UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974 OF I.B.P.A.T., AFL-CIO; and JOHN ALFARONE, as President of Drywall Tapers and Pointers of Greater New York, Local 1974 of I.B.P.A.T., AFL-CIO,

Plaintiffs,

- against -

LOCAL 530 OF THE OPERATIVE PLASTERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Defendant.

MEMORANDUM AND ORDER

93-CV-0154 (JG)

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DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974 OF I.B.P.A.T., AFL-CIO,

Plaintiff,

- against -

LOCAL 530 OF THE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Defendant.

98-CV-7076 (JG)

- X

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JOHN GLEESON, United States District Judge:

These cases are among the latest installments in a 25-year jurisdictional dispute between plaintiff Drywall Tapers and Pointers of Greater New York, Local 1974 ("Local 1974") and defendant Local 530 of the Operative Plasterers' and Cement Masons' International Association ("Local 530"). On December 18, 1990, the Hon. Eugene H. Nickerson issued an injunction that prescribed a standard for allocating jurisdiction over drywall finishing work in New York City as between the rival unions. Both Local 1974 and Local 530 seek modifications of that injunction.[1]

More than a decade ago, in affirming the issuance of the injunction at issue, the Second Circuit relied in part on Local 530's "long and deplorable history" of stealing work belonging to Local 1974 and evading injunctions prohibiting it from doing so. *Drywall Tapers &*

[1] When the cross-motions were argued on April 11, 2003, I encouraged counsel to attempt to resolve their dispute over the injunction consensually. (*See* Tr. dated April 11, 2003, at 27, 48.) Nothing came of those efforts.

Pointers, Local 1974 v. Local 530 of Operative Plasterers' and Cement Masons' Int'l Ass'n, 954 F.2d 69, 78 (2d Cir. 1992) ("*Drywall IV*").[2] Unfortunately, Local 530's deplorable conduct continues unabated.

A basic premise of the December 18, 1990 injunction was that there is a qualitative difference between the work performed by Local 1974 and the work purportedly sought and performed by Local 530. The injunction envisions typical drywall finishing, on the one hand (Local 1974 work), and an "expensive" skimcoating process "used when a wall is damaged or will be exposed to an unusual amount of light" on the other (Local 530 work). *Drywall IV*, 954 F.2d at 78. Experience shows, however, that Local 530 has no interest in anything other than the former type of work. The "skimcoating" at issue in this dispute is a sham, a hollow excuse for Local 530 to steal work from a legitimate union.

A second premise of the December 18, 1990 injunction was that the enjoined party, Local 530, would make "an honest effort to comply with the order of the district court." *Id*. at 78-79. Although the history recounted in *Drywall IV* itself rendered that expectation extremely optimistic, the Second Circuit relied on it in concluding the injunction was "practically administrable." *Id*. at 78. In fact, Local 530 officials have been, and continue to be, nothing but dishonest.

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[2] The Second Circuit decisions relating to this longstanding dispute, and the shorthand references that may be used here to refer to them, include the following: *Operative Plasterers' & Cement Masons' Int'l Ass'n, Local 530 v. Drywall Tapers & Pointers, Local 1974,* No. 04-2028 (2d Cir. January 31, 2005) ("*Drywall VI*"); *Drywall Tapers & Pointers, Local 1974 v. Local 530 of Operative Plasterers' and Cement Masons' Int'l Ass'n*, 36 F.3d 235 (2d Cir. 1994) ("*Drywall V*"); *Drywall Tapers & Pointers, Local 1974 v. Local 530 of the Operative Plasterers' and Cement Masons' Int'l Ass'n, 954 F.2d 69 (2d Cir. 1992) ("Drywall IV*"); *Drywall Tapers & Pointers, Local 1974 v. Local 530 of Operative Plasterers' & Cement Masons' Int'l Ass'n*, 889 F.2d 389 (2d Cir. 1989) (*"Drywall III*"), *cert. denied*, 494 U.S. 1030 (1990); *Drywall Tapers & Pointers, Local 1974 v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 601 F.2d 675 (2d Cir. 1979) ("*Drywall II*"), *cert. denied*, 444 U.S. 1073 (1980); *Drywall Tapers & Pointers, Local 1974 v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 537 F.2d 669 (2d Cir. 1976) ("*Drywall I*").

The confluence of these events has produced an intolerable situation. The careful undertaking of the December 18, 1990 injunction to set the boundaries of work Local 530 may lawfully perform (but has no real interest in performing) has served only to provide ammunition for Local 530's cynical, deceptive and ongoing efforts "to purloin work from Local 1974." *Id*. at 78. I am convinced that the only proper course is to order Local 530 out of the drywall finishing business entirely, except in those infrequent cases where the drywall surfaces will receive a plaster or an acoustical finish. In other words, from this point forward, Local 530, a plasterers' local, will do the work of plasterers. Where, for example, as in all the cases in which Local 1974 and Local 530 have fought for more than two decades, the newly constructed surfaces are to be painted, Local 530 may not assert jurisdiction.

