UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

CHAMPAGNE DEMOLITION, LLC, a limited liability company, and JOSEPH A. CHAMPAGNE, Individually.

Defendants.

Civil Action
File No. 12-CV-1278 (FJS/TWD)

MEMORANDUM OF LAW IN SUPPORT OF SECRETARY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Thomas E. Perez, Secretary of Labor, United States Department of Labor ("the Secretary"), submits this Motion for Partial Summary Judgment. The Secretary seeks judgment as a matter of law that defendants Champagne Demolition, LLC ("Champagne Demolition" or "CDLLC") and Joseph A. Champagne violated section 11(c) of the Occupational Safety and Health Act ("OSH Act") when they terminated Donald Miles' employment in June 2010. The Secretary also seeks summary judgment on part of his claim that defendants violated section 11(c) when they filed a defamation lawsuit against Mr. Miles in July 2010. With these aspects of the case determined through summary judgment, the Secretary will prove at trial that defendants' defamation lawsuit constituted adverse action and was motivated by a desire to retaliate against Mr. Miles for raising concerns about defendants' violations of the asbestos code. The Secretary will also prove that Mr. Miles is entitled to damages as a result of defendants' actions.

On July 14, 2014, a New York Supreme Court jury concluded that Champagne Demolition fired Mr. Miles because he reported to company management his concern that Champagne Demolition's employees had illegally removed asbestos at a company worksite. The jury made four findings decisive to the Secretary's case: (1) Mr. Miles was an employee of Champagne Demolition, LLC on or about June 10, 2010; (2) Mr. Miles complained to his supervisor about illegal asbestos removal; (3) an actual violation of New York's asbestos regulations occurred; and (4) Champagne Demolition discharged Mr. Miles because of his complaint. Because the state court determined facts that prove each element of the Secretary's case of retaliatory termination and two elements of the Secretary's claim of retaliatory litigation, the application of collateral estoppel compels judgment as a matter of law. Simply put: a federal jury need not hear the same issues that a state court jury already decided.

STATEMENT OF RELEVANT FACTS

The Secretary brings this case pursuant to Section 11(c) of the OSH Act, which protects employees who report concerns relating to occupational safety and health. 29 U.S.C. § 660(c)(1). As the facts concerning Mr. Miles' termination have been extensively briefed, *see* Defs. Amd. Mot. for SJ (Dkt. No. 60); Sec'y Mem. of Law in Opp'n to Defs. Mot. for SJ (Dkt. No. 63) ("Sec'y Opp'n"); *see also* Dkt. Nos. 66 (Reply), 70 (Surreply), the Secretary will limit the present discussion to those facts relevant to this motion. Defendants terminated employee Donald Miles in June 2010 and sued him for defamation a month later. The termination and the filing of the lawsuit were prohibited acts of retaliation motivated by Mr. Miles' reporting of his concerns about Champagne Demolition's removal of asbestos at Gloversville High School on June 10, 2010. Mr. Miles filed a retaliation complaint with the Occupational Safety and Health Administration ("OSHA") in July 2010, days after Champagne Demolition filed its defamation lawsuit against him.

In addition to reporting Champagne Demolition's actions to OSHA, Mr. Miles also retained private counsel both to defend him from Champagne Demolition's defamation allegation and to affirmatively challenge Champagne Demolition's conduct in New York State court. On May 27, 2011**,** Mr. Miles initiated an action in New York Supreme Court, Fulton County. *See* Declaration of Allison L. Bowles ("Bowles Decl."), dated April 6, 2015, Ex. A; *see also* Affidavit of Scott M. Peterson ("Peterson Aff.") ¶ 3. In his state complaint, Mr. Miles alleged that Champagne Demolition's termination of his employment violated Section 740 of the New York Labor Law, New York State's whistleblower statute. Bowles Decl., Ex. C at 826-29; *see also id.* Ex. A at ¶¶ 3, 12, 23-30. Because New York law did not permit Mr. Miles to sue Mr.

