clark Aff." and the affirmation of Larry Krantz, dated July 31, 2003 is referred to as the "Krantz Aff."

buyer of Pennzoil bonds in having the sales team, including Mr. Williams, solicit holders of Pennzoil 2009 bonds. Again, who was the "big buyer" and what did he know about any contract to acquire Shell before public announcement after the close of business on March 25, 2002? What did he tell Deutsche?

17. What has Deutsche asked the "big buyer" after the pubic announcement of the contract for Shell to purchase Pennzoil? What has the "big buyer" told Deutsche? Has anyone accused the "big buyer" of acting on insider, non-public information in respect to Pennzoil bonds?

E. Summary Judgment is Inappropriate When Salient Facts Are Particularly Within the Knowledge of Movant

MBOI's attempts to obtain full document production from Deutsche has been stonewalled. And MBOI has yet to have MBOI's [sic] deposition. It is undeniable that direct proof of Deutsche's foreknowledge of the contract to acquire is within Deutsche's domain, but MBOI has been denied the opportunity to discovery [sic] this potentially exculpatory evidence. This alone justifies denial of Deutsche's motion under CPLR 3212(f). CPLR 3212(f) provides:

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

MBOI should be permitted at a minimum to obtain the discovery material denied by Deutsche and deposition discovery in order to oppose this motion.

In any event, courts have recognized that summary judgment is particularly inappropriate where "there are salient facts within the knowledge and control of the movant which maybe revealed through pretrial discovery." *Integrated Logistic Consultants v. Fidata Corp.,* 131 A.D.2d 338, 517 N.Y.S.2d 135, 137 (1st Dep't 1987). The First Department has repeatedly held that "summary judgment should not granted [sic] when the facts on which the motion is predicated are exclusively within the moving party's knowledge." *Vitiello v. Mayrich Constr. Corp.,* 255 A.D.2d 182, 680 N.Y.S.2d 482, 485 (1st Dep't 1998); *Chiambalero v. Waldbaum's Supermarket, Inc.*, 250 A.D.2d 360, 672 N.Y.S.2d 318, 319 (1st Dep't 1998); *Gaughan v. Chase Manhattan Bank,* 204 A.D.2d 67, 612 N.Y.S.2d 5, 6 (1st Dept. 1994).

This is particularly true when, as here, such information "might well be disclosed by cross-examination or examination before trial," *Baldasano v. The Bank of New York,* 199 A.D.2d 184, 605 N.Y.S.2d 293 (1st Dep't 1993), and when "there are likely to be defenses that depend upon knowledge in the possession of the party moving for summary judgment." *Aubrey Equities, Inc. v. SMZH 73rd Assocs.,* 212 A.D.2d 397, 622 N.Y.S.2d 276, 278 (1st Dept. 1995) (summary judgment denied where defendant alleged fraud perpetrated by plaintiff, circumstances of which were in plaintiff's exclusive knowledge). In fact, the First Department has specifically recognized that summary judgment should be denied and defendant afforded the opportunity to explore the facts and details known only by plaintiff, concerning the transaction at issue, when the

defendant, as here, has raised defenses of fraud, mutual mistake or inequitable conduct. *See*, *Citibank, N.A. v. Kielman,* 61 A.D.2d 937, 403 N.Y.S.2d 30, 31 (1st Dep't 1978); *see also Koffman v. Smith,* 191 A.D.2d 776, 594 N.Y.S.2d 427, 428 (3d Dep't 1993) (affirmative defense of mutual mistake presented a factual issue precluding summary judgment.)

Furthermore, it is, indeed, well established that issues involving a party's good faith, state of mind, and credibility must, except in extraordinary circumstances not present here, be left to the trier of fact. *See generally,* Siegel, *Practice Commentaries,* McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6 at 314-315; *Bonnie Briar Country Club, supra,* 687 N.Y.S.2d at 663 (motive and credibility are questions of fact).

II.

GENUINE QUESTIONS OF MATERIAL FACT EXIST CONCERNING DEUTSCHE BANK'S KNOWLEDGE OF "INSIDER INFORMATION"

Deutsche cannot simply submit two self-serving affidavits from the Deutsche sales person, Stephen Williams, and trader, Keith Lombardo, involved to disclaim any knowledge of "insider information" underlying the transaction. In general, a party's knowledge of fraudulent activity is a question of fact for the jury to decide. *Wechsler v. Steinberg,* 733 F.2d 1054, 1058 (2d Cir. 1984) (explaining in Rule 10b-5 action that "issue of motive and intent are usually inappropriate for disposition on summary judgment.") Indeed, the need to test the affiant's credibility on this critical issue dictates that Deutsche's summary judgment motion be denied. *See Millerton Agway Cooperative,*

Inc. v. Briarcliff Farms, Inc., 17 N.Y.2d 57, 64 (1966) (holding that Appellate Division improperly granted summary judgment based on its assessment of the affiants' credibility explaining that "[t]he truth as to these matters must be arrived at in the lawful and customary way, that is, by a trial where the witnesses can be examined and cross-examined and their demeanor and their versions put under the scrutiny of the triers of the facts.")

Here, it is not so cut and dry, as Deutsche wants this court to believe, whether the transaction was tainted by fraud and involved insider information. The Second Circuit has explained that under a misappropriation theory of Rule 10b-5, "insider trading occurs whenever a person trades while in knowing possession of misappropriated and material non-public information." *United States v. Mylett,* 97 F.3d 663, 666 (2d Cir. 1996) (holding that tippee who received non-public information from insider, related to possible corporate acquisition, and then purchased securities based on this information was guilty of insider trading based upon circumstantial evidence.). By way of example, federal courts in this state have consistently permitted insider trading cases to go to trial, based upon circumstantial evidence of trading on nonpublic information, even though the defendant denied any wrongdoing. *See e.g.*, *United States v. Gutierrez,* 181 F. Supp.2d 350, 353-54 (S.D.N.Y. 2002) (circumstantial evidence such as size of purchases, temporal proximity to receipt of nonpublic information, and use of broker with whom tippee did not previously have account provided basis for inferring that trading occurred on insider information); *SEC v. Euro Security Fund,* 2000 U.S. Dist. LEXIS 13847 at *11 (S.D.N.Y. Sept. 25, 2000) (circumstantial evidence including trading patterns sufficient to

withstand motion for judgment as a matter of law); *SEC v. Singer,* 786 F. Supp. 1158, 1164-65 (S.D.N.Y. 1992) ("circumstantial evidence such as suspicious timing of trades, contacts between potential tippers and tippees and incredible reasons for such trades provides an adequate basis for inferring that tipping activity has occurred.").

The issue of Deutsche's veracity concerning its knowledge of insider information, in itself, justifies denial of the summary judgment motion. But even if Deutsche were telling the truth as to its actual knowledge, its remaining intentionally ignorant of trading on nonpublic information in the face of the suspicious circumstances surrounding the trade is sufficient alone to infer the defendant's knowledge of the fraudulent trading activity. *See United States v. DeVeau,* 734 F.2d 1023, 1028 (5th Cir. 1984) (deliberate ignorance of high probability of fact in question is sufficient to convict defendant of securities fraud); *Otten v. Marasco,* 353 F.2d 563, 565 (2d Cir. 1965) (holding that failing to inquire under suspicious circumstances may constitute "willful ignorance" sufficient to establish that defendant had knowledge of facts alleged); *Cohen v. Hallmark Cards, Inc.,* 45 N.Y.2d 493, 499 (1978) (whether party exhibited a "reckless disregard for the truth" is a question for the jury); *accord Majer v. Schmidt,* 169 A.D.2d 501, 564 N.Y.S.2d 722, 503 (1st Dep't 1991) ("a person is charged with constructive notice of any fact which would have been disclosed by a reasonably diligent inquiry if circumstances are such as to indicate to a person of reasonable prudence and caution the necessity of making inquiry to ascertain the true facts and he or she avoids such inquiry."); *Charles W. Schreiber Travel Bureau, Inc. v. Standard Surety and Casualty Co.,* 240 A.D 279, 269 N.Y.S. 804, 807 (2d Dep't 1934) (issue of whether plaintiff

acquired knowledge of facts from which it should have inferred employee's fraud was a question of fact for jury.).

Further, even if Deutsche was truly unaware and was not deliberately ignorant of any wrongful trading activity, Deutsche is still not entitled to enforce its purported contract with MBOI if Deutsche, itself, was the victim of its customer's fraud. It has long been the law in New York that "[w]here a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed." *Fidelity National Title Ins. Co. v. Consumer Home Mortgage Inc.,* 272 A.D.2d 512, 708 N.Y.S.2d 445, 447 (2d Dep't 2000); *see also* 60A NY Jur.2d, *Fraud and Deceit,* § 194 at p. 313 (2001).

In *Fidelity National Title Ins., supra,* the plaintiff, a title insurer, sought a declaration that it was not obligated under a title insurance policy issued by it to the corporate defendant which sought a judgment that the title insurer was liable for coverage of the defalcations by the law firm/escrow agent appointed by the corporate defendant. The corporate defendant was a lender for purchases of residential real estate and had made various such loans. The corporate defendant designated a law firm as escrow agent for receipt of loan funds and to handle, for the corporate defendant, the closings of the mortgage loans and issuance of checks drawn on the escrow account for the loans. However, checks drawn on the law firm's escrow account were dishonored for insufficient funds. The Court held that the insurance policies issued by the plaintiff could not provide coverage for the benefit of the corporate defendant on the defalcations of counsel. One of the alternative bases for this holding was the fact that the corporate defendant had designated the law firm as the

escrow agent and to perform services for the corporate defendant at closings. The Court applied, against the corporate defendant, the principle that:

* * *

any finding of transaction of business in New York. There, the only contacts which the defendant, a non-domiciliary buyer of stock from plaintiff, had with the State of New York, were several telephone conversations with an account representative of the plaintiff in a New York office, which "resulted in a telephone purchase order for the stock", and a letter sent to plaintiff's New York office thereafter "protesting the purchase of the shares at issue". 452 N.Y.S.2d at 631. In that action, for breach of that purchase order, the Court concluded that there were insufficient contacts between the non-resident domiciliary of Pennsylvania and the State of New York for jurisdiction to be found under the transaction of business test found in CPLR 302(a)(1). Similarly, in *Granat v. Bochner,* 268 A.D.2d 365, 702 N.Y.S.2d 262, 263 (1st Dept. 2000), the First Department concluded that the court below had

> "properly dismissed the complaint based on plaintiffs failure to establish that defendants had transacted business within the state subjecting them to jurisdiction under CPLR 302(a)(1). Contrary to plaintiff's argument, sending faxes and making phone calls to this State are not, without more, activities tantamount to "transacting business" within the meaning of the aforecited long-arm statute."

IV.

THE STATE OF MONTANA AND ITS AGENCIES, INCLUDING MBOI, ARE IMMUNE FROM SUIT IN THE STATE OF NEW YORK

This case presents an attempt by a private litigant, Deutsche, to bring the State of Montana, acting through its MBOI, before the courts of the State of New York to answer a breach of contract claim arising from the State's management of its treasury funds. It is an attempt that is fraught with constitutional difficulty. Litigation of this claim in this forum infringes Montana's sovereign immunity from suit in this Court, striking at the core of Montana's status as a sovereign state.[2]

A. Montana Has Preserved Its Immunity From Suit Except In Limited Circumstances Not Applicable Here

In *Alden v. Maine,* 527 U.S. 706 (1999), the United States Supreme Court recognized that "the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission to the Union upon an equal

[2] The Montana Constitution requires the Montana legislature to "provide for a unified investment program for public funds and public retirement system and state compensation insurance fund assets. . . . " The legislature created MBOI to implement this constitutional mandate, and empowered MBOI to administer the unified investment program. Mont. Code Ann. § 17-6-201. MBOI is an arm of the state protected by its immunity from suit. *See Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743, 751 n.6 (2002) (holding that the state port authority is an instrumentality of the state of South Carolina protected by the state's sovereign immunity).

footing with other states) except as altered by the plan of the Convention or certain constitutional amendments." *Alden* further recognized that states could voluntarily surrender their sovereign immunity by consenting to suit. 527 U.S. at 755 ("[S]overeign immunity bars suits only in the absence of consent.") Such waivers, however, must be so explicit as "to leave no room for any other reasonable construction." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 239-40 (1985). Montana has not consented to this action before the courts of the state of New York.

Prior to 1972, Montana's immunity from suit was well-established in Montana law. *See*, *e.g., Longpre v. Joint School District No. 2,* 151 Mont. 345, 347, 443 P.2d 1, 4 (1968) ("[T]he state is immune for tort liability because of its sovereign character. And, generally speaking, all public agencies, institutions or political subdivisions of the state partake of this sovereign immunity, at least while performing governmental functions. . . . ") In 1972, however, Montana adopted a new constitution that contained a limited waiver of the state's sovereign immunity:

> The state, counties, cities, towns, and all other local government entities shall have no immunity from suit except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

Mont. Const., Art. II, § 18. The Montana Supreme Court has definitively construed this provision to be a limited waiver of immunity applicable only to actions sounding in tort. *Leaseamerica Corp. v. State,* 191 Mont. 462, 468-69, 625 P.2d 68, 71 (1981). Moreover, the federal courts have recognized that the constitutional waiver applies only to actions filed in Montana state courts. *State of Montana v. Gilham,* 133 F.3d 1133, 1138-39 (9th Cir. 1998) (Montana

constitutional waiver applies only to actions filed in Montana state court); *State of Montana v. Peretti,* 661 F.2d 756, 758 (9th Cir. 1981) (same).

Similarly, while the Montana legislature has enacted a statute consenting to suits against the State of Montana for breach of contract, Mont. Code Ann. § 18-1-404, the legislature has also limited the fora in which the State may be sued to Montana's district courts, Mont. Code Ann. § 18-1-401. The federal courts have accordingly held that this statute waives the State's immunity only with respect to actions brought in Montana state courts. *Peretti,* 661 F.2d at 758.

It is clear that the sovereign immunity of the states limits not only ***whether*** they may be sued but also ***where*** they may be sued. *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984). The people of Montana have determined to retain the State's immunity from suit except for certain actions filed in that State's own courts. As the following discussion shows, this determination has binding constitutional force with respect to the ability of Deutsche to bring this action against MBOI before this Court.

B. Montana's Sovereign Immunity Erects a Constitutional Barrier To This Court's Assertion of Subject Matter Jurisdiction In This Case

The MBOI has consistently raised Montana's constitutional immunity from suit as a bar to this Court's assertion of subject matter jurisdiction in this case. (*See*, *e.g.,* Answer, Exh. B to Ross Aff.; at ¶¶ 15, 13 and 14 in Answer). Plaintiff's motion for summary judgment, and MBOI's cross-motion, bring the point to issue and require

this Court to examine whether its subject matter jurisdiction extends to this action. *Morrison v. Budget Rent-A-Car Systems, Inc.,* 230 A.D. 2d 253, 657 N.Y.S. 2d 721, 727 (2d Dept. 1997) (defense of sovereign immunity deprives New York court of subject matter jurisdiction.) If MBOI is correct and the Court lacks jurisdiction, MBOI's motion must be granted and Deutsche's must be denied.

MBOI's position on this issue requires exploration of two arguments. First, the United States Supreme Court, in a series of recent cases, has endorsed the view that state sovereign immunity inheres in the federal constitutional plan, relying on historical evidence that the states' immunity from unconsented suit was a given in the minds of the constitutional framers, so much so that significant elements of state sovereign immunity were so fundamental as to require no explicit mention in the Constitution. The same historical evidence that supports the recent holdings that states are immune from suit in federal court, *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), in their own courts, *Alden,* 527 U.S. at 754, in federal administrative tribunals, *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743 (2002), and in tribal courts, *Gilham,* 133 F.3d at 1135-37, compels the conclusion that states cannot be sued without their consent in the courts of a sister state.

Second, the authority of two prior court decisions on which Deutsche relies is quite dubious. In *Nevada v. Hall,* 440 U.S. 410 (1979), the United States Supreme Court held that the courts of California were not bound by state sovereign immunity or the Full Faith and Credit Clause to honor, in a case filed in a California state court arising from an auto accident in California, a Nevada statute placing limits on recovery in tort claims against the state.

The following year, in *Erlich-Bober & Co., Inc. v. University of Houston,* 49 N.Y. 2d 574 (1980), the Court of Appeals relied on *Hall* in holding that New York would not accord Full Faith and Credit to the sovereign immunity of a Texas state university sued in the courts of this State over a claim arising from certain investment transactions centered in New York.

1. Recent Authority Establishes That The Sovereign Immunity of The States In Actions Brought In Other States Is A Matter Of Constitutional Dimension

The United States Supreme Court has expended substantial energy in recent years clarifying the constitutional status of the sovereign immunity of the states. Three seminal cases, all following the same general analytical outline, provide guidance on the question presented here.

First, in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), the Court clarified that Congress lacks the power under Article I of the Constitution to abrogate the sovereign immunity of the states and subject states to suit in federal court. Specifically, the Court held that the Indian Gaming Regulatory Act did not overcome the states' immunity from suit in federal court under the Eleventh Amendment, despite the clear expression of Congress of its intent to subject the states to suit. The Court relied in significant part on the clear historical evidence that at the time Article I was adopted it was "the general sense and the general practice of mankind" to shield sovereign states from unconsented suits. 517 U.S. at 69, *quoting* The Federalist No. 81 at 487 (C. Rossiter ed. 1961) (A. Hamilton).

The Court extended the rationale of *Seminole* three years later in *Alden.* In that case, the Court considered whether Congress could require a state's courts to entertain actions against the state to enforce the Fair Labor Standards Act over the State's objection that it was immune from suit in its own courts. *Alden* rejected the notion that a state's courts could be opened by Congress to unconsented suits against the state, relying, as in *Seminole,* on the clear historical record showing that such actions would have been unimaginable to the framers of the Constitution. 527 U.S. at 715-24 (citing evidence from Blackstone, the Federalist, early Supreme Court decisions, other writings of the framers, the convention debates on adoption of the Constitution and its ratification by the states, and the adoption of the Eleventh Amendment).