Specifically, for the reasons discussed more fully below, the December 18, 1990 injunction is vacated, and in its place I impose a separate order filed herewith containing the following injunction:

> It is hereby ordered that Local 530 of the Operative Plasterers' and Cement Masons' International Association ("Local 530"), its officers, agents, servants, employees and attorneys, and all others in active concert or participation with any of them who receive actual notice of this Order, are enjoined and restrained from asserting jurisdiction over, and from causing or permitting members of Local 530 to perform, any drywall finishing in the City of New York unless the owner of the site, through architect's specifications, requires that the drywall surfaces at issue are to receive plaster, acoustical or imitation acoustical finishes. All other pointing and taping, regardless of material used, and regardless of whether "skimcoating" is requested or performed, shall be the work of Drywall Tapers and Pointers of Greater New York, Local 1974. If the architect's specifications require that some drywall surfaces receive plaster, acoustical or imitation acoustical finishes, while other drywall surfaces receive other finishes, Local 530 may assert jurisdiction only over the finishing

of drywall that will receive plaster, acoustical or imitation acoustical finishes.

A. Background

For a similar (but more complete) narrative of the history of this lengthy dispute, I invite the reader's attention to my 2002 decision finding Local 530 in contempt of the December 18, 1990 injunction based on its assertion of jurisdiction at numerous job sites in violation of the injunction's terms. *See Drywall Tapers and Painters, Local 1974 v. Local 530 of the Operative Plasterers' and Cement Masons' Int'l Ass'n*, Nos. 93 CV 154 & 98 CV 7076, 2002 WL 31641597 (E.D.N.Y. November 19, 2002), at *3-*7. I set forth here only those facts and events that are central to my decision to grant plaintiff's motion and implement a new injunction.

Local 1974 was chartered in 1970 by the International Union of Painters and Allied Trades, AFL-CIO ("Painters International") in 1970. Local 530 was chartered by the Operative Plasterers' and Cement Masons' International Association, AFL-CIO ("Plasterers' International") in 1978. Both locals prepare newly-constructed interior walls for painting on construction jobs in New York City. The longstanding dispute between them is over when Local 1974 gets to do this work and when Local 530 gets to do it.

Local 1974 members are drywall "tapers" and "pointers." Taping is the traditional process for finishing interior walls constructed with gypsum wallboard, which is also referred to as "drywall" and as "sheetrock." Drywall is the material used for most interior walls in modern construction. After the walls are installed by carpenters, they are taped and pointed. The taping process, often referred to as "three-coat taping," entails the application of tape and three coats of joint compound to areas where the pieces of drywall join each other. The joint

compound is applied with a broadknife. The first coat embeds the tape in the joints between the sheets of drywall; the second and third coats, which are "feathered" out slightly beyond the edges of the preceding coats, produce a smooth finish to the wall after sanding. "Pointing" entails the filling of the indentations left by the screws or nails (which affix the sheets of wallboard to the studs beneath) and of other imperfections in the drywall. The pointing is accomplished by the application of one or more coats of joint compound, and it further ensures a smooth surface for the finishing of the walls.

Local 530 was founded in 1978 by gangsters for gangsters and the companies affiliated with them. Specifically, it was founded by Louis Moscatiello, who was then an associate of the Genovese Crime Family of La Cosa Nostra (the "Genovese Family"), to be an employer-friendly alternative to Local 1974. The goal from the outset was that Local 530's members would do the same work as Local 1974 members -- tape and point newly-constructed drywall surfaces to prepare them for finishing. However, companies employing Local 530 members could do the work for less, because, *inter alia*, Local 530's pay scale is substantially lower and its corrupt leadership has always been willing to look the other way if non-union labor is used.

Local 530 members call themselves "skimcoaters." Skimcoating is a process for finishing walls that entails, either in lieu of or in addition to the final coat of compound over the joints, a skimcoat of compound over the entire wall. This is accomplished by using the broadknife to cover the entire wall with a thin layer of joint compound and then to immediately wipe it off, leaving a thin film of compound on the surface. Seized upon by Local 530 from its inception in 1978 as its *raison d'etre*, and as the basis for distinguishing its members' work from

the work of Local 1974 members, real-world experience has proved that skimcoating is functionally identical to three-coat taping. With the narrow exception of certain high-end work that is virtually never at issue in these unions' disputes, architects and owners not only do not desire skimcoating, they often have no idea what it is. Moreover, even within that narrow exception, the final skimcoat of drywall compound is easily applied by a drywall taper. In short, the establishment of this minor purported difference in work performed (which, the evidence has shown, is often not performed at all, even when Local 530 employees do the work) as the dividing line between the jurisdictions of these two unions was a mistake. The purpose of the injunction entered today is to correct that mistake.

1. The Events Culminating in the December 18, 1990 Injunction

The parent international unions of Local 1974 and Local 530 are member unions of the AFL-CIO, and of its Building and Construction Trades Department (the "Department"). The jurisdictional disputes between Local 1974 and Local 530 are governed by the Constitution of the Department, which empowers the Department to resolve disputes among its members. The Department, together with the relevant employer associations, established a "Plan of Settlement of Jurisdictional Disputes in the Construction Industry" (the "National Plan"), which is binding upon all members and administered by the Joint Administrative Committee ("JAC") of the Department. The National Plan provides for local plans, if they exist, to govern jurisdictional disputes in the first instance. In this case, the applicable local plan is the New York Plan for the Settlement of Jurisdictional Disputes (the "New York Plan").