Champagne individually, Mr. Miles' private lawsuit sought back wages and attorneys' fees from a single defendant, Champagne Demolition, LLC. *See id.* at Ex. A ¶ 31, 34.

In July 2014, the state court case proceeded to trial before a jury. The trial lasted a week. *See* Peterson Aff. ¶¶ 7-11. Champagne Demolition was represented at trial by Kevin A. Luibrand, Esq., *see id.* ¶ 8, who represents both Champagne Demolition and Joseph Champagne in this federal action. Defendant Joseph Champagne was present at counsel's table during the entirety of trial as the sole representative of Champagne Demolition. *Id.* ¶ 21. Champagne Demolition vigorously defended the state court charges. *See id.* ¶¶ 12, 13, 16-17, 19-20, 27. Mr. Champagne's direct examination constituted a core part of Champagne Demolition's defense and Champagne Demolition relied heavily on his testimony about his values and business ethos in its closing argument to the jury. *See* Bowles Decl., Ex. C at 751:17-756:3. The defense Champagne Demolition mounted was primarily three-fold: (1) Mr. Miles was not an employee when he reported his concerns about illegal asbestos removal because he was on temporary lay-off at the time, and/or alternatively, because he had quit and/or been fired some time prior to reporting his concerns; (2) the asbestos at Gloversville High School had been removed properly; and (3) Mr. Miles' complaint was motivated by ill will towards the company. *See* Peterson Aff. ¶ 23.

The jury returned a verdict for Mr. Miles. *Id.* at ¶¶ 24-25; *see also* Bowles Decl., Ex. C at 845-46. The jury determined that Mr. Miles "proved, by a preponderance of the evidence, that he was an employee of [Champagne Demolition] who reported a violation [of N.Y.'s asbestos regulations] to his supervisor; that an actual violation occurred; that the violation created a substantial and specific danger to the public health or safety; and [Champagne Demolition's] reason for discharging him was motivated by his reporting of the violation." *See Miles v. Champagne Demolition, LLC.*, Index No. 2011-00425, slip op. at 1 (Jan. 28, 2015), attached as

Ex. B to Bowles Decl.; *see also id.*, Ex. C at 845-846. On January 28, 2015, Justice Richard T. Aulisi issued a decision denying Champagne Demolition's motion to set aside the jury verdict. *See* Peterson Aff. ¶¶ 28; *see also* Bowles Decl., Ex. D, Ex. B at 1-3. In the same decision, Justice Aulisi awarded Mr. Miles $103,793.84 in back wages and $62,348.83 in attorney's fees and expenses. *See* Peterson Aff. ¶ 29; *see also* Bowles Decl., Ex. D, Ex. B at 4. The state court's Order and Judgment was entered with the clerk's office on or about March 25, 2015. *See* Bowles Decl., Ex. D.

ARGUMENT

The Secretary seeks partial summary judgment in this matter. The doctrine of collateral estoppel compels summary judgment on the Secretary's claim that defendants violated section 11(c) of the OSH Act when they terminated Mr. Miles' employment in June 2010. Collateral estoppel also requires summary judgment on part of the Secretary's claim that defendants' defamation lawsuit against Mr. Miles constitutes unlawful retaliation. A state court already determined that Champagne Demolition terminated Mr. Miles' employment because he reported a complaint about asbestos removal to his supervisor. The findings of fact supporting the state jury's conclusion are decisive on all of the elements of the Secretary's retaliatory termination claim and on two of the elements of the Secretary's retaliatory lawsuit claim. Accordingly, no genuine issues of material fact remain to be tried on the issues the state court determined and judgment as a matter of law is appropriate.