The core significance of *Alden* for this case is found in the Court's recognition that the sovereign immunity of the states pre-existed the Constitution, and was merely confirmed by, rather than created by, the adoption of the Eleventh Amendment. The Eleventh Amendment, in the Court's view, re-confirms the "presupposition . . . that each state is a sovereign entity in our federal system; and . . . that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state's] consent.'" 527 U.S. at 729, *quoting Seminole,* 517 U.S. at 13 and *Hans v. Louisiana,* 134 U.S. 1, 13 (1890).

Finally, in *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743 (2002), the Court extended the reasoning of *Seminole* and *Alden* to hold that despite the fact that the Eleventh Amendment explicitly limits only the federal judicial power under Article III of the Constitution, the sovereign immunity of the states prevented a federal administrative tribunal

from exercising jurisdiction over a claim against a state agency. The Court assumed that such a tribunal did not "exercise the judicial power of the United States" so as to be subject to the express provisions of the Eleventh Amendment, 535 U.S. at 754, but found that this assumption did not end the analysis. Relying principally on *Alden,* the Court reaffirmed that "the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" 535 U.S. at 755, *quoting Hans,* 134 U.S at 18. Finding that federal administrative adjudications "are the type of proceedings from which the framers would have thought the States possessed immunity," 535 U.S. at 756, the Court concluded that the ports authority could not be forced to litigate before the Commission. *Id.* at 760-61. Thus, even in a tribunal of another sovereign, the residual sovereign immunity of the state precluded the tribunal from asserting jurisdiction over a state agency.

Both the structure of the Constitution and its framing and ratification suggest not that the states' pre-constitutional sovereign immunity was surrendered, but rather the opposite – that to the extent it was considered, the intent was to maintain all then-existing state immunities from suit. Moreover, recognition of states' immunity from suit in the courts of other states would serve the core interests underlying the doctrine of sovereign immunity. *See Alden,* 527 U.S. at 750; *Federal Maritime Commission,* 535 U.S. at 765-66 (outlining policy bases for state immunity from unconsented suits in foreign tribunals.) That is the state of the law now under the Supreme Court's jurisprudence, and as the following argument demonstrates, the existing contrary authority cannot be squared with it.

The Ninth Circuit's decision in *Gilham* holding Montana immune from a suit brought in a tribal court by a tribal member arising from an auto accident on the reservation likewise undercuts the concept that the state's sovereign immunity does not apply in the tribunals of another sovereign.

2. In Light of The Recent Supreme Court Jurisprudence, *Hall* and *Erlich-Bober* Should Not Be Viewed As Binding Authority on The Sovereign Immunity Issue

In *Nevada v. Hall,* 440 U.S. 410 (1979), the Supreme Court considered the question of whether Nevada's sovereign immunity required a California state court to dismiss a complaint against the University of Nevada arising from its employee's negligence in operating a motor vehicle in California which caused an accident in which the plaintiffs were seriously injured, or, in the alternative, to apply a Nevada law that limited the State's damage exposure to $25,000. In a relatively brief discussion focused exclusively on the text of the Constitution, the *Hall* majority dismissed the idea that a State's amenability to suit in the forum of another sovereign was a matter with which the Constitution had any concern.[3]

[3] The Court stated that "the question of whether one State might be subject to suit in the courts of another state was apparently not a matter of concern when the new Constitution was being drafted," 440 U.S. at 419, that "[t]he debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Article III," *id.* at 419, and that all of the early cases dealing with state sovereign immunity "concerned questions of federal court jurisdiction and the extent to which the States, by ratifying the Constitution and

(Continued on following page)

This view is clearly at odds with the more recent jurisprudence. Clearly, if limits on Article III jurisdiction defined the complete scope of the Constitution's concern with state sovereign immunity, the Court's most recent decision in *Federal Maritime Commission* is wrong, because the Court there expressly eschewed any reliance on the scope of Article III judicial power in deciding whether sovereign immunity barred federal administrative contested cases against a state. Likewise, the decision in *Alden* would clearly be wrong if the scope of the State's constitutional immunity extended only to suits in Article III federal courts, since in that case the Supreme Court recognized that the sovereign immunity of the states was constitutionally based and extended to bar suits against a state in its own courts as well as in federal Article III courts.

Moreover, *Hall* has spawned an anomalous jurisprudence in which New York can, in actions brought in its courts, deny Texas the benefit of a public policy choice in which New York itself may seek protection. *Erlich-Bober,* 49 N.Y. 2d at 583-85 (Jones, J., dissenting) (noting that New York provides by statute the same kind of forum restrictions in suits against its universities that Texas asserted). The same anomalous reasoning allowed New York to deny the sovereign immunity claims of the State of Texas in *Erlich-Bober* and then, six years later, in *Guarini v. New York,* 215 N.J. Super. 426, 521 A.2d 1362 (1986), to assert (successfully, as it turned out) that New York was immune from suit in the courts of New Jersey.

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creating federal courts, had authorized suits against themselves in those courts", *id.* at 420-21.

The reasoning in *Hall*[4] regarding the reach of the states' sovereign immunity simply cannot be squared with the view of the sovereign immunity of the states that controlled the outcome of *Seminole, Alden,* and *Federal Maritime Commission.* Accordingly, if this action was before the United States Supreme Court today, there is every reason to believe the Court would not find *Hall* to be authoritative regarding the question presented here.

The recent decision in *Franchise Tax Board v. Hyatt,* 123 S.Ct. 1683 (2003), does nothing to bolster *Hall*'s reasoning as to the scope of state sovereign immunity. In that case, the Court granted certiorari to resolve the question of whether the Full Faith and Credit Clause required a Nevada court to apply California law, which afforded statutory immunity from suit to state officials in tax collection matters, in resolving tort claims arising from the collection of California taxes from a Nevada resident. The Court expressly reserved judgment on the question of whether *Hall*'s holding that the states' sovereign immunity does not preclude suits against a state in another state's courts survives in light of more recent case law. 123 S. Ct. at 1689 ("Petitioner does not ask us to reexamine [*Hall's* sovereign immunity analysis], and we therefore decline the invitation of petitioner's *amici* States . . . to do so.")

[4] It is perhaps highly significant that despite *Hall*'s reliance on the separate sovereign dichotomy to find that Nevada was not immune from suit in California, 440 U.S. at 416-17 (relying on differing analysis where a state is sued in its own courts or in the courts of another sovereign), the Court in *Federal Maritime Commission* did not even cite, let alone discuss in detail, the *Hall* separate sovereign rationale in holding that the port authority could not be sued before the administrative tribunal of the United States, itself a separate sovereign from the State of South Carolina.

The Court's holding regarding the Full Faith and Credit Clause issue that it decided, based on the arguendo assumption that *Hall*'s holding was still good law, does not suggest how the Court might rule if a frontal challenge to Hall's soundness was properly presented by a party.

The Court of Appeals' decision in *Erlich-Bober,* like *Hyatt,* is simply a straightforward application of *Hall*'s comity analysis. The State of Texas did not challenge the applicability of the *Hall* sovereign immunity analysis to its case. 49 N.Y. 2d at 580 n. 2 ("The defendant does not attempt to distinguish this case so as to bring it outside the rule of Hall.") Accordingly, the Court of Appeals treated the case as raising only the question of the application of *Hall's* comity analysis. *Id.* at 580-81 (viewing the constitutional sovereign immunity issue as settled by *Hall* and proceeding to decide the case under comity principles).[5] It is hornbook law that an appellate decision is binding authority only as to those matters that are actually litigated

[5] The Court of Appeals reasoning under even the comity issue has been somewhat undercut by recent cases. The Court of Appeals reasoned that New York's interest in "assuring a ready forum for redress of injuries arising out of transactions spawned here . . . [and] access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law" was sufficient to justify subjecting the State of Texas to suit in New York courts. Leaving aside the fact that nothing in the opinion in *Erlich-Bober,* or in the record here, would suggest that suing the defendant state in its own courts would subject the plaintiff to substantive law that differs significantly from the law of New York or to a forum hostile to their claims, or would indeed make any significant difference in the outcome of the case, the Supreme Court rejected a similar rationale advanced by the United States in holding that states could not be sued without their consent in federal administrative tribunals. *Federal Maritime Commission,* 535 U.S. at 767-68 (holding that federal interest in promoting uniformity in maritime regulation was insufficient to overcome state sovereign immunity).

before it and are necessary to its decision. The Board submits that under this test *Ehrlich-Bober* does not bind this Court with respect to the applicability of *Hall's* sovereign immunity analysis.

Both *Hall* and *Erlich-Bober* relied in part for their outcomes on concerns that the application of state sovereign immunity would prejudice the plaintiffs' claims. *Hall*, 440 U.S. at 426 (noting that adoption of Nevada's arguments would frustrate California public policy favoring full compensation for injured tort victims); *Erlich-Bober,* 49 N.Y. 2d at 581 (expressing preference for New York's "strong policy" favoring local forum for redress of injuries arising from transactions centered in New York). Such concerns are misplaced here. Montana has opened its courts to breach of contract claims against the state without discrimination against foreign plaintiffs. Mont. Code Ann. §§ 18-1-401, 18-1-404. Thus, this is not a case like *Hall* where the application of the defendant state's law would frustrate plaintiff's claim, nor has there been any showing that Montana's courts would be any more hostile or inconvenient for Plaintiff than the courts of New York would be for the State of Montana.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action as (a) the Court lacks jurisdiction over the person of MBOI by reason of the fact that MBOI did not transact any business giving rise to this action in New York, and (b) the Court is precluded by the sovereign immunity of the State of Montana from exercising subject matter jurisdiction over the claim in this case, and

Deutsche's motion for summary judgment should be denied.

Dated: New York, New York
August 20, 2003

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**SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK**

x

**DEUTSCHE BANK
SECURITIES, INC.**

Plaintiff,

vs.

**MONTANA BOARD
OF INVESTMENTS,**

Defendant.

x

Index No. 603200/02

**IAS Part 56
(Hon. Richard B. Lowe III,
J.S.C.)**

DEFENDANT'S REPLY MEMORANDUM ON ITS CROSS-MOTION FOR SUMMARY JUDGMENT

This memorandum is submitted on behalf of Defendant Montana Board of Investments ("MBOI") in reply on its cross-motion for summary judgment dismissing the Complaint in this action by virtue of (i) the Court's lack of personal jurisdiction over MBOI and (ii) the sovereign immunity of the State of Montana and its governmental agencies, such as MBOI, from unconsented suit in the State of New York. In its papers in opposition to the cross-motion, Plaintiff Deutsche Bank Securities, Inc. ("Deutsche") not only failed to submit a response to the Rule 19-a(a) statement of indisputable material facts submitted by MBOI on the cross-motion, and thereby admitted those facts, but also (a) avoided two of the three "on point" cases cited by MBOI showing, as matter of law, that it did not transact any business giving rise to the action in New York, (b) shifted its argument for jurisdiction to a basis never before urged by Deutsche, i.e., that MBOI purportedly does business in the State of New York,

a defense that is also insufficient under prevailing law and indisputable facts, and (c) failed to deal adequately with recent United States Supreme Court cases since *Nevada v. Hall*, 440 U.S. 410 (1979) and *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y. 2d 574, 427 N.Y.S. 2d 604 (1980), which urge dismissal of the Complaint on grounds of Montana's sovereign immunity.

* * *

III

DEUTSCHE'S CONTENTION THAT *EHRLICH-BOBER & CO., INC. V. UNIVERSITY OF HOUSTON* REMAINS CONTROLLING IS UNTENABLE AFTER MORE RECENT U.S. SUPREME COURT JURISPRUDENCE

Histrionics aside, Deutsche relies almost entirely on the New York Court of Appeal's decision in *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726, 427 N.Y.S2d 604 (1980) in opposing MBOI's sovereign immunity defense. Specifically, Deutsche contends that "MBOI has not offered any facts to take this case outside the scope" of *Ehrlich-Bober* (Deutsche Reply Mem. at 25), and that the recent weight of Supreme Court jurisprudence specifically addressing the constitutional significance of state sovereign immunity leaves *Ehrlich-Bober's* comity analysis unaffected. *Id*. at 27-28. Both arguments fail.

As to the first, this case is factually distinct from *Ehrlich-Bober.* In *Ehrlich-Bober* the defendant initiated the two transactions at issue by making a telephone call to the plaintiff's offices in New York. 49 N.Y.2d at 578, 427 N.Y.S2d at 606. In explaining why, under those circumstances, it was

appropriate for the New York courts to not recognize Texas' conditional waiver of immunity statute, the *Ehrlich-Bober* Court explained:

> It is more logical, surely, to assume that when a governmental entity seeks financing in the New York market that it will be amenable to suit here than to presume the financial institution ***to which it comes*** must seek a remedy in Austin, Texas.

Id. at 582. Here MBOI did not initially ***come to*** New York to do business (assuming it ever "came to" New York at all). Rather, the subject transaction flowed from a solicitation initially sent by Deutsche from New York ***to Montana.*** Under those circumstances "[i]t is more logical, surely" (*Id*.) that Deutsche would assume that a transaction it solicited from a party it knew to be in Montana would be enforced (if enforceable) in Montana rather than in New York.

More fundamental is the error in Deutsche's argument that the comity analysis in *Ehrlich-Bober* remains good law. If anything can be taken from the Supreme Court's recent line of immunity cases beginning with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), it is that state sovereign immunity ***is*** a matter of grave concern in the constitutional order. Accordingly, a mechanical application of the comity analysis employed by the *Ehrlich-Bober* court – which conflated the comity question with the question of long-arm jurisdiction (*id*. at 582, 427 N.Y.S2d at 609; *see also id*. at 585, 427 N.Y.S2d at 611 (Jones, J. dissenting)) – is not sufficiently solicitous of Montana's (or any other state's, for that matter) sovereign interests to

pass constitutional muster.[1] Rather, the appropriate analysis a forum state's court should employ in light of Montana's constitutionally and statutorily-expressed policies was discussed by the Supreme Court in *Franchise Tax Board v. Hyatt*:

> States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister state. The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, ***relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.***

123 S. Ct. 1683, 1689 (2003) (emphasis added); *quoting Carroll v. Lanza*, 349 U.S. 408, 413 (1955).[2]

In sharp contrast to the mode of analysis discussed approvingly in *Hyatt*, the *Ehrlich-Bober* court specifically ***ignored*** New Yorks' own statutory immunity provisions in its analysis. Indeed, this was the dissent's principal point.

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[1] To illustrate this point, under the *Ehrlich-Bober* majority's rule – where the existence of long-arm jurisdiction appears to be sufficient, without more, to ignore Montana's clearly expressed statutory policy – Montana stands before this Court in no different of a posture than an ordinary private litigant, which is contrary to the history of sovereign immunity.

[2] On a related point, the *Hyatt* Court's reluctance to engage in an analysis that would differentiate between the importance of one state function as opposed to another (123 S. Ct. at 1689) undercuts Plaintiff's effort here to distinguish *Guarini v. New York* 521 A.2d 1362 (N.J. Super. 1986) as involving a matter going "to the very heart of the governmental function." Deutsche Reply Mem. at 28, n. 10, quoting *Guarini*, 521 A. 2d at 1369.

See Ehrlich-Bober, 49 N.Y.2d at 585, 427 N.Y.S2d at 611 (Jones, J. dissenting). Rather, the *Ehrlich-Bober* majority used as its "benchmark" two choice of law decisions which elevated a nonstatutory policy favoring "economic development" in New York over the interests of *private* litigant-defendants in applying a foreign state's law. *See Intercontinental Planning, Limited v. Daystrom, Incorporated*, 24 N.Y.2d 372, 384, 583, 300 N.Y.S2d 817, 827 (1969) ("New York law affords foreign principles the greatest degree of protection against the unfounded claim of brokers and finders. This encourages the use of New York brokers and finders by foreign principals ***and contributes to the economic development of our state***" (emphasis added)); *Bache & Co., Inc., v. International Controls Corporation*, 339 F. Supp. 341, 348 (S.D.N.Y. 1972) ("New York is concerned in seeing its statute applied ***in order to encourage sellers of securities to transact business in New York***. . . . " (emphasis added)).

It is one thing to hold that the interests of a private litigant must give way to a nonstatutory policy favoring the economic interests of New York. It is another thing entirely to say that the constitutionally and statutorily expressed policies of another sovereign state must give way to a nonstatutory policy of economic development; especially where the forum state here, New York, statutorily claims for its own agencies the same types of protections Montana asserts here.

In light of the discussion in *Hyatt* (quoted above) and the Supreme Court's recent discussions regarding the centrality of sovereign immunity in the constitutional order, the mode of analysis reflected in the majority opinion in *Ehrlich-Bober* can no longer reasonably be viewed to be sound. Rather, Justice Jones's dissent seems

now to be a more correct analysis of the issue.[3] The "benchmark" for the comity/immunity analysis here should be the statutorily-expressed policy of New York most analogous to the one asserted by Montana here. That policy, which embodies "a categorical limitation of the court in which claims against the [state] may be instituted" (49 N.Y.2d at 584, 427 N.Y.S2d at 611 (Jones, J., dissenting)), has not substantively changed since the time it was discussed by Justice Jones in *Ehrlich-Bober*. Accordingly, his conclusion should also control:

> Inasmuch as our New York conceptually identical policy analogue parallels that of the State of Texas, we should recognize and give effect to the legislatively declared policy of that State. This is precisely what the Appellate Division did.

Id. at 585, 427 N.Y.S2d at 611.

Finally, even taking *Ehrlich-Bober's* predicate cases at face value, Deutsche's argument fails. Both *Intercontinental Planning* and *Bache & Co., Inc.* involved situations where the foreign's state's laws were substantively different (weaker) than New York's law. Deutsche has identified no substantive difference between Montana law and New

[3] Justice Jones' predictions of an anomalous jurisprudence seem also to have been correct. See *K.D.F. v. Rex*, 878 S.W.2d 89, 94 (Tex. 1994) ("We suppose that the courts of New York, applying [*Ehrlich-Bober's*] rationale, would not necessarily consider it appropriate for any state other than New York to exercise jurisdiction over another sovereign in a commercial dispute" (emphasis added)). This observation by the Texas Supreme Court illustrates an important point: The *Ehrlich-Bober* Court's analysis fails to provide for a situation where the New York courts would respect a sister state's immunity. If *Ehrlich-Bober* truly sets out such a categorical rule, it comes dangerously close to the type of "hostility" of concern to the Court in *Hyatt.* 123 S. Ct. at 1689, quoting *Carroll v. Lanza*, 349 U.S. at 413.