The New York Plan was adopted by agreement between the Building and Construction Trades Council of Greater New York (the "Trades Council"), of which Local 1974

and Local 530 are members, and the Building Trades Employers' Association of the City of New York (the "Employers' Association"). The New York Plan calls initially for mediation of jurisdictional disputes by a representative from the Trades Council and a representative of the Employers' Association. If mediation fails to resolve the dispute, it is then subject to arbitration, at the request of any party to the dispute, by the executive committee of the Employers' Association (the "Executive Committee").

In 1975, in the course of litigation involving Local 1974 and the Plasterers' International, the parties were directed to petition the JAC under the National Plan to resolve a jurisdictional dispute. *See Drywall II*, 601 F.2d at 677. In 1977, a hearings panel (the "Hearings Panel") was established in accordance with the provisions of the National Plan. On March 1, 1978, the Hearings Panel issued a decision (the "Hearings Panel Decision") that concluded as follows:

> (1) All pointing and taping, regardless of material used, is painters' work, provided the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes.
>
> (2) Pointing and taping, regardless of material used, of drywall surfaces which are to receive plaster, acoustical or imitation acoustical finishes shall be the work of plasterers.
>
> (3) The surface produced by the application of the same plaster pointing material as used in the pointing and taping of the joints to the entire drywall surface for the purpose of producing a uniform surface compatible with the pointed and taped joints shall be considered a plaster finish, and the pointing and taping in connection therewith shall be the work of plasterers.

PX 16, at 33. Paragraphs (1) and (2) of the Hearings Panel Decision could scarcely be clearer, as they divided drywall finishing work by reference to the ultimate finish to be applied to the

surface. Plaster walls, or walls that would receive acoustical finishes, would be the work of one trade (the plasterers); walls that would merely be painted would be the work of another (the painters, or tapers). In short, those paragraphs suggested a logical division of work between two distinct trades. Moreover, that allocation of work accorded precisely with a 1961 memorandum of understanding between the Painters' International and the Plasterers' International. *See Drywall I*, 537 F.2d at 671.

Unfortunately, paragraph (3) of the Hearings Panel Decision undercut this clarity and logic. It purported to define as a "plaster finish," and thus as the work of the plasterers, work that -- depending on how one reads the ambiguous language "plaster pointing material" -- may not be a plaster finish at all. As Judge Nickerson observed 11 years later, the interpretation of the third paragraph quoted above is at the heart of the longstanding dispute between Local 1974 and Local 530.

In 1980, Local 1974 challenged Local 530's right to perform drywall finishing at the offices of Ebasco in the World Trade Center in New York. Local 530 had asserted jurisdiction over the work at that site. The workers had watered down joint compound and, using rollers, had spread it over the entire drywall surface. This coat of diluted compound was not required by the general contractor's specifications. In accordance with the New York Plan, the Executive Committee conducted an arbitration hearing. In a decision dated June 26, 1980 (the "Ebasco Decision"), the Executive Committee ruled in favor of Local 1974, holding that "the material applied [by Local 530 members] is not applied for the purpose of producing a uniform surface compatible with the pointed and taped joints," as required by the Hearings Panel Decision. PX 17. The Ebasco Decision, which interpreted paragraph (3) of the Hearings Panel

Decision, was published in the Employers' Association handbook. Because Local 530 did not appeal or request a rehearing, the Ebasco Decision became a final decision governing the award of drywall-finishing work on all future jobs in New York City.[3]

Throughout the 1980s, Local 530 refused to abide by the Ebasco Decision, even when directed to do so by the Trades Council. As a result, injunctions were issued by Judge Nickerson prohibiting Local 530 from performing work on numerous jobs. However, Judge Nickerson denied multiple requests by Local 1974 during that period for an area-wide injunction, reasoning that the organs of the New York Plan were best suited to determine whether Local 530 had wrongfully asserted jurisdiction at any particular job.

In a Memorandum and Order issued on August 9, 1990, granting yet another injunction, Judge Nickerson rejected Local 530's argument that its skimcoating process satisfies the Ebasco Decision's requirement of a "'uniform surface compatible with the taped and pointed joints.'" Memorandum and Order dated Aug. 9, 1990, at 5. Judge Nickerson stated that such a "narrow reading of Ebasco would eviscerate" the Hearings Panel's effort in its 1978 decision to limit Local 530's drywall finishing work "to only those drywalls receiving a 'plaster, acoustical or imitation acoustical finishes [sic].' A thin, virtually translucent, blotchy coat lacking thickness, consistency, or uniform appearance hardly can be considered a 'finish' or 'glaze' coat

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[3] For more than 15 years, Local 530 has argued that the Ebasco Decision was subsequently eviscerated by the action of the National Plan and the ensuing inaction of the New York Plan. It repeats that claim here, contending through the affidavit of the Vice President of the Plasterers' International that the decision "remain a nullity." (Gannon Aff. ¶ 22.) This claim was repeatedly rejected by Judge Nickerson when Local 530 raised it in defense of its wrongful conduct, and I reject it again here. *See e.g.*, Report and Recommendation of Magistrate Judge Caden, dated April 6, 1990 ("Local 530 raises the additional argument that, even if the work is 'of the kind' challenged in Ebasco, that decision was wrongly decided. This argument is one Local 530 has raised every time it has been forced to explain its work; Judge Nickerson has repeatedly rejected it. Even assuming that defendants had standing to challenge Ebasco, which they do not, this defense would be untenable. Accordingly, it must be rejected once again.").

akin to other plaster, acoustical or imitation acoustical finishes." *Id.* Judge Nickerson further held that "the Ebasco and 1978 Hearings Panel decision allocating jurisdiction between the unions depended on before-the-fact determinations of the types of finishes to be applied at the jobsite," and that "[s]uch judgments manifestly cannot be rendered absent the existence of contractor's specifications . . . ." *Id.* at 6.