I. THE RELEVANT LEGAL STANDARDS

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "on each claim or defense—or part of each claim or defense" is appropriate when "the movant shows

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *see also In re SemCrude, L.P.*, 2012 WL 694505, at *3 (Bankr. D. Del. Mar. 1, 2012) (explaining that partial summary judgment on claims or elements of claims is appropriate in the wake of the 2010 revisions to Rule 56); *In re Methyl Tertiary Butyl Ether MTBE Products Liab. Litig.*, 824 F. Supp. 2d 524, 533 (S.D.N.Y. 2011) ("Summary judgment is not an all-or-nothing proposition; Rule 56(a) permits a party to move for summary judgment as to a claim, defense, or part of a claim or defense.").

For purposes of Rule 56, material facts are defined as those which might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In order to defeat a motion for summary judgment, "the non-moving party must set forth specific facts showing that there is a genuine issue for trial by a showing sufficient to establish the existence of every element essential to the party's case, and on which the party will bear the burden of proof at trial." *Masonic Ass'n. of Utica v. West Am. Ins. Co.*, 2010 WL 1223177, at *3 (N.D.N.Y. Mar. 30, 2010) (internal quotation and citation omitted). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* (quoting *Anderson*, 477 U.S. at 247-48). "[M]ere speculation and conjecture is insufficient to preclude the granting of the motion." *Harlen Assocs. v. Vill. of Mineola*, 273 F. 3d 494, 499 (2d Cir. 2001). Courts routinely grant summary judgment on the basis of collateral estoppel. *See, e.g., Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (affirming summary judgment based on offensive collateral estoppel where the Secretary of Labor's evidence in ERISA action relied upon the same evidence in used in prior suit), *cert. denied sub nom., Levy v. Martin*, 504 U.S. 909 (1992).

Here, summary judgment is appropriate because a state court has already determined all of the elements of the Secretary's case of retaliatory termination and two of the elements of the Secretary's claim of retaliatory litigation.

B. Section 11(c) of the Occupational Safety and Health Act

Section 11(c) of the OSH Act protects employees who report concerns about safety and health in the workplace from retaliation. *See* 29 U.S.C. § 660(c) ("No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter . . . ."). To prevail on a claim of unlawful discrimination under Section 11(c), the Secretary must show (1) the whistleblower's participation in a protected activity; (2) a subsequent adverse action against the whistleblower by the employer; and (3) a causal connection between the two. *Reich v. Hoy Shoe*, 32 F.3d 361, 365 (8th Cir. 1994); *see also Perez v. United States Postal Service*, -- F. Supp. 3d ----, 2015 WL 630476, at *12 (W.D. Wash., Feb. 13, 2015). The Secretary must also demonstrate the existence of an employee-employer relationship. *See* 29 U.S.C. § 652(6) ("The term employee means an employee of an employer who is employed in a business of his employer which affects commerce."). Section 11(c) does not require that an employee report an actual violation; the federal statute protects employees from retaliation so long as the complaint is made in "good faith," 29 C.F.R. 1977.9(c), or in other words, is based on a reasonable belief that that an occupational safety or health concern exists. *See* Sec'y Opp'n at 7-8, 15-17.

C. Section 740 of the New York Labor Law

New York Labor Law Section 740 provides employees who report violations creating a substantial and specific danger to the public health or safety protection from retaliation. *See* N.Y. Lab. Law § 740(2)(a) ("An employer shall not take any retaliatory personnel action against an

employee because such employee . . . discloses, or threatens to disclose to a supervisor . . . an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents substantial and specific danger to the public health or safety….”); *see also* Bowles Decl., Ex. C at 827-29. Like Section 11(c) of the OSH Act, New York Labor Law Section 740 requires the existence of an employer-employee relationship. *See* N.Y. Lab. Law § 740(1)(a) (defining an employee as “an individual who performs services for and under the control and direction of an employer for wages or other remuneration.”); *see also* Bowles Decl., Ex. C at 829-30. However, whereas the Secretary may prevail under Section 11(c) if an employee has a reasonable belief about the existence of a health or safety concern, New York courts have interpreted section 740 to require that employees meet a higher burden; under the state statute, an employee must demonstrate that an actual violation of law occurred. *See Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 871 (1996); *see also* Bowles Decl., Ex. C at 828-29, 834-35.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES DEFENDANT CHAMPAGNE DEMOLITION FROM RELITIGATING IN THIS COURT ISSUES IDENTICAL TO THOSE THAT IT FULLY AND FAIRLY LITIGATED IN *MILES V. CHAMPAGNE DEMOLITION, LLC.*