York law that might serve as the basis for an argument that it must be protected by this forum. In the absence of such a showing, Deutsche's contention that *Ehrlich-Bober* mechanically dictates the outcome here is wrong.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action as (a) the Court lacks jurisdiction over the person of MBOI by reason of the fact that MBOI did not transact any

* * *

To be Argued by
HERBERT C. ROSS JR.

New York County Clerk's Index No. 603200/02

New York Supreme Court

Appellate Division – First Department

DEUTSCHE BANK SECURITIES, INC.,

Plaintiff-Appellant,

– against –

MONTANA BOARD OF INVESTMENTS,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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* * *

note of issue and statement of readiness but also because he had "never requested discovery in connection with the motion [for summary judgment], or contended that discovery was necessary to respond to the facts alleged in the defendant's affidavits (CPLR 3212, subd. [f]. Under these circumstances, it cannot be said, as a matter of law, that the plaintiff should be granted additional opportunities for

discovery." 64 N.Y.2d at 186. The same finding of waiver of discovery applies here to Deutsche.

IV

IF THE COURT FINDS THAT THE TRIAL COURT ERRED IN FINDING NO PERSONAL JURISDICTION, THE JUDGMENT OF DISMISSAL SHOULD BE AFFIRMED BECAUSE MBOI IS IMMUNE FROM SUIT ON THIS CLAIM IN NEW YORK.

In its cross-motion for summary judgment, MBOI also argued that the action should be dismissed without prejudice because MBOI is immune from suit in the courts of New York on the claim, or that the New York courts should otherwise honor Montana immunity as a matter of comity. (R. 3-4 at ¶¶ 13-15, 365-66, 329-39) Although the court below did not reach this issue, this Court may affirm the judgment of dismissal, relying on other sound reasons that were advanced in but not decided by the trial court. *Murray Hollander v. HEM Research*, 111 A.D. 2d 63, 65-66 (1st Dept. 1985). As set forth herein, the decision of the court below to dismiss the complaint without prejudice was correct, even if this Court reverses the dismissal based on lack of personal jurisdiction over MBOI.

A. Montana Is Immune From Suit In The Courts of New York.

The United States Supreme Court has repeatedly observed in recent years that the Constitutional plan under which the States formed the federal government had as one of its bedrock principles the concept that the States generally could not be sued without their consent. *See, e.g., Seminole Tribe v. Florida,* 517 U.S. 44, 54 (1996).

While the states may waive their immunity and consent to suit, Deutsche correctly concedes that Montana has made no such waiver here. (Deutsche Br. at 58).

Even in those instances in which Montana has consented to suit, it has protected its prerogative to choose the forum in which it may be sued. *See Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984) (recognizing that sovereign immunity allows a state to determine not only *whether it may be sued, but also where* it may be sued). Thus, it has been held that Montana constitutional waiver of immunity for tort actions applies only to those actions filed in state courts in Montana. *Montana v. Gilham,* 133 F.3d 1133, 1138-39 (9th Cir. 1998) (state immune from suit in tribal court); *State of Montana v. Peretti,* 661 F.2d 756, 758 (9th Cir. 1981) (state constitutional waiver inapplicable in federal court). Thus, while the Montana legislature has enacted a statute consenting to suits against the State of Montana for breach of contract – such as the one here, Mont. Code Ann. § 18-1-404 – the legislature has also limited the fora in which the State may be sued to Montana's district courts. Mont. Code Ann. § 18-1-401.

Thus, Deutsche's assertion that MBOI has advanced its sovereign immunity defense in an "attempt to avoid liability," (Deutsche Br. at 57), is clearly wrong. Appellant is free to bring its action against MBOI in a Montana court pursuant to Mont. Code Ann. §§ 18-1-401 and 18-1-404. What Deutsche has tried to do here, however – to hale another sovereign state into the courts of this State without the defendant sovereign's consent – is impermissible.

B. *Ehrlich-Bober* Does Not Control This Case Because the Issue Raised Here–Whether Montana May Constitutionally Be Sued In New York Courts Without Its Consent – Was Not Litigated or Decided in That Case

In opposing MBOI's sovereign immunity defense, Deutsche relies entirely on *Ehrlich-Bober & Co., Inc. v. University of Houston,* 49 N.Y.2d 574 (1980). This reliance is misplaced.

In *Ehrlich-Bober,* the Court of Appeals did not litigate or decide the issue MBOI presents here. *Erlich-Bober,* following closely on the heels of the United States Supreme Court's decision in *Nevada v. Hall,* 440 U.S. 410 (1979), is simply an application of *Hall's* comity analysis. The State of Texas did not challenge the applicability of the *Hall* sovereign immunity analysis to its case. 49 N.Y. 2d at 580 n. 2. Accordingly, the Court of Appeals treated *Ehrlich-Bober* as raising only the question of the application of *Hall's* comity analysis. *Id.* at 580-81. "A case 'is precedent only as to those questions presented, considered and squarely decided'." *Wellbilt Equipment Corp. v. Fireman*, 275 A.D.2d 162, 168 (1st Dept.) 2000), *quoting, People v. Bourne,* 139 A.D.2d 210, 216 (1st Dept. 1988), *lv. denied,* 72 N.Y.2d 955. Thus, this Court may treat, as a question of first impression, the extent to which *Hall* and *Ehrlich-Bober* remain authoritative as to MBOI's sovereign immunity argument. Those cases should not dictate the outcome here.

C. *Hall* Has Been Undercut By More Recent Decisions of the United States Supreme Court

In recent years, the United States Supreme Court has done much to clarify the constitutional status of the sovereign immunity of the states. Three seminal cases provide guidance on the question presented here.

First, in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), the Court found that Congress lacks the power under Article I of the Constitution to abrogate the sovereign immunity of the states and subject states to suit in federal court. The Court held that the Indian Gaming Regulatory Act did not overcome the states' immunity from suit in federal court under the Eleventh Amendment, despite the clear expression of Congressional intent to subject the states to suit. The Court extended the rationale of *Seminole* three years later in *Alden v. Maine*, 527 U.S. 706 (1999). The Court considered whether Congress could require Maine's courts to entertain actions against Maine to enforce the Fair Labor Standards Act over Maine's objection that it was immune from suit in its own courts. *Alden* rejected the notion that a state's courts could be opened by Congress to unconsented suits against the state, relying, as in *Seminole*, on the clear historical record showing that such actions would have been unimaginable to the framers of the Constitution. 527 U.S. at 715-24.

The significance of *Alden* here is the Court's recognition that the sovereign immunity of the states pre-existed the Constitution, and that the Eleventh Amendment confirmed the "presupposition that each State is a sovereign entity in our federal system; and . . . that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state's] consent." 527

U.S. at 729, *quoting Seminole,* 517 U.S. at 54 and *Hans v. Louisiana,* 134 U.S. 1, 13 (1890).

Finally, in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court extended the reasoning of *Seminole* and *Alden* to hold that, the sovereign immunity of the states prevented a federal administrative tribunal from exercising jurisdiction over a claim against a state agency. The Court assumed that such a tribunal did not "exercise the judicial power of the United States" so as to be subject to the express provisions of the Eleventh Amendment, 535 U.S. at 754. Relying principally on *Alden,* the Court reaffirmed that "the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" 535 U.S. at 755, *quoting Hans,* 134 U.S. at 18. Finding that federal administrative adjudications "are the type of proceedings from which the Framers would have thought the States possessed immunity," 535 U.S. at 756, the Court concluded that the Ports Authority could not be forced to litigate before the Commission. *Id.* at 760-61. Thus, even in a tribunal of another sovereign, the residual sovereign immunity of the state precluded the tribunal from asserting jurisdiction over a state agency.

The Court of Appeals for the Ninth Circuit has extended the reasoning of these cases to bar a tort suit against Montana in a tribal court. *Montana v. Gilham,* 133 F.3d 1133 (9th Cir. 1998). As in *Federal Maritime Commission,* the court recognized no distinction based on the fact that the judicial power at issue was not federal Article III power but rather was the sovereign judicial authority of an Indian tribal government. 133 F.3d at 1136 (noting that the inherent sovereign immunity of the states, and not

Eleventh Amendment's limitation on federal judicial power, operated to bar tribal court jurisdiction.)

The same historical evidence that supports the recent holdings that states are immune from suit in federal court, *Seminole Tribe v. Florida,* in their own courts, *Alden,* in federal administrative tribunals, *Federal Maritime Commission v. South Carolina State Ports Authority,* and in tribal courts, *Gilliam,* compels the conclusion that states cannot be sued without their consent in the courts of a sister state. *Hall* and *Ehrlich-Bober* cannot be squared with the Supreme Court's most recent cases.

The structure, and ratification of the Constitution suggest not that the states' pre-constitutional sovereign immunity was surrendered, but that to the extent it was considered, the intent was to maintain all then-existing state immunities from suit. Moreover, recognition of states' immunity from suit in the courts of other states would serve the core interests underlying the doctrine of sovereign immunity. *See Alden*, 527 U.S. at 750; *Federal Maritime Commission*, 535 U.S. at 765-66 (outlining policy bases for state immunity from unconsented suits in foreign tribunals.) That is the state of the law now under the Supreme Court's jurisprudence, and the existing contrary authority cannot be squared with it.

In *Hall,* the Supreme Court considered the question of whether Nevada's sovereign immunity required a California state court to dismiss a complaint against the University of Nevada arising from its employee's negligence in operating a motor vehicle in California which caused an accident in which the plaintiffs were seriously injured, or, in the alternative, to apply a Nevada law that limited the State's damage exposure to $25,000. In a relatively brief

discussion focused exclusively on the text of the Constitution, the *Hall* majority dismissed the idea that a State's amenability to suit in the forum of another sovereign state was a matter with which the Constitution had any concern.

This view is clearly at odds with the more recent jurisprudence. Clearly, if limits on Article III jurisdiction defined the complete scope of the Constitution's concern with state sovereign immunity, the Court's most recent decision in *Federal Maritime Commission* is wrong, because the Court there expressly eschewed any reliance on the scope of Article III judicial power in deciding whether sovereign immunity barred federal administrative contested cases against a state. Likewise, the decision in *Alden* would clearly be wrong if the scope of the State's constitutional immunity extended only to suits in Article III federal courts, since in that case the Supreme Court recognized that the sovereign immunity of the states was constitutionally based and extended to bar suits against a state in its own courts as well as in federal Article III courts. And, the Ninth Circuit's *Gilham* decision would be wrong as well, since the court there recognized that a state's immunity in a tribal court found no anchor in the Eleventh Amendment.

Moreover, *Hall* has spawned an anomalous jurisprudence in which New York courts can deny Texas and Montana the benefit of a public policy choice in which New York itself may seek protection. *Ehrlich-Bober,* 49 N.Y. 2d at 583-85 (Jones, J., dissenting) (noting that New York provides by statute the same kind of forum restrictions in suits against its universities that Texas asserted). The same anomalous reasoning allowed New York to deny the sovereign immunity claims of the State of Texas in *Ehrlich-Bober*

and then, six years later, in *Guarini v. New York,* 215 N.J. Super. 426, 521 A.2d 1362 (1986), to assert successfully that New York was immune from suit in the courts of New Jersey.

The reasoning in *Hall* regarding the reach of the states' sovereign immunity simply cannot be squared with the view of the sovereign immunity of the states that controlled the outcome of *Seminole, Alden, Federal Maritime Commission,* and *Gilham*. Accordingly, if this action were before the United States Supreme Court today, there is every reason to believe the Court would not find *Hall* to be authoritative regarding the question presented here.

The recent decision in *Franchise Tax Board v. Hyatt,* 538 U.S. 488 (2003), does nothing to bolster *Hall's* reasoning as to the scope of state sovereign immunity. In *Hyatt,* the Court granted certiorari to resolve the question of whether the Full Faith and Credit Clause required a Nevada court to apply California law, which afforded statutory immunity from suit to state officials in tax collection matters, in resolving tort claims arising from the collection of California taxes from a Nevada resident. The Court expressly reserved judgment on the question of whether *Hall's* holding that the states' sovereign immunity does not preclude suits against a state in another state's courts survives in light of more recent case law, because, as in *Ehrlich-Bober,* the issue was not raised by the petitioner. 538 U.S. at 497 The Court's holding regarding the Full Faith and Credit Clause issue that it decided, based on the *arguendo* assumption that *Hall's* holding was still good law, does not suggest how the Court might rule if a frontal challenge to *Hall's* soundness was properly presented by a party.

D. The Comity Analysis in *Ehrlich-Bober* is Inconsistent With Later Decisions and Should Be Reexamined

This Court should also honor the State of Montana's claim of immunity as a matter of comity among states. On this point, *Ehrlich-Bober* is distinguishable and otherwise warrants reexamination.

First and foremost, this case is factually distinct from *Ehrlich-Bober*. In *Ehrlich-Bober the defendant* initiated the two transactions at issue by making a telephone call to the plaintiff's offices in New York. 49 N.Y.2d at 578. In explaining why, under those circumstances, it was appropriate for the New York courts to not recognize Texas' immunity statute, the *Ehrlich-Bober* Court explained:

> It is more logical, surely, to assume that when a governmental entity seeks financing in the New York market that it will be amenable to suit here than to presume the financial institution to which it comes must seek a remedy in Austin, Texas.

Id. at 582. Here MBOI did not come to New York to do the transaction. Rather, the subject transaction resulted from an initial solicitation made by Deutsche from New York to Montana. Under those circumstances "[i]t is more logical, surely" (*id.*) that Deutsche would assume that a transaction it solicited from a party it knew to be in Montana would be enforced (if enforceable) in Montana rather than in New York.

Beyond the factual differences between this case and *Ehrlich-Bober* lies an underlying flaw in that case's reasoning on the comity issue. Since the time of *Nevada v. Hall,* many state courts examined whether, as a matter of

comity among states, to honor a foreign state's plea of immunity. *See e.g. Morrison v. Budget Rent-A-Car Systems, Inc.,* 230 A.D. 2d 253, 267-68 (2d Dept. 1997) (canvassing cases). *Ehrlich-Bober* was among the first. Viewed in hindsight, the *Ehrlich-Bober* court's basis for rejecting Texas' plea of immunity is starkly incongruent with later decisions of the Court of Appeals, and of courts in other states – most of whom have displayed a higher regard for the interests of a sister state than did *Ehrlich-Bober.* These later decisions make continued reliance on *Ehrlich-Bober* inappropriate.

The fundamental flaw in the *Ehrlich-Bober* approach toward interstate comity lies in its failure to "benchmark" its analysis of New York's comparative interest in the matter by the State's own *statutorily-expressed* public policies. That statutorily-expressed public policy in New York is – as was Texas' and is Montana's – to restrict the venue for damage suits against state agencies to certain specified courts. NY CLS Ct. C. Act § 8 (damage actions against state agencies must be brought in Court of Claims). In similar circumstances, most other state courts have viewed legislation of this type to "unequivocally constitute[ ] the public policy of the [forum] state" for purposes of a comity analysis. *Beard v. Viene,* 826 P. 2d 990, 997 (Ok., 1992).

Based on their own statutes as the "benchmark," those courts have held that the "recognition of another state's limitation of its own liability will turn upon [the forum state's] policies and 'whether [the forum state] would permit itself to be sued if it had engaged in the conduct assigned' the foreign state in a given action." *Hernandez v. City of Salt Lake,* 686 P.2d 251, 253 (Nev. 1984), *quoting Mianecki v. District Court,* 658 P.2d 422

(Nev. 1983). Indeed, in *Crair v. Brookdale Hospital,* 94 N.Y. 2d 524, 528 (2000) the Court of Appeals specifically based its holding – that the plaintiffs' failure to comply with the foreign states' notice of claim provisions barred the actions in New York courts – on the fact that New York itself had statutory notice provisions that were similar in nature. 94 N.Y. 2d at 530-31. On this point it is very significant that in *Hyatt* the Supreme Court pointed approvingly to the Nevada Supreme Court's method of addressing the comity issue:

> States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister state. The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, *relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.*

538 U.S. at 49 (italics added); *quoting Carroll v. Lanza,* 349 U.S. 408, 413 (1955).

Based on this approach, the majority of the state courts who have *refused* to respect a foreign state's plea of immunity have only done so where it has been shown that the forum state has a substantively different statutory policy, and that to subject a forum-state plaintiff to a foreign state's laws would result in either no remedy for the forum-state plaintiff, or a substantively more constrained remedial scheme. *See e.g. Radley v. Transit Auth. of Omaha,* 486 N.W. 2d 299 (Iowa 1992); *Clement v. State of Indiana,* 524 N.E. 2d 36 (Ind. Ct. App. 1988); *Head v. Platte*

County, 749 P.2d 6 (Kan. 1988); *Haberman v. Washington Public Power Supply System,* 744 P. 2d 1032 (Wash. 1987).

In sharp contrast to the mode of analysis discussed approvingly in *Hyatt,* the majority in *Ehrlich-Bober* specifically *ignored* New Yorks' own statutory immunity provisions in its analysis. Indeed, this was the dissent's principal point. *See* 49 N.Y.2d at 585 (Jones, J. dissenting). Rather, the *Ehrlich-Bober* majority used as its "benchmark" two choice of law decisions which elevated a *non-statutory,* judge-made policy favoring "economic development" in New York over the interests of *private* litigant-defendants in applying a foreign state's law. *See Intercontinental Planning, Limited v. Daystrom, Incorporated,* 24 N.Y.2d 372, 384 (1969) ("New York law affords foreign principles the greatest degree of protection against the unfounded claim of brokers and finders. This encourages the use of New York brokers and finders by foreign principals *and contributes to the economic development of our state"* (italics added)); *Bache & Co., Inc. v. International Controls Corporation,* 339 F. Supp. 341, 348 (S.D.N.Y. 1972) ("New York is concerned in seeing its statute applied *in order to encourage sellers of securities to transact business in New York*. . . ." (italics added)).