In a Memorandum and Order issued August 15, 1990,[4] Judge Nickerson clarified the preliminary injunction. He held that in order for Local 530 to obtain jurisdiction over a job site,

> Ebasco, at a minimum, demands that 1) the specifications for the site or approved amendments to the specifications require skim coating be applied to the entire drywall surface when finishing the wall, and 2) that the skim coating cover the entire wall and create a smooth surface that will not show shadows when placed under strong natural lighting and will not show any color or sheen variations after painting.

PX 10, at 2. Judge Nickerson further stated that "the specifications enable a contractor to make a determination in advance of the work as to which union will be hired to finish the drywalls at the job sites." *Id.* at 3. Any modification of the specifications had to be "reviewed and approved by either the owner or its architect." *Id.*

In the August 9, 1990 decision, Judge Nickerson had requested briefs on Local 1974's latest request for an area-wide injunction governing all future jobsites. He issued such an injunction on December 18, 1990, enjoining Local 530 from

> asserting jurisdiction over, and from causing or permitting members of such labor union to perform work at, any job site in the

[4] The August 9, 1990 and August 15, 1990 decisions are inadvertently dated August 9, 1989 and August 15, 1989, respectively.

> City of New York unless the owner of the site or the agent of the owner, through architect's specifications or other contractual documents, requires the employer of Local 530 members to skimcoat, as a matter of course, the entire drywall surface in order to eliminate shadowing and color or sheen variations. The court emphasizes that instructions to skimcoat when necessary or if required are not sufficient to vest defendant with jurisdiction over a work-site.

Memorandum and Order dated December 18, 1990, at 3. Local 530 challenged the injunction on appeal, asserting, *inter alia*, that the district court lacked the jurisdiction to enter it and that the terms of the injunction were too broad. The Second Circuit affirmed on January 14, 1992. *See Drywall IV*, 954 F.2d 69.

2. The Continuing Contempts Committed by Local 530

On January 13, 1993, Local 1974 filed the complaint in No. 93 CV 154, in which it alleged that Local 530 acted in contempt of Judge Nickerson's December 18, 1990 injunction at numerous construction sites throughout New York City. The extensive trial of those charges occurred in 1996 and 1997. On November 12, 1998, Local 1974 filed the complaint in No. 98 CV 7076, which alleged that Local 530 violated the December 18, 1990 injunction on a job at Christie's Auction House at 20 Rockefeller Plaza in 1998. The trial of that charge occurred from October 22 to 24, 2001 (with summations on December 12, 2001). In lengthy findings of fact and conclusions of law dated November 7, 2002, I found Local 530 in contempt with respect to 20 job sites, all but two of the sites at issue.

The evidence revealed that Local 530 officials routinely violated the December 18, 1990 injunction, for which they exhibited nothing but cynical contempt. Its signatory contractors, with Local 530's blessing, would bid on jobs that Local 530 plainly had no

jurisdiction to seek, only to finagle or to extort from the general contractor or construction manager a piece of paper containing the word "skimcoat," which would then be held forth as proof of compliance with the injunction. All three Local 530 officials who testified at the trial -- former President Angelo Domenici, current President Carmine Mingoia and current Secretary-Treasurer George Nickoletos -- gave testimony that was laced with perjury.

3. The Recent Indictment of Moscatiello, Mingoia and Others

In a 225-page indictment unsealed on April 20, 2004, a grand jury sitting in the United States District Court for the Southern District of New York charged 22 defendants, including Louis Moscatiello, Sr., Carmine Mingoia, and John Campanella, Jr., with racketeering and various other offenses arising out of their control, on behalf of the Genovese Family, of the drywall industry in New York City. *United States v. Moscatiello, et al.*, No. 04 CR 343. A principal means of that control, according to the indictment, was Local 530, which "was created specifically to enhance the Genovese Organized Crime Family's control over the drywall industry." (Indictment, ¶ 26.) Moscatiello was charged by the grand jury as having risen to the rank of acting captain in the Genovese Family (*id*. at ¶ 21a); Mingoia is charged as an associate in Moscatiello's crew (*id*. at ¶ 21e). Campanella, who is also charged as an associate, is an officer of Local 530 and Moscatiello's brother-in-law (*id*. at ¶ 21n). Thus, Local 530's founder and two-thirds of its current leadership are named as defendants in the indictment.

Among the other charges related to Local 530, the indictment alleges that it helped enrich the leaders, members and associates of the Genovese Family by, among other things, allowing Local 530 contractors to violate the collective bargaining agreements, such as by employing workers off-the-books, employing non-union workers, paying workers less than

union-scale wages and defrauding Local 530 benefit funds. (*Id*. at ¶ 30a.) Since they were permitted to conduct their business in this way, these "favored contractors" (*id*. at ¶ 30a) -- drywall finishing companies with ties to the Genovese Family and collective bargaining agreements with Local 530 -- could perform the work quite inexpensively. They could bid lower than honest contractors, get the jobs, and then reap higher profits, which they shared (in amounts usually calculated on a percentage of the value of the contract) with their Genovese Family sponsors. (Indictment, ¶ 30a.) Sometimes, when work could not be obtained through the submission of low bids, extortion was used instead. (*Id*. at ¶ 30d.)