This federal court has been asked to review the same essential question that a state court already decided, albeit through a less exacting statutory lens than that of the state court: whether defendants unlawfully retaliated against Donald Miles when they discharged him in 2010. Because a New York Supreme Court jury has heard evidence about Mr. Miles’ termination and, applying the stricter standard, resolved that question in the affirmative, a federal jury need not do so. The “fundamental notion of the doctrine of collateral estoppel, or issue preclusion, “is that an *issue of law or fact* actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies.” *Colliton v. Donnelly,* 399 Fed. App’x 619, 620 (2d Cir. 2010) (emphasis in original) (quoting *Ali*

v. Mukasey, 529 F.3d 478, 489 (2d Cir. 2008). Similarly, "third parties unrelated to the original action can bar [a] litigant from relitigating that same issue in a subsequent suit," where that "litigant has had an opportunity to fully and fairly litigate an issue and lost." *Austin v. Downs, Rachlin & Martin Burlington St. Johnsbury*, 270 Fed. App'x 52, 54 (2d Cir. 2008) (explaining "non-mutual collateral estoppel."), *cert. denied* 554 U.S. 920 (2008); *Shwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65 (1969) (noting that "mutuality is a dead letter," or that judgments may be used offensively). The doctrine of collateral estoppel promotes conservation of judicial resources, finality of judgment, and fairness. *Kaufman v. Eli Lilly & Co*., 65 N.Y.2d 449, 455-56 (1985).

Pursuant to 28 U.S.C. § 1738, a federal court must, in according full faith and credit, give to a state court judgment the same preclusive effect as would be given to the judgment under the law of the state in which the judgment was rendered. *See Giakoumelos v. Coughlin*, 88 F.3d 56, 59 (2d Cir. 1996). Accordingly, federal courts apply New York law when considering the preclusive effect of a New York State court judgment. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002). In New York, collateral estoppel may be invoked to preclude a party from raising an issue if three factors are shown. *Curry v. City of Syracuse*, 316 F.3d 324, 331-32 (2d Cir. 2003). First, the issue on which collateral estoppel is sought must be identical to an issue already decided. *Id.* at 331. Second, the issue on which collateral estoppel is sought must have been raised in a previous proceeding in which the party against whom it is sought had a full and fair opportunity to litigate it. *Id.* Third, "the issue that was raised previously must be decisive of the present action," *id.* (quoting *LaFleur v. Whitman*, 300 F.3d 256, 271 (2d Cir. 2002)), meaning that the issue "would prove or disprove, without more, an essential element of any of the claims set forth in the complaint." *Id.* at 332. If these three elements are satisfied, a party is

precluded from relitigating the issues in a subsequent matter, "whether or not the tribunals or causes of action are the same." *See Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir. 1994) (quoting *Ryan v. New York Tel. Co.*, 62 N.Y. 2d 494, 500 (1984) ("We have recently reaffirmed that collateral estoppel allows the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided.") (internal quotation omitted)).

As set forth in detail below, there is no question that a jury of the New York Supreme Court determined four issues essential to the Secretary's claim of retaliation. It is equally clear that Champagne Demolition, through competent counsel, had the opportunity to fully and fairly litigate those issues during a five day jury trial, and that CDLLC lost. Thus, the doctrine of collateral estoppel precludes CDLLC from relitigating those issues before a federal jury.