It is one thing to hold that the interests of a private litigant must give way to a non-statutory, judicially-made policy favoring the economic interests of New York. It is another thing entirely to say that the constitutionally and statutorily expressed policies of another sovereign state must give way to a nonstatutory policy of economic development; particularly where the forum state here, New York, statutorily claims for its own agencies the same types of protections Montana asserts here.

Moreover, Montana has opened its courts to breach of contact claims against it without discrimination against foreign plaintiffs. Mont. Code Ann. §§ 18-1-401, 18-1-404. Deutsche has identified no substantive difference between Montana law and New York law that might serve as the basis for an argument that it must be protected by this forum. Nor has it made any showing that Montana's courts would be any more inconvenient for Deutsche than the courts of New York are for the State of Montana; that the Montana courts would be hostile to any legitimate public policy concerns of New York State (indeed, the opposite is true. *See Simmons v. State of Montana*, 670 P. 2d 1372 (Mont. 1983) (suit against Oregon State agency dismissed on comity grounds)); or that there are any other factors that would make any significant difference in the outcome of this case. In the absence of such a showing, it cannot be said that New York's interests in this case automatically predominate.

The other main analytic flaw in *Ehrlich-Bober* lies in its conclusion that the questions of personal jurisdiction and comity are coincident. 49 N.Y.2d at 582. Put differently, under the *Ehrlich-Bober* majority's rule the presence of personal jurisdiction appears to be sufficient, without more to ignore another state's statutory immuity [sic]. This approach is wrong as a legal and practical matter. In an analogous situation, the Appellate Division has explained that

> [c]hoice of law questions are significantly different from questions of jurisdiction. 'Not only are these separate and distinct problems, but the rules formulated to govern their resolution embody different concepts expressed in different language.' The test in deciding whether jurisdiction may be

> asserted is not whether New York is the most convenient forum in which to litigate. Rather, the question is whether assertion of jurisdiction in New York will violate a defendant's right to due process of law. As a respected commentator has observed, there is a 'world of difference between the two.'

Alan Lupton Associates, Inc. v. Northeast Plastics, Inc., 105 A.D.2d 3, 8 (4th Dept. 1984) (internal citations omitted); *see also Leslie Fay Retail Outlets, Inc. v. The Leslie Fay Companies*, 653 So. 2d 1106, 1107 (Ct. App. Fla., 1995) (per curiam) ("[p]rinciples of comity are different from those of jurisdiction). More practically, under the *Ehrlich-Bober* approach, the State of Montana (or any state, for that matter) would stand before the New York courts in no different of a posture than would an ordinary private litigant. Clearly a rule which suggests such a low regard for another's state's sovereign interests – as well as less than the "healthy regard" for another state's sovereign status which the Court praised Nevada's Supreme Court for showing in *Hyatt* – warrants re-examination.

In light of the discussion in *Hyatt* quoted above, and the Supreme Court's recent discussions regarding the centrality of sovereign immunity in the constitutional order (*see* Section IV, C., *supra*), the comity analysis reflected in the majority opinion in *Ehrlich-Bober* can no longer reasonably be viewed to be sound. Rather, Justice Jones's dissent is the correct analysis of the issue.[3] The

[3] Justice Jones' predictions of an anomalous jurisprudence have proven correct. See *K.D.F. v. Rex*, 878 S.W.2d 89, 94 (Tex. 1994) ("We suppose that the courts of New York, applying [*Ehrlich-Bober's*] rationale, would not necessarily consider it appropriate for any state other than New York to exercise jurisdiction over another sovereign in a commercial

(Continued on following page)

"benchmark" for the comity/immunity analysis here thus should be the statutorily-expressed policy of New York that is most analogous to the one asserted by Montana here. That policy, which embodies "a categorical limitation of the court in which claims against the [state] may be instituted" (49 N.Y.2d at 584 (Jones, J., dissenting)), has not substantively changed since the time it was discussed by Justice Jones in *Ehrlich-Bober*. Accordingly, his conclusion should also control:

> Inasmuch as our New York conceptually identical policy analogue parallels that of the State of Texas, we should recognize and give effect to the legislatively declared policy of that State. This is precisely what the Appellate Division did.

Id. at 585. Accordingly, this action should be dismissed, and Deutsche may file file [sic] its claim against MBOI in Montana in accordance with Montana law.

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dispute." This observation by the Texas Supreme Court (i) illustrates an important point: The *Ehrlich-Bober* court's analysis fails to provide for a situation where the New York courts would respect a sister state's immunity in a "commercial" dispute. If *Ehrlich-Bober* truly sets out such a categorical rule, it comes dangerously close to the type of "hostitlity [sic]" of concern to the Court in *Hyatt*. 440 U.S. at 499, *quoting Carroll v. Lanza*, 349 U.S. at 413.

V

GENUINE ISSUES OF MATERIAL FACT URGE AFFIRMING DENIAL OF DEUTSCHE'S MOTION

A. Deutsche Does Not Dispute As a Matter of Law That Insider Trading is an Affirmative Defense

Even if the Court were to vacate the judgment dismissing the action, Deutsche is not entitled to summary judgment on (i) liability and (2) dismissing the affirmative defense that the transaction constituted an unenforceable contract.

Deutsche expended most of its effort on its motion for summary judgment on MBOI's Eighth Affirmative Defense (R. 36-37 at ¶¶ 20-24). MBOI there alleges that Deutsche "and/or the third party, if any, for whose account Plaintiff was acting had received advance, inside information" about the announcement after the close of business on March 25, 2002 that Shell had contracted to acquire Pennzoil, Deutsche and/or such third party were under a duty to abstain from trading in the Pennzoil 2009 bonds, and in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and applicable New York law, induced the transaction in issue, when MBOI was unaware of the impending announcement. Therefore, MBOI alleges that Deutsche is barred from seeking any recovery in connection with the transaction.

Deutsche does not dispute that the insider trading defense embraced in the Eighth Affirmative Defense is a valid defense under legal principles. Trading securities based on material non-public information when the trader has such knowledge as a result of being a corporate insider of the issuer of the securities, or being a temporary insider having a fiduciary duty to the issuer is a violation of

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(1), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. *United States v. O'Hagan*, 521 U.S. 642, 652 (1997). If one is a tippee of an insider who disclosed such information to the tippee, the tippee is similarly prohibited from trading the securities of the issuer if the tippee has knowledge of the breach of the tipper's duty of confidence. *Dirks v. SEC*, 463 U.S. 646, 650 (1983).

Any person, as described above, in possession of nonpublic insider information that is material to the value of a security must abstain from trading in that security until the information has been made public. *Chiarella v. United States*, 445 U.S. 222, 227 (1980); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2001).

B. Summary Judgment is Inappropriate When Salient Facts Are Particularly Within the Knowledge of Movant

Any direct proof of Deutsche's foreknowledge of the contract to acquire must be within Deutsche's domain, but MBOI was denied the opportunity to discover such evidence. This alone justifies denial of Deutsche's motion under CPLR 3212(f), and MBOI so argued below. (e.g., R. 403-420).

Summary judgment is particularly inappropriate where "there are salient facts within the knowledge and control of the movant which may be revealed through pretrial discovery," *Integrated Logistic Consultants v. Fidata Corp.*, 131 A.D.2d 338, 340 (1st Dept. 1987), and "should not granted [sic] when the facts on which the motion is predicated are exclusively within the moving party's knowledge." *Vitiello v. Mayrich Constr. Corp.*, 255 A.D.2d 182, 184 (1st Dept. 1998).

This is particularly true when, as here, such information "might well be disclosed by cross-examination or examination before trial," *Baldasano v. The Bank of New York*, 199 A.D.2d 184, 185 (1st Dept. 1993), and "there are likely to be defenses that depend upon knowledge in the possession of the party moving for summary judgment." *Aubrey Equities, Inc. v. SMZH 73rd Assocs.*, 212 A.D.2d 397, 398 (1st Dept. 1995).

C. The Badges of Fraud Here Urge Denial of Deutsche's Motion

While MBOI has not been afforded the opportunity to examine Deutsche's witnesses on these issues, the facts concerning the suspicious timing of the transaction as well as Deutsche's solicitation and resolicitation of MBOI and offering a premium for the sale carry the traditional "badges of fraud" which justify a trial. *Accord Bulkmatic Transport Co., Inc. v. Pappas.*, 2001 U.S. Dist. LEXIS 6894 at *35(S.D.N.Y. May 11, 2001) (circumstantial evidence or "badges of fraud" evidencing fraudulent intent include the adequacy of the consideration received and the timing of the transactions); *SEC v. Singer*, 786 F. Supp. 1158, 1164-65 (S.D.N.Y. 1992) ("circumstantial evidence such as suspicious timing of trades, contracts between potential tippers and tippees, and incredible reasons for such trades provide an adequate basis for inferring that tipping activity [under the Federal securities laws] has occurred.")

Deutsche fails to explain away the badges of fraud present here. First, the timing of the transaction is highly suspicious. No transaction had been done by MBOI and Deutsche for six months. (R. 13-14.) Mr. Bugni had not heard from Mr. Williams for many months. (R. 371.) Mr.

Lombardo wrote internally on March 25, 2002 at Deutsche specifically urging purchases by sales reps of Pennzoil 2009 bonds. (R. 269). Following the close of business on that very day, the announcement that Shell had contracted to buy Pennzoil was made. There is no basis for Deutsche's statement that such major developments "occur routinely."

Despite Deutsche's suggestion that Mr. Bugni initiated the transaction by re-thinking and seeking clarification on Deutsche's initial solicitation, it was Deutsche that initially solicited MBOI (R. 370-71, 380) and still tried to generate a trade when Mr. Bugni first rejected Mr. Williams' proposal (R. 382).

Additionally, Mr. Williams did not state that Deutsche only wanted $5 million in par value. He volunteered to arrange for purchases of the other $10 million in par value ("We would . . . should be able to trade the balance with one call." (R. 384)) without any prompting from Mr. Bugni.

Deutsche disputes that the price it offered MBOI was a premium but does not address the industry source which shows that the price offered by Deutsche was above market value on March 25, 2002. (R. 373, 389). Similarly, its claims that it bought from MBOI at slightly less than it sold $1 million in par value of Pennzoil 2009 bonds on March 22, 2002 and sold part of MBOI's Pennzoil 2009 bonds on March 25, 2002 at a profit of "only" $1.31 per $100 in par value (R. 55) are unpervasive [sic] because it refused to give any discovery, despite the existence of a stipulation of confidentiality (R. 406-08, 432-35, 439-450), as to the identity of any buyers of Pennzoil bonds. (e.g., R. 432-34).

That Deutsche was not interested in acquiring Pennzoil bonds held by MBOI from another issue of bonds with an earlier maturity date, and apparently did not make any other

purchases on March 25, 2002 of Pennzoil bonds are not revealing. There is little in the record about the other series of Pennzoil bonds. In fact, Mr. Williams sought longer dated Pennzoil bonds from Mr. Bugni. (R. 253.) Nor is it known whether, despite efforts by Deutsche to buy other Pennzoil 2009 bonds on March 25, 2002, it simply failed to find a seller.

In sum, the timing of Deutsche's solicitation on the day of the public announcement of the contract to acquire Pennzoil, Mr. Bugni not having heard from Mr. Williams for many months, Mr. Williams' eagerness to do a deal for Pennzoil 2009 bonds, the premium offered by Deutsche, and Deutsche's unwillingness to disclose for whom it acted, all urge denial of Deutsche's summary judgment motion.

The cases cited by Deutsche (Deutsche Br. at 56) to show grant of summary judgment in allegedly similar circumstances are unpersuasive. In the unpublished disposition which cannot be cited in the Circuit that issued it, summary judgment appeared to have been granted only after the plaintiff had taken depositions. *SEC v. Goldinger*, 106 F.3d 409, 1997 WL 21221 (9th Cir. 1997). In all of the others, the plaintiffs had been afforded broad deposition discovery, unlike here. *SEC v. Truong*, 98 F.Supp. 2d 1086, 1099 (C.D. Cal. 2000); *Azurite Corp., Ltd. v. Amster & Co.*, 844 F.Supp. 929, 933 (S.D.N.Y.), *aff'd*, 52 F.3d 15 (2d Cir. 1995); *Slemrod v. Yardly Savings & Loan Association*, 1989 WL68599 at *3 (E.D.Pa. June 20, 1989).

Even if Deutsche was truly unaware and not deliberately ignorant of any wrongful activity, Deutsche is still not entitled to enforce its purported contract with MBOI if Deutsche, itself, was the victim of its customer's fraud. "Where a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties,

the loss should fall on the one who enabled the fraud to be committed." *Fidelity National Title Ins. Co. v. Consumer Home Mortgage Inc.*, 272 A.D.2d 512, 514 (2d Dep't 2000); *see also 60A NY Jur.2d, Fraud and Deceit*, § 194 at p. 313 (2001).

CONCLUSION

For the foregoing reasons, the Court should affirm the order dismissing this action because (a) the Courts of this State lack jurisdiction over the person of MBOI, or (b), alternatively, because the Courts of New York State are precluded by the sovereign immunity of the State of Montana and comity from adjudicating the claim. In the event this Court reverses the order below insofar as it dismisses this action, the Court should affirm the order's denial of Deutsche's motion for summary judgment.

Dated: New York, New York
October 6, 2004

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(Time Requested: 30 Minutes)

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Court of Appeals
of the
State of New York

DEUTSCHE BANK SECURITIES, INC.,

Plaintiff-Respondent,

-against-

MONTANA BOARD OF INVESTMENTS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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Date Completed: January 20, 2006

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dismissed the defense of insider trading because Deutsche had supplied the affidavits of an employee, Stephen Williams, and former employee denying that they had knowledge of the announcement of the acquisition of Pennzoil when Williams solicited MBOI on March 25, 2002. (R. 697-98.) The court precluded MBOI from cross-examining those witness [sic] by depositions and any other discovery in addition to what the First Department itself characterized as "some limited discovery" that had been permitted and taken in the case. (R. 691.)

MBOI moved the Appellate Division for permission to appeal, to this Court, the Appellate Division's decision and order dated June 14, 2005, and such motion was granted by order dated November 22, 2005. In that order, the Appellate Division certified the following question to this Court for resolution: "Was the Order of the Appellate Division, which reversed the order of Supreme Court, properly made?" (R. 701.)

ARGUMENT

I

THE STATE OF MONTANA AND ITS AGENCIES, INCLUDING MBOI, ARE IMMUNE FROM SUIT IN THE COURTS OF THE STATE OF NEW YORK

This case presents an attempt by a private litigant, Deutsche, to bring the State of Montana, acting through its MBOI, before the courts of the State of New York to answer a breach of contract claim arising from Montana's management of its treasury funds. It is an attempt that is fraught with constitutional difficulty. Litigation of this claim in this forum infringes Montana's sovereign immunity from suit in the courts of the State of New York, striking at the core of Montana's status as a sovereign state.

MBOI is an arm of the State of Montana for purposes of state sovereign immunity. *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 n. 6 (2002) (holding that the state ports authority is an instrumentality of the State of South Carolina protected by the state's sovereign immunity).

MBOI presented its sovereign immunity defense at every opportunity in the trial court (e.g., R. 34-35, 329-38), and before the Appellate Division. The trial court found it unnecessary to reach the sovereign immunity issues by virtue of its determination that the New York courts lacked personal jurisdiction over MBOI. In resolving the issues related to Montana's sovereign immunity defense, the Appellate Division relied exclusively upon the comity analysis in this Court's decision in *Ehrlich-Bober*. (R. 10-11.) *A* more thorough consideration of the sovereign immunity issue shows that MBOI's immunity from suit should preclude the exercise of subject matter jurisdiction over this claim by a New York court.[2]

A. Montana Has Preserved Its Sovereign Immunity From Suit Except In Limited Circumstances Not Applicable Here.

In *Alden v. Maine*, 527 U.S. 706, 713 (1999), the United States Supreme Court recognized that "the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today (either

[2] Montana recognizes that to the extent the Supreme Court has resolved the sovereign immunity issue adversely to the State's position on federal constitutional grounds in *Nevada v. Hall*, 440 U.S. 410 (1979), this Court is bound by that determination. However, Montana must present the issue in this forum to be assured that it is adequately preserved for further Supreme Court review in the event this Court affirms the Appellate Division's decision. Sup. Ct. R. 14.1(g)(ii). Moreover, Montana submits that the infirmity of *Hall* in light of later Supreme Court jurisprudence is an important factor supporting reconsideration of this Court's decision in *Ehrlich-Bober* regarding the appropriate application of the rule of comity to a sister state's assertion of sovereign immunity. See Point II.A.2, *infra.*

literally or by virtue of their admission to the Union upon an equal footing with the other states) except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* further recognized that states could voluntarily surrender their sovereign immunity by consenting to suit. 527 U.S. at 755 ("[S]overeign immunity bars suits only in the absence of consent.") Such waivers, however, must be so explicit as to "leave no room for any other reasonable construction." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985). Montana has not consented to this action before the courts of the State of New York.

Prior to 1972, Montana's immunity from suit was well-established in Montana law. *See, e.g., Longpre v. Joint School District No. 2*, 151 Mont. 345, 347, 443 P.2d 1, 2 (1968) ("[T]he state is immune for tort liability because of its sovereign character. And, generally speaking, all public agencies, institutions or political subdivisions of the state partake of this sovereign immunity, at least while performing governmental functions. . . . ") In 1972, however, Montana adopted a new constitution that contained a limited waiver of the state's sovereign immunity:

> The state, counties, cities, towns, and all other local government entities shall have no immunity from suit except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

Mont. Const., Art. II, § 18. The Montana Supreme Court has definitively construed this provision to be a limited waiver of immunity applicable only to actions sounding in tort. *Leaseamerica Corp. v. State*, 191 Mont. 462, 468-69, 625 P.2d 68, 71 (1981). Moreover, the federal courts have recognized that the constitutional waiver applies only to

actions filed in Montana state courts. *Montana v. Gilham*, 133 F.3d 1133, 1138-39 (9th Cir. 1998) (Montana constitutional waiver applies only to actions filed in Montana state court); *State v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981) (same).