Although the focus of contempt trials before me was on work performed on-the-books by Local 530 members, some of these methods were proved nonetheless. For example, the Staten Island College site involved extortion. The Local 530 contractor was Thomas Bove, another of the defendants in the recent indictment (indeed, Bove was involved in quite a few of the Local 530 contempts I found in my November 19, 2002 decision). At the Staten Island site, Herbert Chan, a subcontractor, refused to use a Local 530 contractor because the work belonged to Local 1974. Dominici and Nickoletos sent Bove to give him a price on the job. When Chan rejected it, Local 530 threatened him, with apparent success.

4. Moscatiello's Plea of Guilty

Louis Moscatiello was supposedly ejected from Local 530 in 1991, after being convicted for bribing a labor official. However, in pleading guilty to several charges in the Southern District on October 13, 2004,[5] Moscatiello made it clear that, in reality, he never

[5] Moscatiello was also a named defendant in *United States v. Muscarella, et al.*, No. 03 CR 229, a 24-defendant indictment alleging additional racketeering charges and other offenses. He pled guilty to certain counts of the *Muscarella* indictment and to charges set forth in a superseding information.

stopped controlling Local 530. Through 2004, he used that corrupt control to sell out Local 530 members by allowing Local 530 contractors to use nonunion workers and to file false reports regarding contributions to the local's welfare, benefit and pension plans. One of the criminal acts Moscatiello admitted was his acceptance of a $5,000 payment in September 2003 in exchange for exerting his corrupt influence over Local 530 on behalf of a contractor.[6]

DISCUSSION

A. The Need for the New Injunction

A court has continuing authority to modify or vacate its injunctions. The more common setting in which this authority is invoked is when the enjoined party seeks relief (by modification or vacatur) from restrictions imposed by the injunction. "Of equal importance is the obverse case in which one party seeks a modification that will impose additional burdens upon the enjoined party." 11A Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d § 2961 at 397 (2004). Such a modification is appropriate where "the original purposes of the injunction are not being fulfilled in any material respect." *Id.* (citing *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968)).

The purpose of the December 18, 1990 injunction is not being fulfilled. The injunction was the result of Judge Nickerson's careful effort to protect Local 1974's lawful jurisdiction over traditional three-point taping of newly constructed drywall from incursions by a

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[6] Local 530 concedes both the relevance and the admissibility of Moscatiello's guilty plea. (Tr. dated March 15, 2005, at 28.) However, it objects to the use of these "allegations" (*id*. at 13, 32) at this point because the current leadership of Local 530 will all assert the Fifth Amendment if called to refute them. Local 530 therefore seeks a stay of these proceedings until all relevant statutes of limitations have expired. I reject this argument and deny the stay application. Moscatiello's statements are not allegations, they are *admissions*, and the notion that he would falsely state that he continued his influence over Local 530 through 2004 in order to get a 6½-year jail term is absurd. Moreover, there is simply no indiction that, after the statutes of limitations expire (whenever that is), Local 530 will have any favorable evidence to offer. The motion for a stay is therefore denied.

union that claimed to seek a different type of work: skimcoat finishing designed to achieve a particularly flawless finish when the newly-constructed drywall is painted.

The principal reason for the failure of the injunction is the simple fact that Local 530 never intended to abide by the division of work it sought. To justify its creation and continued existence, it touted skimcoating as a kind of high-end, super-taping process. In reality, it wanted only to steal typical drywall finishing work in order to give the work to employers associated with Local 530's corrupt leadership (or their Genovese Family sponsors). Once the injunction purporting to carve out its lawful jurisdiction was issued, Local 530, in undiluted bad faith, disregarded, manipulated and distorted the terms of the injunction as necessary to defeat its essential purpose. Moscatiello's recent plea of guilty confirms what has been plain all along: Local 530 has never been a legitimate union, and has never been free of the grip of organized crime.

If Local 530 were truly interested only in the (infrequent) jobs on which the surface sheen of the painted drywall is a matter of consequence to the architect and owner,[7] Judge Nickerson's order would have been workable. But Local 530's determination to perform regular drywall finishing work that Local 1974 should be doing, only to later justify its conduct as "skimcoating," has frustrated the injunction's purpose.

As a result, the injunction now artificially (and unsuccessfully) attempts to divide a single trade between two unions. The evidence in this case leaves no room for doubt: "skimcoating" as allegedly performed by Local 530 is not a separate trade. It has become Local

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[7] One example given during the contempt trials was a corporate boardroom that is exposed to glaring sunlight. In those conditions, the area of painted drywall that has not been skimmed with drywall compound (i.e., the centers of the 4' x 8' sheets) has a slightly different sheen when compared to the painted-over joints.

530's excuse for wrongfully asserting jurisdiction over the majority of the drywall finishing work in New York City. The evidence presented in this case has persuaded me that the distinction suggested in Judge Nickerson's August 9, 1990 order, *i.e.*, the distinction between typical drywall finishing to prepare walls for painting and drywall finishing to prepare walls for plaster or acoustical finishes, is the most sensible and workable means of allocating work between Local 1974 and Local 530.