A. A State Jury Actually Decided Issues Identical to those Before this Court in *Miles v. Champagne Demolition, LLC.*

Here, the Secretary easily satisfies the first element of collateral estoppel because the state court actually determined several issues identical to those pending before this Court. The requirement that collateral estoppel be applied only where issues previously decided are identical to those present in a subsequent action, "reflect[s] the doctrine's underlying purpose of preventing repetitious litigation of disputes which are *essentially* the same." *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y. 2d 659, 666 (1990) (emphasis added). The doctrine "does not require that the issues be *exactly* identical. . . ." *Kreinik v. Showbran Photo, Inc.*, 400 F. Supp. 2d 554, 562 (S.D.N.Y. 2005). "[T]wo issues may be identical for estoppel purposes if they are *substantially* or *essentially* the same." *Id.* (emphasis in original) (citing cases). Here, in determining CDLLC's liability under New York State's whistleblower statute, the state jury decided issues that are "substantially or essentially the same," *Kreinik, supra*, at 562, as those

before this Court: (1) On or about June 10, 2010, Mr. Miles reported his concerns about Champagne Demolition's asbestos removal practices to his supervisor; (2) Champagne Demolition discharged Mr. Miles after he reported those concerns; (3) Champagne Demolition's discharge of Mr. Miles was motivated by his complaint about CDLLC's asbestos removal procedures; and (4) Mr. Miles was an employee of CDLLC when he reported his concerns to company management. *See Hoy Shoe,* 32 F.3d at 365, *supra*. The Secretary will discuss each issue in turn below.

i. The Jury Determined that Mr. Miles Reported the Illegal Removal of Asbestos to his Supervisor.

The Secretary seeks collateral estoppel on the issue of protected activity; that is, whether Mr. Miles exercised any right afforded by the OSH Act. *See Hoy Shoe, supra* (To prevail on a claim under Section 11(c) the Secretary must prove, *inter alia,* that the employee participated in "protected activity"). The statute explicitly protects an employee's right to make complaints "under or related to" the Act. 29 U.S.C. § 660(c)(1) (no person shall discharge or discriminate against any employee because the employee has "filed any complaint . . . under or related to" the Act). A complaint to an employer about "occupational safety and health matters" is "related to the Act," and therefore activity protected by Section 11(c). *See* 29 C.F.R. § 1977.9(c) ("Such complaints [about occupational safety and health matters] to employers, if made in good faith, therefore would be related to the Act…."); *see also* 29 U.S.C. § 651(b) (Congress passed the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ."). The "salutary principles of the Act would be seriously undermined" if employees' good faith complaints to their employers were not protected activity. 29 C.F.R. § 1977.9(c).

Asbestos removal activities implicate occupational health and safety. Because asbestos exposure can trigger grave health consequences, asbestos removal activities performed at the workplace are regulated by OSHA, *see* 29 C.F.R. § 1926.1101 (OSHA's asbestos in construction regulations); 29 C.F.R. § 1910.1001 (OSHA's asbestos in general industry regulations), and other federal agencies, as well as the New York State Department of Labor's Asbestos Control Bureau. *See* 12 NYCRR Part 56 (requiring training and certification of employees and "setting forth standards and procedures that shall be followed when removing, enclosing, encapsulating, repairing, or disturbing friable or non-friable asbestos…."). It follows that an employee engages in activity protected by the OSH Act when, in good faith, the employee makes a complaint about asbestos removal procedures at the workplace.

The New York Supreme Court determined that Mr. Miles reported improper asbestos removal procedures to his supervisor. Specifically, the jury in *Miles v. Champagne Demolition, LLC* determined that Mr. Miles reported an "actual violation" of New York State's asbestos regulations to his supervisor on or about June 10, 2010, *i.e.* that Champagne Demolition workers had illegally and dangerously removed asbestos at Gloversville High School. *See* Bowles Decl., Ex. B at 1; *see also* Ex. C at 845-46; *see also id.*, Ex. C at 828-29, 833-35 (relevant jury instructions). The jury's finding is more than sufficient to satisfy Section 11(c)'s lesser "good faith" requirement. 29 C.F.R. § 1977.9(c); *see* Sec'y Opp'n at 7-8, 15-17. Accordingly, the state jury determined an issue that is "substantially or essentially the same" as one in this action: Mr. Miles made a complaint in good faith to his employer about asbestos procedures at the workplace and thereby engaged in activity protected by the OSH Act. *Kreinik*, 400 F. Supp. 2d at 562.

ii. The Jury Determined that Champagne Demolition Discharged Mr. Miles.