Similarly, while the Montana legislature has enacted a statute consenting to suits against the state for breach of contract, Mont. Code Ann. § 18-1-404, the legislature has also limited the fora in which the State may be sued to Montana's district courts, Mont. Code Ann. § 18-1-401, just as New York's legislature has limited suits against the State of New York to the New York Court of Claims. N.Y. Court of Claims Act § 8, § 9, subpart 2 (waiving the sovereign immunity of the State of New York for certain claims but providing exclusive jurisdiction in the New York Court of Claims); *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300 (1987) ("Since the adoption of the Court of Claims Act . . . the State has been subject to suit for damages, but only in the Court of Claims."). The federal courts have accordingly held that Montana's statute waives the State's immunity only with respect to actions brought in Montana state courts. *Peretti*, 661 F.2d at 758.

In *Hall*, the Court noted that "[t]he States' practice of waiving sovereign immunity in their own courts is a relatively recent development. . . . " 440 U.S. at 417 n.3. Now, however, most states have waived their immunity or provided a procedure for claimants to recover against the state with respect to at least some claims, and many would, like Montana and New York, allow suit to be brought against them in their own courts for breach of contract. *See, e.g.*, Alaska Stat. § 09.50.250; D.C. Code Ann. § 2-308.01; Minn. Stat. § 3.751; Nev. Rev. Stat. § 41.031; N.D. Cent. Code § 32-12-02; 62 Pa. Cons. Stat.

§ 1702; Utah Code Ann. § 63-30d-301(1)(a); Wyo. Stat. § 1-39-104.

It is clear that "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis the Court's). The people of Montana, like the people of New York, have determined to retain the State's immunity from suit except for certain actions filed in the State's own courts. As the following discussion shows, this determination has binding constitutional force with respect to the ability of Deutsche to bring this action against MBOI in the courts of the State of New York.[3]

B. Montana's Sovereign Immunity Erects a Constitutional Barrier To New York Courts' Assertion Of Subject Matter Jurisdiction In This Case.

The United States Supreme Court, in a series of recent cases, has endorsed the view that state sovereign immunity inheres in the federal constitutional plan, relying on historical evidence that the states' immunity from unconsented suit was a "given" in the minds of the constitutional framers, so much so that significant elements of state sovereign immunity were so fundamental as to require no explicit mention in the Constitution. The same historical evidence that supports the recent holdings

[3] Properly invoked, the sovereign immunity of a state deprives the court of subject matter jurisdiction over the claim against the state. *Morrison v. Budget Rent-A-Car Systems, Inc*., 230 A.D.2d 253 (1997) (defense of sovereign immunity deprives New York court of subject matter jurisdiction).

that states are immune from suit in federal court, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), in their own courts, *Alden v. Maine*, 527 U.S. 706 (1999), in federal administrative tribunals, *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), and in tribal courts, *Montana v. Gilham*, 133 F.3d 133, 1135-37 (9th Cir. 1998), compels the conclusion that states cannot be sued without their consent in the courts of a sister state.

These more recent developments in constitutional jurisprudence undercut the authority of two earlier court decisions on which Deutsche, and the decision of the Appellate Division, rely. In *Nevada v. Hall*, 440 U.S. 410 (1979), the United States Supreme Court held that the courts of California were not bound by state sovereign immunity or the Full Faith and Credit Clause to honor, in a case filed in a California state court arising from an auto accident in California, a Nevada statute placing limits on recovery in tort claims against that state. The following year, in *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574 (1980), the Court of Appeals relied on *Hall* in holding that New York would not accord Full Faith and Credit to the sovereign immunity of a Texas state university sued in the courts of this state over a claim arising from certain investment transactions centered in New York. We now turn to these arguments.

1. Recent Authority Establishes That The Sovereign Immunity Of The States Is A Matter Of Constitutional Dimension.

The United States Supreme Court has in recent years clarified the constitutional status of the sovereign immunity of the states. Three seminal cases decided since the

decisions in *Hall* and *Ehrlich-Bober* show that the fundamental premises of *Hall* have been undermined and that the sovereign immunity of the States is a matter of constitutional dimension.

First, in *Seminole Tribe*, the Court clarified that Congress lacks the power under Article I of the Constitution to abrogate the sovereign immunity of the states and subject states to suit in federal court relying on the clear historical evidence that at the time Article I was adopted it was "the general sense and the general practice of mankind" to shield sovereign states from unconsented suits. 517 U.S. at 69, *quoting The Federalist No. 81* at 487 (A. Hamilton) (C. Rossiter ed. 1961). Three years later in *Alden*, the Court considered whether Congress could require a state's courts to entertain actions against the state to enforce the Fair Labor Standards Act over the state's objection that it was immune from suit in its own courts. *Alden* rejected the notion that a state's courts could be opened by Congress to unconsented suits against the state, relying, as in *Seminole*, on the clear historical record showing that such actions would have been unimaginable to the framers of the Constitution. 527 U.S. at 715-24 (citing evidence from Blackstone, the Federalist, early Supreme Court decisions, other writings of the framers, the convention debates on adoption of the Constitution and its ratification by the states, and the adoption of the Eleventh Amendment).

Finally, in *Federal Maritime Commission*, the Court extended the reasoning of *Seminole* and *Alden* to hold that despite the fact that the Eleventh Amendment explicitly limits only the federal judicial power under Article III of the Constitution, the sovereign immunity of the states prevented a federal administrative tribunal

from exercising jurisdiction over a claim against a state agency. The Court assumed that such a tribunal did not "exercise the judicial power of the United States" so as to be subject to the express provisions of the Eleventh Amendment, 535 U.S. at 754, but found that this assumption did not end the analysis. Relying principally on *Alden*, the Court reaffirmed that "the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" 535 U.S. at 755, *quoting Hans*, 134 U.S. at 18. Finding that federal administrative adjudications "are the type of proceedings from which the Framers would have thought the States possessed immunity," 535 U.S. at 756, the Court concluded that the ports authority could not be forced to litigate before the Commission. *Id.* at 760-61. Thus, even in a tribunal of another sovereign, the residual sovereign immunity of the state precluded the tribunal from asserting jurisdiction over a state agency. The Ninth Circuit's decision in *Gilham*, 133 F.3d at 1136-37, holding Montana immune from a suit brought in a tribal court by a tribal member arising from an auto accident on the reservation likewise undercuts the concept that the state's sovereign immunity does not apply in the tribunals of another sovereign.

Both the structure of the Constitution and its framing and ratification suggest not that the states' pre-constitutional sovereign immunity was surrendered, but rather the opposite – that to the extent it was considered, the intent was to maintain all then-existing state immunities from suit. Moreover, recognition of states' immunity from suit in the courts of other states would serve the core interests underlying the doctrine of sovereign immunity. *See Alden*, 527 U.S. at 750; *Federal Maritime Commission*,

535 U.S. at 765-66 (outlining policy bases for state immunity from unconsented suits in foreign tribunals.) That is the state of the law now under the Supreme Court's jurisprudence, and as the following argument demonstrates, the existing contrary authority cannot be squared with it.

2. *Hall* and *Ehrlich-Bober* Have Been Undercut By More Recent Authority On The Sovereign Immunity Issue.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Supreme Court considered the question of whether Nevada's sovereign immunity required a California state court to dismiss a complaint against the University of Nevada arising from its employee's negligence in operating a motor vehicle in California which caused an accident in which the plaintiffs were seriously injured, or, in the alternative, to apply a Nevada law that limited the State's damage exposure to $25,000. In a relatively brief discussion, the *Hall* majority dismissed the idea that a State's amenability to suit in the forum of another sovereign was a matter with which the Constitution had any concern.

The *Hall* opinion based its conclusion principally on two premises. One was that the Constitution does not of its own force compel a state to recognize the sovereign immunity of another state. 440 U.S. at 417 n. 12 ("[Nevada] could not, absent California's consent and absent whatever protection is conferred by the United States Constitution, invoke any higher authority to enforce rules of interstate comity and to stop California from asserting jurisdiction. For to do so would be wholly at odds with the sovereignty of California.") The other was that the sovereign immunity of the States with respect to actions in the

courts of another state, unlike their immunity with respect to actions in federal courts, was simply not a matter of constitutional concern when the Constitution was ratified. 440 U.S. at 418-19 ("But the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified. Regardless of whether the Framers were correct in assuming, as presumably they did, that prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another, the need for constitutional protection against that contingency was not discussed.")

While normally an extended review of the reasoning of a Supreme Court Justice's dissenting opinion would seem an idle exercise, in this case it is warranted because much of the argument in then-Justice Rehnquist's separate opinion has now become part of the Supreme Court's majority view on these matters. In dissent, Justice Rehnquist debunked both of the majority's principle contentions. He argued that the sovereign immunity of the states, like many other principles of law in existence in 1789, was not addressed explicitly in the Constitution but remained part of the "constitutional plan" – one of the "postulates and assumptions" drawn from "shared experience and common understanding" that "are as much engrained in the fabric of the [Constitution] as its express provisions, because without them the Constitution is denied force and often meaning." 440 U.S. at 433 (Rehnquist, J., dissenting). Because the Constitution is built upon many such "postulates and assumptions," the absence of mention of state sovereign immunity cannot, Justice Rehnquist argued, be dispositive. Rather, the

question required examination of "the understanding of the Framers and the consequent doctrinal evolution of concepts of state sovereign immunity." *Id.* at 434.

Justice Rehnquist then presented historical evidence that, contrary to the *Hall* majority's assumption, suits against states in the courts of other states were a concern in the 1780's when the constitutional plan was being conceived. *Id.* at 435, *citing Nathan v. Virginia*, 1 Dall 77 (1781) (Virginia property immune from attachment order issued by Pennsylvania court). He referred to the debate on the effect of the proposed constitution on the states' immunity from suit, which prompted Alexander Hamilton's oft-cited response in *The Federalist No. 81*:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . .

The Federalist No. 81 (H. Lodge ed. 1908) at 508 (emphasis in the original), *quoted in id.* at 436; *see also id.* n. 3 (quoting other constitutional history materials establishing the reach of state sovereign immunity.)

Justice Rehnquist then turned for support to the structure of the Constitution itself, recounting the history of the adoption of the Eleventh Amendment following the Supreme Court's controversial decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793) allowing an action to be brought against the State of Georgia in federal court. The Eleventh Amendment was swiftly adopted following the

decision in *Chisholm* to make explicit in the Constitution what had been the widely held assumption – that the jurisdiction of the federal courts defined in Article III and the implementing statutes cannot extend to an unconsented suit against a State. *Id.* at 437.

In light of this history, Justice Rehnquist argued, it simply makes no sense to suggest that the immunity of the states from suit in other states' courts was not part of the constitutional plan. The provision in Article III of the Constitution extending federal court jurisdiction to actions between citizens of different states, Art. III, § 2, cl. 1, grew out of a recognition that local state courts might be, or be perceived to be, biased in favor of in-state interests. *See, e.g., The Federalist No. 80* (Rossiter ed. 1961) (Hamilton) at 478 ("The reasonableness of the agency of the national courts in cases in which State tribunals cannot be supposed to be impartial speaks for itself. No man certainly ought to be a judge in his own cause, or in any cause in respect to which he has an interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.") Reading the Constitution to disallow, under the Eleventh Amendment, actions against a State in the federal courts in another state, but allowing such suits in the other state's local courts, simply ignores this principle. 440 U.S. at 442 (Rehnquist, J., dissenting) ("Despite the historical justification of federal courts as neutral forums, now suits against unconsenting States by citizens of different States can *only* be brought in the courts of other States. That result is achieved because in the effort to 'protect' the sovereignty of individual States, state legislators had the

lack of foresight to ratify the Eleventh Amendment.") (Emphasis in the original).

Justice Rehnquist buttressed his argument by reference to a number of the Court's own opinions in which the Court had assumed in dicta that the states' immunity from suit extended to any court except as specifically eroded pursuant to the constitutional plan. *Id.* at 435-441, *citing, e.g., Beers v. Arkansas*, 20 How. 527, 529 (1858) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State.") (emphasis added); *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. *Behind the words of the constitutional provisions are postulates which limit and control.* There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81.") (Justice Rehnquist's emphasis).

Justice Rehnquist's opinion closes with concerns, also expressed by Justice Blackmun in his dissenting opinion, 440 U.S. at 429-30 (Blackmun, J. dissenting), that the majority's relegation of the sovereign immunity of a state to the protection of "comity" will prove unworkable. Unlike

a recognition that the sovereign immunity of the states protects them from unconsented suit in the court of other states, the doctrine of comity is without clear guiding principles, and "having shunned the obvious, the Court is truly adrift on uncharted waters; the ultimate balance struck in the name of 'cooperative federalism' can only be a series of unsatisfactory bailing operations in fact." *Id.* at 443 (Rehnquist, J. dissenting). He expressed further concerns about the ability of larger states to overreach over their smaller dependent neighbors – a concern quite pertinent to this case – and about the practical effects that will inhere when states take steps to insulate themselves from the judicial reach of their neighbors.

The views expressed in then-Justice Rehnquist's dissenting opinion in *Hall* have since become firmly entrenched in the Court's majority opinions. First, in *Seminole*, Chief Justice Rehnquist, writing for a majority of the Court, held, consistent with his separate opinion in *Hall*, that the sovereign immunity of the States was not created and is not defined by the literal terms of the Eleventh Amendment. 517 U.S. at 67-68, *citing Monaco v. Mississippi*, 292 U.S. at 321-23

Next, and probably most significantly for present purposes, the Court's decision in *Alden*, for the first time, upheld under the federal Constitution a state's claim of sovereign immunity in a state court. Justice Kennedy's opinion for the Court adopts at the outset the principle that the sovereign immunity of the states is part of the plan of the convention:

> [T]he sovereign immunity of the States neither derives from nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative

> interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

527 U.S. at 713. The Court's opinion then recounts, in more exacting detail than the dissent in *Hall*, the historical evidence of the understanding of the framers that the States enjoyed immunity from suit prior to the ratification of the Constitution. 527 U.S. at 715-24. The Court punctuated its historical review with a rebuke to one of the premises of the *Hall* decision – the idea that the Eleventh Amendment addressed the only aspect of state sovereign immunity that was thought to be of consequence at the time: "The more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush." *Id.* at 724.

The Court's opinion agreed with Justice Rehnquist's observation in *Hall* that its decisions subsequent to the adoption of the Eleventh Amendment confirm the expansive reach of state sovereign immunity. For example, *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890) held that despite the reference in the Eleventh Amendment to suits "commenced or prosecuted against one of the United States by Citizens of another State," the sovereign immunity of the states protected them from actions brought by their own

citizens as well, and *Monaco* and *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) extended that rule to actions brought by foreign nations and Indian tribes as well. The Court concluded:

> These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.

527 U.S. at 728-29. This "constitutional principle" "inheres in the system of federalism established by the Constitution." *Id.* at 730.

The yet more recent decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) sheds further light on the interaction of sovereign immunity among separate sovereigns. In that case, the Federal Maritime Commission, a federal regulatory agency, attempted to compel the South Carolina State Ports Authority, an agency of the state, to respond in a contested administrative case to a complaint against the state agency brought before the Commission by a private party. The Court held that South Carolina's sovereign immunity precluded the agency action, relying on the "presumption . . . that the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was

adopted.'" 535 U.S. at 755, *quoting Hans*, 134 U.S. at 18.[4] The Court examined the historical record and found no evidence that the framers would have thought a State could be subjected to a court-like enforcement proceeding before an agency of the national government. The Court stated its conclusion in terms pregnant with meaning for this case:

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. *See In re Ayers*, 123 U.S. 443, 505 (1887). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden*, 527 U.S. at 748, (quoting *In re Ayers*, 123 U.S. at 505).
>
> Given both this interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State. Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the

[4] This presumption was overlooked by the majority in *Hall*. The majority opinion found: "It is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts" 440 U.S. at 417. The majority nevertheless "raised up" the ability of California to compel Nevada to answer the lawsuit in California's courts.

> complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.

535 U.S. at 760.

The Court has had two occasions to revisit the holding in *Hall*. In neither did the Court explicitly reaffirm the *Hall* Court's reasoning. First, in *Alden*, the Court reviewed the holding in *Hall*, but not with respect to its determination that Maine enjoyed a constitutionally-based immunity from suit. Rather, the Court found it necessary to look at *Hall* only in the context of the secondary question of whether Congress could overcome the constitutionally-based sovereign immunity of the State through the Fair Labor Standards Act. The Court accepted for purposes of that discussion the premise that sovereign immunity operated differently with respect to actions in the sovereign's own courts and the courts of another sovereign. 527 U.S. at 738. The Court distinguished *Alden* from *Hall* because *Alden*, unlike *Hall*, did not involve an action against Maine in another state's courts, and because *Hall* did not present a question of the power of Congress to abrogate the constitutional immunity enjoyed by the States in their own courts. *Id.* at 739-40.

Most recently, in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), the Court considered the application of state sovereign immunity with respect to a claim brought in a Nevada court that California tax authorities had committed various torts in the enforcement of California's tax laws against a Nevada resident. The Court decided the issue solely on the question of whether a state court's comity analysis was bound to defer

to the defendant state's interest in performing "core sovereign functions" such as collection of taxes. 538 U.S. at 497 ("The question presented here . . . implicates *Hall's* second holding: that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy.") The Court assumed, *arguendo*, the validity of *Hall's* holding that Nevada was not immune from suit in California's state courts, stating: "Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner's *amici* States, see Brief for States of Florida, et al. as *Amici Curiae* 2, to do so. See this Court's Rule 14.1(a)."[5] *Id.* Thus the Court has yet to consider whether its 1979 decision in *Hall* collides with any of the principles it has consistently applied to other state sovereign immunity questions in the last ten years.