Owners and architects, except in rare circumstances, generally do not desire a skimcoat of drywall compound over finished drywall, do not include it in job specifications, and do not care if it is actually performed even if it is contracted for. As a result, an allocation of jurisdiction based solely on whether such a skimcoat has been sought by the owner or architect is an invitation to the sort of manipulation in which Local 530 has routinely engaged.

By contrast, a division of jurisdiction based on whether the drywall surfaces will receive a plaster or acoustical finish would mean that the allocation of work to one local or the other would turn on a decision of consequence to the owners and architects. They will care whether the surface of the finished walls are taped gypsum wallboard (ready for painting) on the one hand, or plaster or an acoustical finish on the other. A division of union jurisdiction based on such a decision would greatly reduce the room for the sort of machinations Local 530 has engaged in in its effort to justify its assertion of jurisdiction after the injunction was issued. Moreover, the workers would actually be performing different trades. In a world where the plasterers apply plaster or acoustical finishes, the work of Local 530 members would differ significantly from that of Local 1974 members. Where "skimcoating" means what Local 530

wants it to mean, the work is identical except for a needless (and frequently omitted) flourish at the very end in which drywall compound is quickly applied and removed.[8]

Local 530 asserts that the modification I order here will put hundreds of its members out of work. I suspect otherwise; nothing will prevent those workers from performing the same work, as members of Local 1974 or of another union. Indeed, they will be better off as members of a union that places its members' interests ahead of their employers'. Local 530 further asserts that its officers will, in effect, be placed out of work. There is reason to doubt that representation, but even if it were true, I would give it little weight in light of the conduct its officers, present and former, have engaged in over the years.

Local 530 not only argues against any tightening of the injunction, it also affirmatively seeks an order freeing it from the supervision of the Court. Specifically, Local 530 contends that the injunction should be modified to require the two locals to resume the practice of submitting their jurisdictional disputes to the New York Plan. Although the argument is frivolous, some background is necessary to appreciate just how audacious it is.

It took Local 1974 nearly a decade to get the area-wide injunction that Judge Nickerson imposed on December 18, 1990. In rejecting Local 1974's application for such an injunction in 1981, Judge Nickerson reasoned that "the organs of the New York Plan were best

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[8] I have asked the parties to brief other possible modifications to the injunction, ones that effect less change than the new injunction I have decided upon. Thus, I have received arguments regarding changes to the following elements of the December 18, 1990 injunction: (1) "agent of the owner"; (2) "other contractual documents"; (3) the "actual intent" with which skimcoating requirements are issued; and (4) when the justifying documentation must be obtained in relation to Local 530's exercise of jurisdiction. All of these proposed modifications share the same problem. They all would merely tinker with the process by which a body of drywall finishing work that is functionally identical in practice is allocated between the two locals. Amending the language of these elements may make it more difficult for Local 530 to continue its decades-long encroachment on Local 1974's jurisdiction, requiring it to devise more ingenious methods to secure the work. But such a regime would continue to attempt to divide work that should be considered indivisible, and Local 530 would no doubt dedicate itself to finding new ways to defeat its purpose.

suited to determine whether Local 530 was engaged in work it was authorized to perform. *See Drywall IV,* 954 F.2d at 72. On half a dozen additional occasions throughout the 1980s, occasioned by Local 530's persistence in performing work in violation of the Ebasco Decision with no response from the Trades Council (the entity that, according to the New York Plan, was responsible for enforcing the Ebasco Decision), Local 1974 again sought such an injunction, without success. *See id*. at 72-75. Finally, in 1990, convinced that the organs of the New York Plan constituted wholly futile mechanisms to prevent Local 530 from stealing work that rightfully belonged to Local 1974, Judge Nickerson issued the area-wide injunction. *Id.* at 76-78.

In contending now that the only appropriate modification of the injunction would be to return to the days when Local 1974 was consigned to the New York Plan, Local 530 argues that the organs of the New York Plan have undergone a metamorphosis. It claims that the Plan has become a "fully functioning" method for resolving the jurisdictional disputes between Local 1974 and Local 530. (Gannon Aff. ¶ 30.) "[T]here is no basis to believe," Gannon asserts, "that either [the National Plan or the New York Plan] is unwilling or unable to consider disputes between [the locals] or that either Plan is unwilling or unable to enforce decisions reached by [the New York] Plan." (*Id.*)

In extolling the claimed virtues of the New York Plan, counsel for Local 530 stated at oral argument that the Plan has now become "what Judge Nickerson had hoped for at some point" -- a "viable source" for dispute resolution for Local 1974 and Local 530. (Tr. dated April 11, 2003, at 40.) "[T]his is 2003 and people change," counsel argued, so the sins of 15 years ago, when "the New York Plan wasn't working," no longer warrant the supervision of this

Court via the injunction. (*Id.*) There is no basis to believe, the argument concludes, that the Plan cannot resolve disputes in accordance with the applicable jurisdictional rules.

Recent events in this very case demonstrate the absurdity of that argument. Indeed, they demonstrate that the exact opposite is true: when it comes to disputes between Local 1974 and Local 530, the New York Plan cannot follow its own procedures, cannot follow the governing rules, expresses the same contempt for Judge Nickerson's orders that Local 530 has exhibited for 15 years, and awards work to Local 530 even where (according to Local 530) it is prohibited from taking it and does not ask for it.