The Secretary also seeks collateral estoppel on the issue of whether Champagne Demolition discharged Mr. Miles. *See Hoy Shoe, supra* (Section 11(c) requires proving that Mr. Miles suffered an "adverse action"). Section 11(c) of the OSH Act explicitly prohibits an employer from "discharg[ing]" an employee who exercises any right provided for in the Act. *See* 29 U.S.C. § 660(c)(1). Because the state jury determined that Champagne Demolition "discharged" Mr. Miles, *see* Bowles Decl., Ex. B at 1; Ex. C at 845-46; *see also id.*, Ex. C at 829-30, 834, 836 (relevant jury instructions), the state court actually decided an issue that is "substantially or essentially the same" as one in this action. *Kreinik*, 400 F. Supp. 2d at 562.

iii. The Jury Determined that Champagne Demolition Fired Mr. Miles Because he Reported Illegal Asbestos Removal to his Supervisor.

The Secretary also seeks collateral estoppel on the question of whether there is a "causal connection" between Mr. Miles' protected activity and his termination. *Hoy Shoe, supra; see also* 29 C.F.R. § 1977.6(b) ("[T]he employee's engagement in protected activity need not be the sole consideration behind the discharge or other adverse action."). A state court has decided this issue. The jury in *Miles v. Champagne Demolition, LLC* concluded that Champagne Demolition's "reason for discharging [Mr. Miles] was motivated by [Mr. Miles'] reporting of" CDLLC's violation of Code Rule 56. *See* Bowles Decl., Ex. B at 1; Ex. C at 846; *see also id.*, Ex. C at 834-35, 830 (relevant jury instructions). Accordingly, the state court actually decided an issue that is "substantially or essentially the same" as one in this action: that Champagne Demolition's termination of Mr. Miles was causally related to his complaint about the company's asbestos removal procedures. *Kreinik*, 400 F. Supp. 2d at 562.

iv. The Jury Determined that Mr. Miles was an Employee of Champagne Demolition on or about June 10, 2010.

Finally, collateral estoppel bars Champagne Demolition from relitigating a fourth issue: Mr. Miles' employment status. To prevail on a claim under Section 11(c), the Secretary must

prove the existence of an employment relationship. *See* 29 U.S.C. § 660(c)(1) ("No person shall discharge or in any manner discriminate against any *employee*…") (emphasis added). The New York Supreme Court has decided that an employment relationship existed between Mr. Miles and CDLLC on the date he engaged in protected activity. *See* Bowles Decl., Ex. C at 845-46; *see also id.*, Ex. C at 829-30, 834 (relevant jury instructions). At the conclusion of *Miles v. Champagne Demolition, LLC* the jury determined that Mr. Miles "was an employee of [Champagne Demolition] who reported a violation [of New York Code Rule 56] to his supervisor." Bowles Decl., Exs. B at 1; Ex. C at 845-46; *see also id.*, Ex. C 829-30 (relevant jury instructions). In other words, the state jury determined that Mr. Miles was an "individual who perform[ed] services for and under the control and direction of [Champagne Demolition] for wages or other remuneration" at the time he complained to Champagne Demolition. *See* N.Y. Lab. Law § 740(1)(a); *see also* Bowles Decl., Ex. B at 2 ("Here, the evidence in the record was such that, if believed, supports the jury's verdict that [Mr. Miles] was an employee on or about June 11, 2010."). An individual "who performs services for and under the control and direction of [his employer] for wages or other remuneration," *see* N.Y. Lab. Law § 740(1)(a), is an "employee" for purposes of the OSH Act.[1] Accordingly, the state court actually decided an issue