Hall's view is at odds with the more recent cases. Clearly, if limits on Article III jurisdiction defined the complete scope of the Constitution's concern with state sovereign immunity, the Court's most recent decision in *Federal Maritime Commission* is wrong, because the Court there expressly eschewed any reliance on the scope of Article III judicial power in deciding whether sovereign

[5] This Court's decision in *Ehrlich-Bober*, like *Hyatt*, is simply a straightforward application of *Hall's* comity analysis. The State of Texas did not challenge the applicability of the *Hall* sovereign immunity analysis to its case. 49 N.Y. 2d at 579 n. 2 ("The defendant does not attempt to distinguish this case so as to bring it outside the rule of *Hall.")* Accordingly, the Court of Appeals treated the case as raising only the question of the application of *Hall's* comity analysis. *Id.* at 579-80 (viewing the constitutional sovereign immunity issue as settled by *Hall* and proceeding to decide the case under comity principles).

immunity barred federal administrative contested cases against a state.

Likewise, the decision in *Alden* would clearly be wrong if the scope of the State's constitutional immunity extended only to suits in Article III federal courts, since in that case the Supreme Court recognized that the sovereign immunity of the states was constitutionally based and extended to bar suits against a state in its own courts as well as in federal Article III courts.

Moreover, *Hall* has spawned an anomalous jurisprudence in which New York can, in actions brought in its courts, deny Texas the benefit of a public policy choice in which New York itself may seek protection. *Ehrlich-Bober*, 49 N.Y.2d at 584-85 (Jones, J., dissenting) (noting that New York provides by statute the same kind of forum restrictions in suits against its universities that Texas asserted). This anomaly allowed New York to deny the sovereign immunity claims of the State of Texas in *Ehrlich-Bober* and then, six years later, in *Guarini v. New York*, 215 N.J. Super. 426, 521 A.2d 1362 (1986), to assert (successfully, as it turned out) that New York was immune from suit in the courts of New Jersey.

The reasoning in *Hall* regarding the reach of the states' sovereign immunity simply cannot be squared with the view of the sovereign immunity of the states that controlled the outcome of *Seminole, Alden*, and *Federal Maritime Commission*. It is a settled matter of federal constitutional law under these cases that Montana cannot be sued in a federal court, a federal administrative agency, or absent consent, in its own courts. While not a determination by the United States Supreme Court, the Ninth Circuit's decision in *Gilham* immunizes Montana from suit

in the courts of an Indian tribe, yet another separate sovereign. 133 F.3d at 1135-37. Indeed, assuming *Hall* is still good law, the courts of another state are the only ones in which Montana may be forced to answer without the State's consent. Montana believes that when given the opportunity the Supreme Court will bring order to its decisions regarding state sovereign immunity by overruling *Hall* or limiting it to its facts. For purposes of deciding whether the courts of New York should entertain this action, therefore, a blind reliance by the New York courts on the supposed soundness of the *Hall* decision would be misplaced.

II

COMITY CONSIDERATIONS REQUIRE DISMISSAL OF THE ACTION

The comity doctrine "is an expression of one State's entirely voluntary decision to defer to the policy of another." *Ehrlich-Bober*, 49 N.Y.2d at 580. The Supreme Court has made clear that "States' sovereignty interests are not foreign to the full faith and credit command," and has cautioned against application of the comity doctrine in a manner that "exhibit[s] a 'policy of hostility to the public Acts' of a sister State." *Hyatt*, 538 U.S. at 499. This Court's application of comity principles in *Ehrlich-Bober*, one of the earliest cases considering the sovereign immunity claims of a sister state after *Hall*, is inconsistent with the Supreme Court's cautionary statement in *Hyatt* and with the body of case law that has developed in this area in other states following the decision in Hall. Montana submits that *Ehrlich-Bober* should be limited to its facts and distinguished from the case at bar. Failing that, its

doctrinal flaws warrant it reconsideration, and upon reconsideration it should be overruled.

A. *Ehrlich-Bober* does not require the Court to disregard Montana law requiring actions against the MBOI to be brought in Montana.

1. This case is distinguishable on its facts

Based on this Court's decision in *Ehrlich-Bober*, the Appellate Division rejected MBOI'S comity argument regarding New York jurisdiction in this case. This case, however, is factually different from *Ehrlich-Bober* in several respects. Those differences require a different result than reached in *Ehrlich-Bober*.

Initially, the transactions involved in that case were loans, albeit ones collateralized by securities which were nominally sold to the plaintiff, 49 N.Y.2d at 577, rather than a simple agreement to sell securities; thus, the agreement created a continuing relationship between the plaintiff and defendant. Second, the transactions at issue were two in a series of twenty-two transactions between the parties; thus, the parties had an ongoing, regular business relationship. 49 N.Y.2d at 577. Third, unlike the present case, the defendant in *Ehrlich-Bober* not only initiated the transactions by telephoning the plaintiff's offices in New York but on a previous occasion had actually visited the plaintiff's New York office and purchased securities while there. 49 N.Y.2d at 577-78.

The facts in *Ehrlich-Bober* were critical to the decision in that case. In refusing to recognize a Texas statute requiring actions against state agencies to be brought in Texas, the Court explained:

> It is more logical, surely, to assume that when a governmental entity seeks *financing* in the New York market that it will be amenable to suit here than to presume the financial institution *to which it comes* must seek a remedy in Austin, Texas.

Id. at 582 (emphasis added). The Court characterized the transactions at issue as being "centered in New York", *id.* at 581-82 ("the transactions in question, judged by any indicator, must be considered to have been centered here" and jurisdiction is proper in New York "where an action concerns a wholly commercial transaction centered in New York"), and concluded that "on these facts" it would not defer to the Texas courts, *id.* at 582-83. Finally, it noted that the extent of the defendant's contacts with New York may be taken into account in a comity analysis. *Id.* at 582.

2. The Appellate Division improperly read *Ehrlich-Bober to* require, in a comity analysis, that controlling weight be given to New York's non-statutory policy supporting its status as a commercial center and ignoring its statutory policy favoring state sovereign immunity.

Although *Ehrlich-Bober* contains broad language articulating New York's strong interest in "maintaining and fostering its undisputed status as the preeminent commercial and financial center," 49 N.Y.2d at 581, the Court's focus on the nature of the transaction at issue in the case, along with language indicating that its decision rested on the particular facts of the case, belie any intent to lay down a blanket rule of comity with respect to all

financial transactions involving New York businesses. And, for good reasons involving considerations underlying the comity doctrine, no broad rule should be laid down. Rather, the Court should look at the particular nature of the transaction at issue in this case and determine whether New York's public interest in adjudicating the dispute overrides the sovereignty interests of the State of Montana in doing so. *See Hyatt*, 538 U.S. at 493, 499 (observing that the Nevada Supreme Court suitably balanced comity consideration of accommodating and giving effect to another state's law against its own state's policies and interests).

Montana has consented to be sued in its own courts with respect to the transaction at issue in this case. Mont. Code Ann. §18-1-401 provides, "The district courts of the state of Montana shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim or dispute arising out of any express contract entered into with the state of Montana or any agency, board, or officer thereof." Even if New York's public policies concerning commercial transactions are taken into consideration, the provision is entitled to deference under the facts of the present case.

In *Ehrlich-Bober* this Court found that New York's interest in assuring a New York forum for resolving disputes involving commercial transactions trumped a similar Texas' law requiring legal actions against its agencies to be brought only in Texas. However, New York's interest in regulating commercial transactions is not the only New York policy which must be considered in a comity analysis. Another critical policy is New York's own policy, similar to that of Montana, waiving sovereign immunity

but requiring that breach of contract actions against New York state agencies be brought in New York in its Court of Claims. N.Y. Court of Claims Act § 8 (sovereign immunity waived) and § 9, subpart 2 (providing that the Court of Claims has jurisdiction over actions against the state "for the breach of contract, express or implied"). The dissent in *Ehrlich-Bober* pointed out the New York policy in this regard. 49 N.Y. 2d at 584-85 (Jones, J., dissenting) (noting the similarity between New York's limited waiver of immunity for actions against the state in the Court of Claims and Texas law, and stating, "[t]he strong policy considerations undergirding the jurisdictional stance on which the majority relies should not be confused with or permitted to obscure the strong policy considerations which dictate that, under principles of sovereign immunity, units of State government should not be exposed to claims in all courts which might otherwise have authority constitutionally to entertain suits against such units.")

The majority in *Ehrlich-Bober* apparently viewed New York's statutory policy requiring suits against the State to be brought in New York as subordinate to the New York's interest in adjudicating commercial disputes, at least under the circumstances of that case. However, it is likely that under circumstances similar to this case New York would adamantly urge another state's courts to respect New York's statutory requirement that actions against it be brought in a New York court. New York took precisely that stance, successfully, in *Guarini v. New York*, 215 N.J. Super. 425, 521 A.2d 1362 (1986), a case in which the courts of New jersey [sic] declined to accept a claim against the State of New York, holding that New York's sovereign immunity and principles of comity barred the suit. Thus, it

was anomalous for the Appellate Division in this case to ignore Montana's policy.

Indeed, in similar circumstances most other state courts have viewed legislation of this type to "unequivocally constitute[ ] the public policy of the [forum] state" for purposes of a comity analysis. *Beard v. Viene,* 826 P.2d 990, 996 (Ok. 1992). Based on their own statutes as the "benchmark," those courts have held that the "recognition of another state's limitation of its own liability will turn upon [the forum state's] policies and 'whether [the forum state] would permit itself to be sued if it had engaged in the conduct assigned' the foreign state in a given action." *Hernandez v. City of Salt Lake,* 686 P.2d 251, 253 (Nev. 1984), quoting *Mianecki v. District Court,* 658 P.2d 422 (Nev. 1983).

Analogously, in *Crair v. Brookdale Hospital Medical Ctr.,* 94 N.Y.2d 524 (2000), this Court specifically based its holding – that the plaintiff's failure to comply with the foreign states' notice of claim provisions barred the action in New York courts – on the fact that New York itself had statutory notice provisions that were similar in nature. 94 N.Y. 2d at 530-31.

The majority of the state courts that have refused to respect a foreign state's limitation of actions against it to its own courts have done so only where it has been shown that the forum state has a substantively different statutory policy, and that to subject a forum-state plaintiff to a foreign state's laws would result in either no remedy for the forum-state plaintiff, or a substantively more constrained remedy. *See e.g. Radley v. Transit Auth. of City of Omaha,* 486 N.W.2d 299 (Iowa 1992); *Clement v. State of Indiana,* 524 N.E.2d 36 (Ind.App. 1st.Dist. 1988); *Head v.*

Platte County, 749 P.2d 6 (Kan. 1988); *Haberman v. Washington Public Power Supply System,* 74 P.2d 1032 (Wash. 1987).

Deutsche has failed to identify any substantive difference between Montana law and New York law that might serve as the basis for an argument that it must be protected by this forum. This case therefore differs significantly from *Intercontinental Planning, Ltd. v. Daystrom, Inc.,* 24 N.Y.2d 372, 384 (1969) ("New York law affords the foreign principals the greatest degree of protection against the unfounded claims of brokers and finders") and *Bache & Co., Inc., v. International Controls Corp.,* 339 F. Supp. 341, 348 (S.D.N.Y. 1972) ("New York is concerned in seeing its statute applied in order to encourage sellers of securities to transact business in New York"), in which the foreign state's laws were substantially different and weaker than New York's laws.

Montana has opened its courts to breach of contract claims against the state without discrimination against foreign plaintiffs. Mont. Code Ann. §§ 18-1-401, 18-1-404. Requiring Deutsche to seek relief in Montana courts is no more inconvenient than requiring the State of Montana to litigate in courts of New York. There is no indication that the Montana courts would be hostile to any legitimate public policy concerns of the State of New York. Indeed, the opposite is true, *see e.g. Simmons v. State of Oregon,* 670 P.2d 1372, 1384-85 (Mont. 1983) (declining to exercise jurisdiction over tort action against the state of Oregon despite the presence of much lower liability limits under Oregon law, stating: "Under the particular facts of this case, however, a de-emphasis on sovereignty interests in order to insure the possibility of higher monetary damages would serve as an affront to the political decisions of

Oregon, whose legislature has decided that a $100,000 limitation in suits against governmental agencies is appropriate.") Finally, Deutsche has identified no factors that put it at a disadvantage if required to bring its action in Montana. In the absence of such showings, it cannot be said that New York's interests in this case automatically predominate. Deutsche's action should therefore be dismissed even assuming the correctness of *Ehrlich-Bober* with respect to the claims brought in that case.

B. In the alternative, *Ehrlich-Bober* should be overruled.

Should the Court not find this case distinguishable, *Ehrlich-Bober* should be revisited and overruled. For the reasons stated in Point I, *Ehrlich-Bober's* reliance on *Hall* is misplaced. Since the decision in *Nevada v. Hall,* many state courts have had occasion to examine whether, as a matter of comity among states, they will honor a foreign state's plea of immunity. *See e.g. Morrison v. Budget Rent-A-Car Systems, Inc.,* 230 A.D.2d 253, 267-68 (2d Dept. 1997) (canvassing cases); *see also Kent County, State of Maryland v. Steven A. Shepherd et. al,* 713 A. 2d 290, 298-302 (Del. 1998) (same). *Ehrlich-Bober* was among the first. Viewed with benefit of these later and better-reasoned decisions, the *Ehrlich-Bober* Court's rejection of Texas' plea of immunity stands apart as an inappropriate application of comity principles.

Initially, as noted above, *Ehrlich-Bober* failed to give adequate consideration to New York public policy, set forth in its own statutes, governing waiver of sovereign immunity and jurisdiction over actions involving the state. *Ehrlich-Bober,* 49 N.Y.2d at 584-85 (Jones, J., dissenting)

(noting that New York statutes provide the same kind of forum restrictions in suits against its universities as Texas did). That statutory policy, as set forth in N.Y. Court of Claims Act § 8 (sovereign immunity waived) and § 9, subpart 2, was entitled to as much weight, if not greater weight, than the non-statutory, more general and vague policy concerning economic development. *Id.*

While other public policies, such as protecting economic and financial markets, are also entitled to consideration in any conflict of laws analysis, see generally Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception,* 106 Yale L. J. 1965 (1997), they must be carefully applied. Judge Cardozo explained that another state's laws should be disregarded on public policy grounds only where the other state's laws would "violate some fundamental principle of justice, some prevalent conception of good morals [or] some deep rooted tradition of the common weal." *Loucks v. Standard Oil,* 224 N.Y. 99, 111 (1918). In light of New York's own public policy requiring suits against it to be brought in New York courts, it cannot be said that requiring Deutsche to sue MBOI in a Montana state court threatens the welfare of the people of New York.

The decision in *Ehrlich-Bober* also relied heavily, and erroneously, on the presence of long-arm jurisdiction in its comity analysis. 49 N.Y.2d at 582. Indeed, the presence of personal jurisdiction coupled with a general, non-statutory policy of promoting New York's financial interests was deemed sufficient to disregard the Texas statute requiring suits against its agencies to be brought in Texas courts. This approach is wrong as a legal and practical matter. As to the former, the Appellate Division has explained that

> [c]hoice of law questions are significantly different from questions of jurisdiction. 'Not only are these separate and distinct problems, but the rules formulated to govern their resolution embody different concepts expressed in different language.' The test in deciding whether jurisdiction may be asserted is not whether New York is the most convenient forum in which to litigate. Rather, the question is whether assertion of jurisdiction in New York will violate a defendant's right to due process of law. As a respected commentator has observed, there is a 'world of difference between the two.'

Alan Lupton Associates, Inc. v. Northeast Plastics, Inc., 105 A.D.2d 3, 8 (4th Dept. 1988) (internal citations omitted). Similarly, the Utah Supreme Court recently analyzed the issue as follows:

> Trillium contends that the extension of comity undermines Utah's public policy of providing its citizens with a forum to redress their grievances, as evidenced by Utah's long-arm statute. We disagree. We recognize that the long-arm statute requires Utah courts to extend their jurisdiction "to the fullest extent allowed by due process of law." Nevertheless, the long-arm statute does no go so far as to require a court to exercise that jurisdiction whenever possible. Put another way, the long-arm statute requires trial courts to recognize the full scope of their jurisdiction, but it does not require them to exercise that jurisdiction in the face of countervailing policies, such as principles of comity. Accordingly, numerous courts have held that the fact an action fits within a state's long-arm statute does not prohibit the extension of comity. Indeed, the existence of jurisdiction is not inconsistent with the

> extension of comity, but rather is a necessary predicate to it: if a court lacks jurisdiction, it does not have the authority or the need to consider whether to dismiss the case under principles of comity.

Trillium USA, Inc. v. Board of County Commissioners of Broward County, Florida, 37 P.3d 1093, 1098 (Utah 2001) (internal citations omitted).

More practically, under the *Ehrlich-Bober* approach the State of Montana (or any state, for that matter) would stand before the New York courts in no different of a posture than would an ordinary private litigant, violating Montana's interest, unique to sovereign states, in preserving constitutional immunity from suit. Clearly a rule which creates a result so anomalous warrants reexamination. *See K.D.F. v. Rex,* 878 S.W.2d 589, 594 n. 3 (Tex. 1994) ("We suppose that the courts of New York, applying *[Ehrlich-Bober's]* rationale, would not necessarily consider it appropriate for any state *other than New York* to exercise jurisdiction over another sovereign in a commercial dispute" [emphasis added]).

Finally, *Ehrlich-Bober's* economic policy analysis is flawed. One of the policies discussed by the Court was the need to maintain consistent governance over the financial markets and market-participants located in New York. Justice Baer, then of the Supreme Court, pointed out the shortcomings of that reasoning, explaining that

> Greater governance over the financial markets in New York is provided by federal law than state law. And yet, for example, securities fraud claims can be brought in any district in the country and, notwithstanding the possibility of nation-wide cacophony in judicial rulings, the securities

> markets function. This suggests that disaster will not befall plaintiffs and the market in government securities if the *Ehrlich-Bober* doctrine is not transformed into exclusive New York jurisdiction over cases involving the markets.