This continuing inability of the New York Plan as a viable option was demonstrated in 2003, when Local 530, through its President and Business Manager, Carmine Mingoia, complained to the Plan about Local 1974's assertion of jurisdiction over a job at 60 Wall Street, New York, New York. In light of the architect's specifications for the job and Judge Nickerson's injunction, Local 530 members could not lawfully work on the job. Local 530 does not contend otherwise.[9] Nevertheless, Mingoia challenged Local 1974's jurisdiction pursuant to the New York Plan.

Step two of the New York Plan is mediation.[10] On August 6, 2003, the two locals met with the mediators, who were provided with, *inter alia*, a copy of Judge Nickerson's December 18, 1990 injunction. Pursuant to the clear terms of the injunction, the 60 Wall Street job belonged to Local 1974. However, the mediation ended without a resolution.

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[9] *See* Tr. dated March 19, 2004 at 23 (Counsel for Local 530: "We did not possess at that point or any point I know of, your Honor, the requisite documents to assert jurisdiction on the job.").

[10] Step One, which was unsuccessful in connection with the 60 Wall Street job, is direct resolution by the parties.

The next step of the New York Plan is supposed to be arbitration, but Local 530 did not seek it within the prescribed seven-day time period. The matter should have ended there. However, in an odd development, the mediators issued a memorandum that simply awarded the job to Local 530. Since (1) mediation is never supposed to result in an award; and (2) Local 530 disclaims having asked for the work (claiming instead that it only wanted Local 1974 *not* to perform it), the mediators' award was unusual indeed, not to mention in violation of the injunction that Local 1974 had brought to their attention.

After various other procedural irregularities that need not be cataloged here, the administrator of the New York Plan commenced an arbitration hearing on October 2, 2003. Local 1974 sought to convince the panel that the dispute was not arbitrable. (*See* Giordano Declaration dated January 12, 2004 ("Giordano Decl."), Ex. 17 at 4.) Daniel Clifton, Local 1974's counsel, walked the arbitrators through the history of the dispute and the terms of the December 18, 1990 injunction, under which the 60 Wall Street job clearly fell within the jurisdiction of Local 1974. With respect to the role of the New York Plan, Clifton attempted to inform the arbitrators that, pursuant to an earlier order of Judge Nickerson finding the Plan to be ineffective, Local 1974 need not present its disputes to the Plan before seeking relief in court. The following colloquy ensued among Clifton, Arbitrator Michael Mazzucca and the Chair of the Arbitration panel, Eric J. Schmertz:

Clifton: . . . Judge Nickerson, and I'll hand this up, of course, in an order said, "Plaintiff need not exhaust the ineffective administrative procedures and instead may present its specific claims on particular job sites to this court to enforce the 1980 arbitration decision [*i.e.*, the Ebasco Decision]."

I will read it again and hand it up.

Mazzucca: Fuck him. Put that on the record, please.

Schmertz: Read it again so I have [sic] hear it again.

Clifton: Judge Nickerson wrote, "However, Plaintiff need not exhaust the ineffective administrative procedures and instead may present its specific claims on particular job sites to this court to enforce the 1980 arbitration decision[.]"

On October 16, 2003, the arbitrators rejected Local 1974's claim, finding the dispute to be arbitrable. It scheduled a hearing on the merits for November 20, 2003. Local 1974 understandably chose not to attend. In an award dated November 25, 2003, the arbitrators awarded the job to Local 530 (which, as mentioned above, concedes that it could not perform the work consistent with the terms of Judge Nickerson's injunction).

An adjudicative body that, upon being informed of one of Judge Nickerson's key orders, responds "Fuck him," does not strike me as the right forum for resolving disputes over the application of Judge Nickerson's injunction. Local 530's lame attempt to minimize the comment as the inappropriate remark of but one member of a five-member arbitration panel is refuted by the transcript. No one sought to chastise the arbitrator in question, or to distance himself in any manner from the contempt expressed for Judge Nickerson's order. And of course the arbitrators' actions speak even louder than their silence; by awarding the work to Local 530, the arbitrators of the New York Plan could hardly have stated more eloquently their contemptuous disregard of the injunction. Even Local 530's counsel, who are not bashful in advancing frivolous arguments on their client's behalf -- indeed, they argue here that the current New York Plan "is what judge Nickerson had hoped for" (Tr. dated April 11, 2003, at 40) --

concede that the award gave work to Local 530 that could not lawfully have been performed by them under the injunction.[11] (*See* Tr. dated March 19, 2004, at 22.)

When Local 530 petitioned to confirm that illegal award in state court, it ran into a problem. Under the version of the Plan used by the arbitrators, recourse was permitted to federal court, so Local 1974 removed the petition to confirm to this Court. Local 530 then sought -- and obtained -- a letter from the Plan's administrator saying (falsely) that there had been no formal adoption of that version of the Plan after all, and so a prior version must control. Conveniently, that prior version permitted recourse only to state court. That clumsy and unsuccessful[12] capstone to the 60 Wall Street dispute highlights what more than two decades of experience have proven: the New York Plan cannot control Local 530 because Local 530, for whatever reasons, controls the Plan.