Salomon Brothers, Inc., et. al v. West Virginia Board of Investments, 152 Misc.2d 289, 297, 575 N.Y.S.2d 993, 999 (Sup Ct. N.Y Co. 1990); *see also Federal Maritime Commission,* 535 U.S. at 767-68 (holding that federal interest in promoting uniformity in maritime regulation was insufficient to overcome state sovereign immunity).

Another *Ehrlich-Bober* concern was for the "intolerable burden" (49 N.Y.2d at 582) that would be placed on New York financial institutions if they were required to litigate in other states' courts. As with the other concerns, this concern is overstated. If New York's own statutes are used as a benchmark for comity analysis, the same burden is placed on out-of-state businesses doing business with New York agencies. This is not a situation where another state's laws governing the transaction are substantively different and less protective than New York's laws. If Montana had not waived its immunity for contract suits at all, or its laws provided less substantive protection with respect to the transaction with Deutsche, then a case could be made that the Montana law is incompatible with New York policy and therefore not entitled to recognition under the comity doctrine. But in this case, New York law governing the place a suit against a state agency must be brought is compatible with Montana policy. It is not unreasonable to require a sophisticated actor such as Deutsche to consider, before it solicits business from an agency of the State of Montana, that it is undertaking an obligation to abide by Montana provisions limiting actions

against the agency to the courts of Montana, just as an actor in another state should be aware that transacting business with a New York state agency will subject it to potential lawsuits in the New York courts should a dispute arise over the transaction.

Ultimately, *Ehrlich-Bober* automatically elevates New York's economic interests over the sovereignty interests of the State of New York and other states. That automatic deference to economic interests fails to satisfy the sort of "healthy regard" for another state's sovereign status that is required in any comity analysis. *See Hyatt,* 538 U.S. at 499 (observing that "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.").

In light of the discussion in *Hyatt,* quoted above, and the Supreme Court's recent discussions regarding the importance of sovereign immunity in the constitutional order (see Point I, *supra*), the comity analysis reflected in the majority opinion in *Ehrlich-Bober* can no longer reasonably be viewed to be sound. Rather, Justice Jones's dissent provides the correct analysis and is consistent with the majority of other state courts addressing the issue. The "benchmark" for comity analysis should be the statutorily-expressed policy of New York that is most analogous to the one asserted by Montana here. That policy, which embodies "a categorical limitation of the court in which claims against the [state] may be instituted" (49 N.Y.2d at 584 (Jones, J., dissenting)), has not substantively changed since the time it was discussed by Justice Jones in *Ehrlich-Bober.* Accordingly, his conclusion should also control:

> Inasmuch as our New York conceptually identical policy analogue parallels that of the State of Texas, we should recognize and give effect to the legislatively declared policy of that State. This is precisely what the Appellate Division did.

Id. at 585. *Ehrlich-Bober* should be distinguished or, if not distinguished, overruled, and this case should be dismissed.

III

THE COURT SHOULD REVERSE THE APPELLATE DIVISION'S GRANT OF SUMMARY JUDGMENT ON LIABILITY AND IMPLICIT RULING THAT AFFIDAVITS DENYING INSIDER TRADING ARE DECISIVE AND PRECLUDE ANY DEPOSITIONS

Deutsche was not entitled to summary judgment (i) on liability and (ii) dismissing the affirmative defense that the transaction constituted an unenforceable contract based on insider trading. MBOI presented circumstantial evidence of transaction that is expected to increase the value of a security is especially likely to affect an investor's decision to buy, hold, or sell stock." *SEC v. Musella,* 748 F.Supp. at 1040.

B [sic]**. The Appellate Division's Ruling Would Obliterate the Rule that Summary Judgment is Inappropriate When Salient Facts Are Particularly Within the Knowledge of Movant**

"The court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it." *Sommer v. Federal Signal Corp.,* 79 N.Y.2d 540, 554 (1992). Summary judgment is a

drastic remedy, which "should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable." *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 404 (1957). "The motion should be granted only if the movant is entitled to judgment as a matter of law." *Sommer*, 79 N.Y.2d at 555. All inferences must be drawn in the non-movant's favor. *Cruz v. American Export Lines, Inc.,* 67 N.Y.2d 1, 13 (1986). When different conclusions may reasonably be drawn from the evidence, the motion should be denied. *Sommer,* 79 N.Y.2d at 555.

Any direct proof of Deutsche's foreknowledge of the contract to acquire Pennzoil must be within Deutsche's domain, but MBOI was denied the opportunity to discover such evidence. This alone justified denial of Deutsche's motion under CPLR 3212(f), and MBOI so argued in both the trial court (e.g., R. 403-420) and the Appellate Division, and supplied both a client affidavit and counsel's affirmation demonstrating the need for depositions and other discovery. (R.369-79, 403-411.)

"[S]ummary judgment is not justified where there are likely to be defenses that depend upon the knowledge in the possession of the party moving for judgment, which might well be disclosed by cross-examination or examination before trial [citations omitted.]" *Procter & Gamble Distr. Co. v. Lawrence Amer. Field Warehousing Corp.,* 16 N.Y.2d 344, 362 (1965); *Terranova v. Emil,* 20 N.Y.2d 493, 497 (1967); *Vitiello v. Mayrich Constr. Corp.,* 255 A.D.2d 182, 184 (1st Dept. 1998) (summary judgment "should not be granted when the facts on which the motion is predicated are exclusively within the moving party's knowledge"); *Integrated Logistic Consultants v. Fidata Corp.,* 131 A.D.2d 338, 340 (1st Dept. 1987).

Cases involving a defense of fraud are especially not suited for summary judgment before discovery is completed. "It is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted." *Jered Contracting Corp. v. New York City Transit Authority,* 22 N.Y.2d 187, 194 (1968).

By its June 14, 2005 order, the First Department rejected those principles. While MBOI has not been afforded the opportunity to examine Deutsche's witnesses on these issues, the facts concerning the suspicious timing of the Pennzoil 2009 bonds, the premium offered by Deutsche, and Deutsche's unwillingness to disclose for whom it acted, all urged denial of Deutsche's summary judgment motion and completion of discovery.

The Appellate Division, focused exclusively on the two affidavits of Mr. Williams and his former superior at Deutsche, Mr. Lombardo, in which the affiants denied advance knowledge of the contract for acquisition. However, in relying on those statements, the Appellate Division rejected those cases that would permit a case to proceed to trial, or, by logical extension, at least through depositions, where there were the types of badges or indicia of fraud present here.

Furthermore, the Court's uncritical crediting of those affidavits would obliterate the rule that where the facts are solely within the knowledge of the accused wrongdoer, discovery must be had, including depositions of the alleged wrongdoers.

Moreover, in relying on these Deutsche affidavits and granting summary judgment, the Appellate Division

prevented MBOI from determining whether Deutsche was buying at the request of a client who had insider information. If a client had such information, MBOI was entitled to break the trade even if Deutsche were unaware and not recklessly ignorant of that fact. "Where a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed." *Fidelity National Title Ins. Co. of New York v. Consumer Home Mortgage Inc.,* 272 A.D.2d 512, 514 (2d Dep't 2000); *see also 60A NY Jur.2d, Fraud and Deceit,* § 194 at p. 313 (2001). At a minimum, MBOI should have been allowed further discovery, including depositions.[6]

The Appellate Division relied on only four cases in granting summary judgment on liability. Two of the cases were cited by Deutsche, *SEC v. Truong*, 98 F.Supp. 2d 1086 (C.D. Cal. 2000); *Azurite Corp., Ltd. v. Amster & Co.,* 844 F.Supp. 929 (S.D.N.Y. 1994), *aff'd,* 52 F.3d 15 (2d Cir. 1995). In each case cited by the Appellate Division and all cases cited by Deutsche, the party claiming insider trading was afforded broad deposition discovery before the motion for summary judgment was heard. In *Truong,* 98 F. Supp. 2d at 1099, the plaintiff SEC conducted "many years of

[6] While Deutsche asserted that it was a principal in the transaction with MBOI, it refused to disclose to whom it sold Pennzoil 2009 bonds, including $5 million in par value out of the $15 million in par value of MBOI's Pennzoil bonds on March 25, 2002. If it was only committed to a buyer for $5 million in par value, and only wanted $5 million for itself, why did it enter into a transaction for all $15 million in par value? Furthermore, Deutsche never explained why it supposedly sold only $5 million out of the $15 million in par value but then felt compelled to buy $15 million in par value of Pennzoil 2009 bonds after March 26, 2002 at a much higher cost. Questions such as these scream for deposition discovery which MBOI was not permitted.

investigation, including dozens of depositions. . . . " In *Azurite,* 844 F. Supp. at 939, the plaintiff had access to the SEC's "voluminous and exhaustive discovery" in a related enforcement proceeding, as well as six depositions and additional discovery in the action. 844 F. Supp. at 933.

In *SEC v. de Castilla,* 184 F.Supp.2d 365, 376 (S.D.N.Y. 2002), also cited by the Appellate Division, there had been "full discovery". Here, the First Department did not permit full discovery; MBOI was not permitted to examine any witnesses.

Furthermore, in *de Castilla,* the Court found that there was direct evidence that the defendant could not have received inside information before he made most of his trades because his law firm partner, from whom he allegedly learned the inside information, was not informed of that information, i.e., an impending takeover, until after the defendant had made most of his trades. 184 F. Supp. 3d at 376, 377, 379. Additionally, well before the defendant's trading, there were rampant rumors reported publicly by Knight-Rider that the issuer would be taken over. *Id.* at 369. None of these fact are found in this case.

Froid v. Berner, 649 F.Supp. 1418 (D.N.J. 1986), the fourth case cited the [sic] by the First Department, is not even a decision in the Second Circuit. The plaintiff there claimed insider trading against defendants solely because: (1) defendants were members of the issuer's Board of Directors when the plaintiff purchased stock of the issuer in December 1985 and (2) the issuer's announced, in February 1986, net losses in 1985 greater than those sustained in 1984. From these facts, the plaintiff argued that the defendants must have known in December 1985, when plaintiff traded, that the issuer's losses would be

greater in 1985 than in 1984. *Froid,* 649 F.Supp. at 1424. However, there had been periodic public announcements of significant losses by the issuer during the period in question, and no evidence that the board of directors were made aware in December 1985 or earlier of write downs that would result in the greater net losses for 1985 reported in February 1986. Furthermore, the plaintiff was unable to point to anything like, as here, suspicious timing of a transaction, the accused's offering a premium for a transaction, and the accused's refusal to answer for whom it was acting.

Furthermore, the court in *Froid* exhibited a hostility to pretrial discovery in an insider trading case that is foreign to the Second Circuit courts. 649 F.Supp. at 1420, 1426. In *de Castilla,* 184 F.Supp. 2d at 376, where the United States District Court for the Southern District of New York granted summary judgment against the SEC in an insider trading case, the court expressly recognized that "[c]ertainly the circumstantial evidence warranted the investigation. Only after full discovery could [the alleged tippee's] knowledge, or lack of it, be determined." Similarly, in *SEC v. Musella,* 578 F.Supp. at 429, Judge Haight recognized the importance of deposition discovery of the alleged inside trader when he ruled that the defendants' refusal to answer questions at deposition, based on their the [sic] Fifth Amendment privilege, warranted the drawing of an adverse inference against them, stating" [i]n instances of insider trading, where the nature of the violation makes proof inherently difficult to obtain, assertion of the privilege may lead to a complete failure of proof." *Id*.

In the two other cases cited by Deutsche in addition to *Truong* and *Azurite,* the parties alleging insider

information were given broad deposition discovery. In the unpublished disposition which cannot even be cited in the Circuit that issued it, summary judgment appeared to have been granted only after the plaintiff had taken depositions. *SEC v. Goldinger,* 106 F.3d 409, 1997 WL 21221 (9th Cir. 1997). In the other case, *Slemrod v. Yardly Savings & Loan Association,* 1989 WL 68599 at *3 (E.D.Pa. June 20, 1989), the plaintiff who alleged insider trading took the deposition of the affiant-defendant who denied in an affidavit in support of his motion for summary judgment having insider information and the depositions of three other witnesses. In fact, the District Court characterized the discovery take by the plaintiff as "extensive". *Id.* at * 3. Here, the Appellate Division characterized the minimal discovery taken as "some limited discovery". (R. 690.)

The Appellate Division panel improperly decided to credit unhesitatingly the affidavits of the accused which denied insider information without subjecting them or anyone else at Deutsche to the truth seeking function of cross-examination at deposition, and despite the existence of indicia of wrongdoing. *See Millerton Agway Cooperative, Inc. v. Briarcliff Farms, Inc.,* 17 N.Y.2d 57, 64 (1966) (holding that Appellate Division improperly granted summary judgment based on its assessment of the affiants' credibility explaining that "[t]he truth as to these matters must be arrived at in the lawful and customary way, that is, by a trial where the witnesses can be examined and cross-examined and their demeanor and their versions put under the scrutiny of the triers of the facts.")

The Appellate Division's decision would create a radically new approach not only to insider trading cases but also to fraud cases in general where the evidence is

often solely within the possession of the accused. Accordingly, in the event the Court does not reverse the First Department's June 14, 2005 decision and order on the basis of the sovereign immunity of the State of Montana, comity, or lack of "transacting business" personal jurisdiction, the Court should (i) reverse the decision and order on the basis that there are triable issues of act on the insider trading defense or that deposition discovery should have been permitted, and (ii) direct that depositions be had and all discovery be completed.

IV

MBOI DID NOT TRANSACT ANY BUSINESS GIVING RISE TO THIS ACTION IN THE STATE OF NEW YORK

A. MBOI Transacted No Business in this State from Which the Complaint's Sole Cause of Action Arose

Supreme Court, New York County was correct in finding no jurisdiction under the transaction of business prong of CPLR § 302(a)(1), and the Appellate Division incorrectly erred in finding transaction of business. In fact, the Appellate Division incorrectly extended the transaction of business basis for personal jurisdiction to a set of facts far beyond the reach of prior jurisdictional cases.

To determine whether a transaction of business under §302(a)(1) has occurred, a New York court must be able to conclude that "the defendant's activities here were purposeful and there is a substantial relationship between the

transaction and the claim asserted." *Kreutter v. McGadden Oil Corp.,* 71 N.Y.2d

* * *

To be Argued by:
CHRIS D. TWEETEN
HERBERT C. ROSS, JR.
(Time Requested: 30 Minutes)

New York County Clerk's Index No. 603200/02

Court of Appeals

of the

State of New York

DEUTSCHE BANK SECURITIES, INC.,

Plaintiff-Respondent,

– against –

MONTANA BOARD OF INVESTMENTS,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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DEFENDANT-APPELLANT'S REPLY BRIEF

INTRODUCTION

This reply brief is submitted in further support of the appeal of defendant-appellant Montana Board of Investments ("MBOI") of the decision and order of the Appellate Division, First Department, entered June 14, 2005. Specifically, MBOI replies here to the brief of plaintiff-respondent Deutsche Bank Securities, Inc. ("Deutsche").

I

NEVADA v. HALL IS AN UNDEPENDABLE PRECEDENT

MBOI has argued from the outset of this case that the sovereign immunity of the State of Montana should protect it from this unconsented suit in the state courts of New York. In making this argument, MBOI has been clear about its understanding that the Supreme Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979) holds that a state's sovereign immunity does not protect the state from unconsented suit in the courts of another state. MBOI has argued that *Hall* is unsound precedent, not because we expect the New York courts to overrule the decision – clearly they cannot – but for two other reasons. First, it is necessary to present the issue in this forum to reserve it for disposition in a Court that *can* overrule *Hall*. Second, and more important for this Court's review, as we argue in Point II, the impairment of *Hall's* reasoning by the Supreme Court's subsequent sovereign immunity cases in turn calls into question the soundness of this Court's decision in *Ehrlich-Bober & Co. v. University of Houston,* 49 N.Y. 2d 574 (1980).

Deutsche's response on this point consists of two arguments. First, it asserts that *Hall* forecloses the sovereign immunity issue. As noted above, MBOI has never contended otherwise, assuming the validity of *Hall*. Deutsche's second point, however, requires some response because it rests on an erroneous reading of two subsequent Supreme Court decisions. Deutsche's argument that the Court reaffirmed *Hall* in *Alden v. Maine*, 527 U.S. 706 (1999) and again in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), transparently misreads the cases.

In *Hyatt,* the Court considered whether the doctrine of comity dictated that the courts of Nevada respect the sovereign immunity of California with respect to certain tort claims arising from attempts by California to collect a tax on Hyatt, a resident of Nevada. In language cited in MBOI's brief on appeal (at 35-36) and conspicuously ignored in Deutsche's brief, the Court made it crystal clear that it was not revisiting the soundness of *Hall* because California had not asked it [sic] do so. 538 U.S. at 497 ("We affirmed [in *Hall*], holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. *Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner's amici States to do so. The question presented here instead implicates Hall's second holding:* that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy." (Citations omitted and italics added.)

California's decision not to ask the Court to revisit the validity of *Hall* was hardly accidental. The transcript of the oral argument in *Hyatt* discloses that Justices of the Court invited California to challenge the soundness of *Hall* several times. 2003 U.S. Trans Lexis 12, *2-3 (Questions by Justice Ginsburg); *id.* at *5-6 (Question by Justice O'Connor); *id.* at *17-18 (questions by unidentified Justice). In each instance California indicated it had considered its position and did not advocate overruling *Hall.*

Deutsche actually contradicts its own argument on this point later in its brief, admitting that "in *Hyatt,* the Court categorically distinguished sovereign immunity in

federal forums from the decidedly different issue of sovereign immunity in sister States. . . . " (Deutsche Br. at 23).[1] Deutsche cannot have it both ways, asserting in one breath that *Hyatt* is controlling as to the soundness of *Hall* and in the next that it distinguished the case.

It is well-established that a decision by the United States Supreme Court is precedent only for those issues actually argued and decided by the Court. *See, e.g., Texas v. Cobb,* 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.") In light of the clear record in *Hyatt,* and Deutsche's own admission that *Hyatt* did not consider the issue presented here and in *Hall,* Deutsche should not be heard to argue that the decision stands as precedent reaffirming *Hall.*

Deutsche is on no stronger ground in its discussion of *Alden.* After criticizing MBOI's discussion of *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), *Alden, Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), and *Montana v. Gilham,* 133 F.3d 1133 (9th Cir. 1998) because "none of the cases . . . dealt with the issue at hand" (Deutsche Br. at 21-22), Deutsche in virtually the same breath asserts that *Alden* reaffirmed *Hall's* holding regarding state sovereign immunity in the courts of other states.

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[1] Citations herein to pages in the Brief for Plaintiff-Respondent Deutsche Bank Securities, Inc. on this appeal are stated as "Deutsche Br. at " followed by the page number(s) in that brief. Citations herein to pages in the Record on Appeal are stated as "R. at" followed by the page number(s) in the record.

Deutsche cannot have it both ways. In fact, its first analysis is the correct one. *Alden* did not revisit the precise issue dealt with in *Hall* – whether one state's sovereign immunity protects it from unconsented suit in the courts of another state. The narrow issue in *Alden* was whether Maine's federal constitutional sovereign immunity protected it from unconsented suit in its own courts. In deciding that Maine could not be compelled to answer for a federal claim in its own courts, the Court had to consider whether *Hall* controlled the question. In the passage cited in Deutsche's brief, the Court distinguished *Hall,* but did not specifically reaffirm its soundness. Since the Court held that *Hall* was a different case, it had no occasion to determine whether *Hall* correctly decided the issue it considered. *Alden*, 527 U.S. at 749.

MBOI has never claimed that any of the subsequent federal cases explicitly overruled *Hall.* MBOI does argue, however, that the law of state sovereign immunity has evolved in the 25 years since the Court decided *Hall,* and that many of the assumptions underlying *Hall* have now been eroded. Deutsche has largely refused to join the argument on this point, and MBOI's position therefore stands virtually unrebutted. The only argument Deutsche raises is that sovereign immunity raises different issues when asserted in a federal court and in the court of a sister state. This is true, but hardly conclusive on the point. The question is whether the Court correctly decided in *Hall* that, first, there is no federal constitutional basis for state sovereign immunity and, second, that the sovereign interests of the forum state dictate that it alone can determine whether to respect the defendant state's immunity.

As argued in detail in MBOI's brief on appeal, the assumptions that underlie *Hall's* conclusions on these points have been fatally eroded by subsequent Supreme Court case law. It is now clear that the Constitution is premised on the assumption that States are immune from suit without their consent, except in the unusual case where the states surrendered their immunity in the "plan of the convention." The Supreme Court's recent decision in *Central Virginia Community College v. Katz,* 126 S. Ct. 990 (2006) accepts that premise in holding that the states agreed to a limited surrender of their immunity from suit in the plan of the convention by agreeing to allow Congress to adopt uniform laws on bankruptcy. The Court surveyed the history of bankruptcy prior to the adoption of the Constitution and concluded that the framers would have understood that surrender of State sovereign immunity in certain bankruptcy proceedings was implicit in the Constitution's bankruptcy clause. 126 S. Ct. at 997-1002. The Court concluded that the sovereign immunity of the States did not bar an unconsented action in bankruptcy court to set aside a preferential transfer, citing *Alden* and *Blatchford v. Native Village of Noatak,* 501 U.S. 775 (1991) for the controlling principal of law: a State is not subject to suit in federal court unless it has consented to suit, either expressly or in the plan of the convention. *Central Virginia Community College,* 126 S.Ct. at 1004-05; see also *id.* at 1006 (Thomas, J., dissenting) ("The majority does not appear to question the established framework for examining the question of state sovereign immunity under our Constitution.")

Hall contains no finding that Congress has validly abrogated state sovereign immunity from suit in the courts of other states. It also does not find that the states

surrendered such immunity in the "plan of the convention." To the contrary, the *Hall* court conceded that the legal norms of the late eighteenth century would have been offended by the idea that states were subject to such suits. 440 U.S. at 417 ("[I]t is fair to infer that if the immunity defense Nevada asserts today had been raised . . . when the Constitution was being framed, the defense would have been sustained by the California courts.") In any event, Deutsche has never asserted that either condition is met with respect to the sovereign immunity rights of Montana at issue in this case.

This Court's decision in *Ehrlich-Bober* that comity does not require New York courts to recognize the sovereign immunity defense of a foreign state, rendered in 1980 when the ink on the *Hall* decision was barely dry, has as its premise the validity of *Hall.* This Court cannot overrule *Hall,* but it can consider in its own comity analysis whether *Ehrlich-Bober* properly weighed the defendant state's immunity interests. It is now clear, contrary to *Hall's* assumption, that the sovereign immunity of the States is a matter of federal constitutional dimension. It is further clear that the controlling rule is whether the state's immunity has been validly abrogated by Congress or surrendered by the States in the plan of the convention. *Hall* contains no finding by the Supreme Court on either point, and none has been advanced as an argument by Deutsche here. For this reason, the Court should take a fresh look at *Ehrlich-Bober,* giving appropriate deference to the constitutional immunity of Montana.

II

COMITY CONSIDERATIONS REQUIRE DISMISSAL OF DEUTSCHE'S ACTION

MBOI stands by its comity arguments set forth in its brief on appeal. In this reply brief, it will limit its reply to several specific arguments made by Deutsche.

Deutsche urges that the doctrine of *stare decisis* "compels the affirmance of *Ehrlich-Bober*." (Deutsche Br. at 33). Deutsche misstates the doctrine. While *stare decisis* principles certainly require respect for prior precedents, they do not "compel" that prior precedents be followed in every case:

> *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision" . . . Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules.

Payne v. Tennessee, 501 U.S. 808, 828 (1991) (internal citation omitted).

The decision in *Erlich-Bober* did not involve "property and contract rights," at least in the sense the terms are used in *Payne.* The decision, and the arguments *Deutsche* advances here, characterize the comity issue as one of mere "forum selection" (e.g. Duetsche at 30). Forum selection is, at its core, a procedural matter. The weaker procedural justification for following *Erlich-Bober* should properly be balanced against the stronger constitutional

interest of the states in determining whether, and where, they may be sued.

This Court's description of the Texas statute at issue in *Ehrlich-Bober* as "a restrictive venue provision put in place to serve the administrative convenience of the State," 49 N.Y. 2d at 581, is understandable in light of the short shrift given the State's constitutional immunity from suit in *Hall*. However, as MBOI has argued with respect to Point I, later case law has cast the States' immunity in a much different light, one that merits a greater degree of deference to State interests. These later cases demonstrate, contrary to *Hall,* that States have a constitutionally protected privilege against unconsented suit. As said in *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99 (1984), "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." (emphasis in original).

Since States in most cases can only be sued if they waive their immunity, limited waivers of immunity are matters of legislative grace. Absent such statutes plaintiffs generally have no right to sue the States at all, and any limitations the States place on their agreement to subject themselves to suit are not mere venue choices but rather are conditions on state waiver of an important constitutional power. As the Supreme Court stated in *Alden,* when a state chooses to enact a limited waiver of its immunity "it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." 527 U.S. at 758.

Deutsche's citation of choice of law cases in footnote 7 of its brief (Deutsche Br. at 29) underscores its misunderstanding of this issue. The cited cases all involved matters

in which a defendant that was not a sovereign state asserted that a choice of law provision favored application of venue or other procedural and substantive laws of its home state. In such cases, the sovereign interests of the defendant's home state are not implicated. It truly is a matter of procedural convenience in such cases whether New York agrees to recognize the defendant's preferred forum choice. Since such cases do not require consideration of the sovereign interests of another state, they have no relevance to the comity analysis here.

Deutsche's description of the current law as a "predictable, user-friendly framework for commercial transactions with New York institutions" (Deutsche Br. at 34-35) depends largely on one's point of view. The comity doctrine spawned by *Hall* has yielded a confusing mass of decisions from various state courts, as demonstrated by Deutsche's ability to summon a string of citations for the proposition that the refusal to recognize a defendant state's immunity is a mainstream principle of law (Deutsche Br. at 37 n. 10, citing 14 cases), while asserting a few pages later that defendant States can sometimes benefit from comity analysis (Deutsche Br. at 45-47). While the rules may be "predictable and user-friendly" from Deutsche's perspective, they are neither if the "user" happens to be a State.

Deutsche further questions whether a New York agency would assert arguments similar to those MBOI is asserting if sued in another state's courts under similar circumstances. (Deutsche Br. at 42). Its argument flies in the face of express New York policy enacted by the New York legislature concerning legal actions against New York state agencies. Presumably, New York state agencies are required to follow legislative mandates and would seek to preserve the legislatively mandated exclusive jurisdiction

of New York courts under circumstances equivalent to those in the present case. That conclusion would seem to follow from the fact that Deutsche has pointed to no case from among the numerous cases it cites in which New York has voluntarily acceded to suit in another forum excluded by its own limited immunity waiver statute.

Deutsche also urges that MBOI could have contractually opted out New York jurisdiction. (Deutsche Br. at 35). Deutsche never explains how this "opt-out" principle would have applied here. This case involves a claim of breach of a contract that was initially solicited by Deutsche. Does Deutsche seriously argue that its clients in such cases regularly bargain for venue provisions in the mails forming the basis of a sale of securities? No evidence has been submitted that such considerations are normally a bargained for part of a sales transaction.

More importantly, the argument essentially boils down to a contention that, by failing to "opt-out", MBOI tacitly waived its immunity from suit and voluntarily submitted itself to New York jurisdiction or waived any objection to that jurisdiction. Deutsche cites no authority for that proposition, and the law is to the contrary. Waiver is a "voluntary choice" for a State, and the Supreme Court requires clear evidence to support a claim that a state has waived its immunity from suit. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 675 (1999) (test for finding state waiver of sovereign immunity "is a stringent one.") MBOI did not consent to suit in a New York court and is entitled to challenge New York's jurisdiction over it.

Deutsche also asserts that MBOI has not shown that that [sic] Deutsche can seek full recovery against MBOI in

Montana courts. (Deutsche Br. at 44, n. 11). That contention seems preposterous in light of its assertion that "this is a simple breach of contract case." (Deutsche Br. at 3). Deutsche has pointed to nothing that would indicate that when it comes to basic contract law Montana is a rogue state which deviates from well established contract principles.

While Deutsche has cited numerous decisions upholding the forum state's jurisdiction over other states' agencies, an examination of those cases shows that most involve tort actions affecting the forum state's residents and committed in the forum state. Deutsche frequently cites and refers to *Haberman v. Washington Power Supply System,* 109 Wash. 2nd 107, 744 P.2d 1032 (1987), as a case showing that *Ehrlich-Bober* is in step with the precedents of other states. (See, e.g., Deutsche Br. at 38). Indeed *Haberman* approvingly cites *Ehrlich-Bober.* 109 Wash. 161, 744 P.2d 1067. However, the citation and discussion were with respect to tort claims asserted against the other states' agencies, specifically claims of negligent misrepresentation and fraud. MBOI stands by its argument that *Ehrlich-Bober* is out of step with comity analysis with respect to contract claims of the sort alleged in this case.

As MBOI has argued in its brief on appeal, New York's own policy concerning actions against its state agencies was given insufficient weight in *Ehrlich-Bober.* There may be good reasons for finding that policy considerations favor the forum state in tort cases involving the state's own citizens and events occurring solely in the forum state. However, where a transaction is an interstate business transaction initiated by a party in the forum state, and the matter involves a contract claim, the scales tip in favor of the considerations of state sovereignty that are at the root

of Montana's and New York's laws requiring that actions against their agencies be brought in their respective states. In the end, comity is a matter of one state respecting the laws of another. In this case, the laws of both states favor the view that state sovereign immunity is an overriding consideration.

III

DEUTSCHE FAILS TO EXPLAIN WHY DEPOSITIONS WERE PRECLUDED ON THE INSIDER TRADING DEFENSE

1. Deutsche Erroneously Asks the Court to Discount Each Indicia of Fraud Separately, and Resolve Factual Issues and Draw Inferences Against MBOI

In responding to MBOI's showing that this Court should reverse grant of summary judgment on liability, Deutsche ignores two fundamental precepts governing motions for summary judgment. First, the facts stated in affidavits opposing the motion should be accepted as true. *Patrolmen's Benevolent Ass'n v. City of New York*, 27 N.Y. 2d 410, 415 (1971). Second, as stated in MBOI's brief on appeal (at 54), all inferences must be drawn in non-movant's favor. *Cruz v. American Export Lines, Inc.*, 67 N.Y.2d 1, 13 (1986), and, similarly, when different conclusions may reasonably be drawn from the evidence, the motion should be denied, *Sommer v. Federal Signal Corp.,* 79 N.Y. 2d 540, 555 (1992). Additionally, Deutsche would have the Court erroneously discount each fact supporting an inference of insider trading, or at least the entitlement to deposition discovery on that defense, by examining each such fact in isolation from the others without looking at the complete picture of all those facts in the context of

each other. Furthermore, in asserting that depositions are not merited here, that, in effect, MBOI should have had all of the key facts establishing insider trading defense even before filing its answer, Deutsche ignores the admonition in *SEC v. Musella,* 578 F. Supp. 425, 429 (S.D.N.Y.1984), that "in instances of insider trading, . . . the nature of the violation makes proof inherently difficult to obtain . . . "

MBOI showed that the following were indicia that insider trading occurred and that, at the very least, deposition discovery by MBOI is warranted on that defense: (i) the timing of Deutsche's solicitation on the day of the public announcement of the contract to acquire Pennzoil, (ii) MBOI's Mr. Bugni not having heard from Deutsche's Mr. Williams for many months before that solicitation, (iii) Mr. Williams' eagerness to do a deal for Pennzoil 2009 bonds, (iv) the premium offered by Deutsche on what were then junk-grade bonds, and (v) Deutsche's unwillingness to disclose for whom it acted. All urged denial of Deutsche's summary judgment motion and completion of discovery. In its brief, Deutsche disputes each separately as if MBOI argued that each in isolation supported its request for depositions and the completion of discovery. In fact, all of these factors together urge reversal of summary judgment in favor of Deutsche on liability and that discovery be completed. But even in discussing them in isolation from each other, Deutsche misconstrues the facts and by the use of adjectives and strawmen, rather than facts, attempts to justify the imprudent grant of summary judgment.

* * *

and removed the names of customers from the meager documents produced by it in this action despite the

existence of a confidentiality stipulation between the parties. That Deutsche had a relationship with someone else on the Pennzoil 2009 bonds is clear because Deutsche admits that it sold Pennzoil 2009 bonds on March 22, 2002 and arranged to sell $6.75 million of MBOI's $15 million in par value of Pennzoil 2009 bonds on March 25, 2002.

Accordingly, the facts already marshaled by MBOI cannot be dismissed as mere "speculation" or "sheer fantasy". Rather they at least require that MBOI have deposition discovery and complete other discovery before a motion for summary judgment should be entertained on the insider trading defense.

The Cases

In its brief on appeal, MBOI showed that, in the insider trading claims cases cited by the Appellate Division and Deutsche, there had been substantial deposition discovery before the courts addressed summary judgment motions against those claims. Deutsche asserts that in one of the cases cited by the Appellate Division, *Froid v. Berner,* 649 F. Supp. 1418 (D.N.J. 1986), there were no depositions. First, Deutsche cites no other insider trading case in which deposition discovery was not allowed. Additionally, Deutsche fails to address the points raised about *Froid* in MBOI's brief on appeal, namely that (i) it is not a decision in the Second Circuit, (ii) the court in *Froid* exhibited a hostility to pretrial discovery in an insider trading case that is foreign to the Second Circuit courts, *compare, e.g., SEC v. Gonzalez de Castilla,* 184 F. Supp. 2d 365, 376 (S.D.N.Y. 2002) ("Certainly the circumstantial evidence warranted the investigation. Only after full discovery could the [alleged tippee's] knowledge, or lack of

it, be determined"), and (iii) the theory of insider trading was completely untenable in *Froid* because, prior to the claimant's acquisition of the issuer's securities, there had been periodic public announcements of significant losses by the issuer. Here, there was no public announcement before the transaction that there was a contract for anyone to acquire Pennzoil.

Finally, Deutsche unsuccessfully attempts to distinguish three important cases cited by MBOI in its brief on appeal, essentially arguing that in each there was more evidence of insider trading than MBOI has presented here. Each of those cases supports the use of circumstantial evidence, including the timing of the securities trades, as the entire or principal basis for establishing an insider trading claim. Whether or not the SEC was able to furnish more evidence of insider trading in those cases than MBOI has here, they offer no comfort to Deutsche's argument that deposition discovery was properly denied as in each there had been depositions, *SEC v. Singer,* 786, Supp. 1158 (S.D.N.Y. 1992), and, in two of them, also a testimonial hearing or trial. *SEC v. Musella,* 748 F. Supp. 1028 (S.D.N.Y. 1989); *SEC v. Musella,* 578 F. Supp. 425 (S.D.N.Y. 1984) (also a refusal by two defendants to answer questions at deposition giving rise to an adverse inference). Here, MBOI has showed more than enough for entitlement to depositions but has been improperly denied the opportunity to gamer additional evidence through deposition testimony.

IV

DEUTSCHE FAILS TO SHOW THAT MBOI TRANSACTED BUSINESS IN NEW YORK

Deutsche theorizes that MBOI deliberately projected itself into New York to consummate a transaction with Deutsche. Without benefit of citation, it argues that transaction of business occurs where the defendant projects itself into New York through interstate communications in a New York centered transaction. (Deutsche Br. at 71). This Court has never held that long distance, electronic contacts alone between an out–of-state defendant and a New York plaintiff constitute transaction of business, long-arm jurisdiction. *Parke-Bernet Galleries, Inc. v. Franklyn,* 26 N. Y. 2d 13 (1970), does not stand for this proposition. While the distinguishing features of that case in relation to this action are discussed a [sic] length in MBOI's brief on appeal (at 69-70), it is enough to point out again that, in *Parke-Bernet,* defendant sent a letter to the plaintiff New York auction house, advising of his interest in bidding on a particular painting, by his telephone call and telegram to the gallery he requested an open telephone line into the New York auction, participated in the live auction for an extended period of time during the

* * *