B. The Effective Date of the New Injunction

I have thought carefully about whether today's injunction, which may put Local 530 out of the drywall finishing business, ought to be stayed pending appeal. Under ordinary circumstances, injunctive relief having such a profound effect ought generally, in my view, be

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[11] Local 530's counsel also argues that Local 530 did not seek the work at 60 Wall Street for its own members. (Tr. dated March 19, 2004, at 24 ("At no time were we attempting to manipulate the system, Your Honor, so as to have the work assigned to Local 530.")). That argument is false, as the record makes clear in numerous ways. (*See, e.g.*, Giordano Decl., Ex. 5 (Mingoia's July 21, 2003 letter to Local 1974 asserting that the 60 Wall Street job was Local 530 work); Ex. 28, at 139 (Nickoletos asking arbitration panel to confirm mediators' award of the work to Local 530.)) The truth is, and I find, that Local 530 manipulated the broken system of the New York Plan so as to have the work assigned to Local 530.

[12] Local 530's motion to remand its petition to confirm the award was denied. Its petition to confirm was denied as well, and Local 1974's cross-motion to vacate the award was granted. The Second Circuit affirmed those rulings by summary order on January 31, 2005. *See Drywall VI.*

subject to such a stay. *See, e.g., Goosby v. Town of Hempstead*, 981 F. Supp. 751, 763 (E.D.N.Y. 1997). However, I conclude that a stay is inappropriate here.

Among the relevant considerations are the usual standards for determining whether to grant a stay pending appeal: (1) whether, absent a stay, Local 530 may suffer irreparable harm; (ii) the nature of the harm to Local 1974 if a stay is granted; (iii) whether Local 530 has demonstrated a substantial possibility of success on appeal; and (iv) any public interests that might be affected. *See LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994).

The last three of those four factors weigh heavily against a stay. Under the December 18, 1990 injunction, Local 530 workers perform (by its own counsel's rough estimate), substantially more drywall finishing work than Local 1974 members perform.[13] Because good faith and respect for the injunction do not act as brakes on Local 530's behavior, Local 1974 is forced to undertake the task of policing a division of jurisdiction that is extremely difficult to police. Among other things, Local 1974 must (1) identify the jobs Local 530 contractors are performing; (2) obtain the architects' specifications for those jobs; (3) if those specifications do not call for skimcoating, determine whether "other contractual documents" call for skimcoating; (4) if such other contractual documents exist, determine whether they were issued by an "agent of the owner;" (5) assuming a proper skimcoat direction was issued, determine when it was issued (in relation to when the work started); and (6) determine whether it was issued for the precise purpose required by the injunction. In short, Local 1974 faces an arduous and expensive task in protecting its jurisdiction. I have little doubt that its dramatic

[13] *See* Tr. dated April 11, 2003, at 47. Local 530's counsel estimated the Local 530/Local 1974 shares as 60%/40%. Local 1974's counsel estimated it at 90%/10%.

diminution in size during the course of this dispute is due in large part to Local 530's wrongful exercise of jurisdiction over jobs, and I am confident that the wrongful conduct continues on an ongoing basis. It is past time for that harm to end.

Local 530's chances for success on appeal strike me as slim at best. For more than 20 years, this Court and the Second Circuit have been endeavoring without success to compensate for an industry's inability to police a thoroughly corrupt union. Our courts have provided an alternative forum for a fair resolution of jurisdictional disputes involving that union because the organs of the New York Plan are broken when it comes to Local 530. Judge Nickerson took an inherently ambiguous Hearings Panel Decision, viewed it in the context of the 1980 Ebasco Decision, and tried in the December 18, 1990 injunction to delineate a workable jurisdictional line that divided a single trade into two parts. As expressed above and in my November 19, 2002 decision, that effort has not succeeded because Local 530, together with the gangsters and affiliated employers its corrupt leadership services, are committed to making it fail. The injunction filed today brings renewed hope for the end of litigation that the Second Circuit described as "long and tortured" 11 years ago. *Drywall V*, 36 F.3d at 236.

The public interest will plainly be served by removing Local 530 from the drywall finishing business (except to the limited degree permitted by the new injunction). As Local 530 itself has argued, a great deal of the drywall finishing work in New York City is performed by nonunion labor (*see* Tr. dated April 11, 2003, at 46), in part because persons influencing Local 530 are paid to ensure that it looks the other way when it happens. It is not in the public's interest to tolerate a situation in which union scale is used to bid jobs but not to pay the workers,

with members of organized crime, their affiliated companies and the corrupt union officials splitting the difference.

The first of the factors identified above is the effect of the injunction on Local 530 if there is no stay. Although Local 530's counsel has suggested it will put the local out of business, there is reason to believe otherwise. Forty percent of Local 530's members are plasterers, or install spray-on fireproofing. Those members' work will be unaffected by the new injunction. In any event, assuming that the new injunction will indeed put the local out of business, it is difficult for me to conceive of that as a bad thing, for Local 530 has never fulfilled a union's core responsibility: advancing and protecting the rights of its rank and file members. Though I am concerned about those workers, I have little doubt that they will be welcomed as members of Local 1974 or of another labor union, where they will no doubt be significantly better off.

On balance, the foregoing factors do not, in my view, warrant staying the implementation of the new injunction pending appeal. Local 530's victimization of Local 1974 and of the members of Local 530 itself has gone on far too long already. The relief I order today is overdue. Accordingly, it is effective immediately.

So Ordered.

John Gleeson, U.S.D.J.

Dated: March 17, 2005
Brooklyn, New York