[1] To determine employee status in the context of both Section 11(c) of the OSH Act and Section 740 of the New York Labor Law, courts look to common-law agency principles. To determine whether an individual is an employee under the OSH Act, courts apply the test the Supreme Court articulated in *Nationwide Mut. Ins. Co. v. Darden*. *See In re Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500 (No. 97-1839 2004); *see also* Surreply (Dkt. No. 70). Under the Supreme Court's holding in *Darden*, much like the plain terms of Section 740, "the hiring party's right to control the manner and means by which the product is accomplished" determines whether an individual is an employee. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *see also* N.Y. Lab. Law § 740(1)(a) (defining an employee as "an individual who performs services for and under the control and direction of an employer for wages or other remuneration."). Several federal courts considering whether collateral estoppel applied to bar relitigation of an individual's employee status have observed that the common law test of agency discussed in *Darden* is the same test applied by New York courts in a variety of employer-employee relationships. *See, e.g., Kreinik, supra*, at 564-66 ("New York courts apply the same common-law right-to-control test [as *Darden*] to determine when a worker is an employee in several contexts.") (citing cases); *Smith v. CPC Int'l, Inc.*, 104 F. Supp. 2d 272, 275 (S.D.N.Y. 2000) (same). For instance, in *Kreinik*, a federal court applied collateral estoppel to bar the relitigation of an individual's employee status where the state court's determination of the issue was preclusive for the purposes of the Employee Retirement Income Security Act of 1974 ("ERISA"). *Kreinik, supra*, at 570.

that is "substantially or essentially the same" as one in this action. *Kreinik*, 400 F. Supp. 2d at 562.

B. Defendant Champagne Demolition Fully and Fairly Litigated the Issues Pending Before this Court in *Miles v. Champagne Demolition , LLC*.

Champagne Demolition had a full and fair opportunity to litigate the issues pending before this Court during the state court trial. The party attempting to defeat the application of collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. *See Schwartz,* 24 N.Y.2d at 73. New York courts have identified a number of factors that are indicative of whether a party or its privy has had its day in court. For instance, "the various elements which make up the realities of litigation," should be explored, including "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." *Schwartz*, 24 N.Y.2d at 72. An examination of these factors demonstrates that Champagne Demolition cannot demonstrate that it lacked the opportunity to fully and fairly litigate all of the above issues at the state trial.

i. Champagne Demolition Vigorously Defended Against Donald Miles' Allegations in New York Supreme Court

The state court litigation was straightforward. Mr. Miles presented a single claim of unlawful retaliation to a jury convened by a justice of the New York Supreme Court. Mr. Miles sought approximately two years' of back wages and attorney's fees, or in other words, a significant enough sum of money to incentivize Champagne Demolition to mount a full defense of the claim. *See, e.g., Schwartz,* 24 N.Y.2d at 72 ("assurance that there was a vigorous fight on the issue of liability" arises from actions involving "substantial sums" as opposed to "a few

hundred dollars."). Champagne Demolition enjoyed the benefit of adequate representation at trial by veteran litigator Kevin A. Luibrand. *See* Peterson Aff. ¶ 8. According to Mr. Luibrand's website, in 2014 he was selected by the National Trial Lawyers Association as one of the Top 100 Trial Attorneys in the United States. *See* www.luibrandlaw.com, last accessed on Apr. 2, 2015. Furthermore, prior to the start of the state trial, Mr. Luibrand had represented Champagne Demolition and Joseph Champagne in the government's Section 11(c) case for approximately two years. *See, e.g., Wisniewski v. Bd. Of Educ.*, 2006 WL 1741023, at *6 (N.D.N.Y. June 20, 2006) (as a matter of law plaintiffs had full and fair opportunity to litigate where they were represented by same attorney in two actions at issue), *aff'd on other grounds* 494 F.3d 34 (2d Cir. 2007), *cert. denied* 552 U.S. 1296 (2008). The interplay of these two related lawsuits—including the potential that the results of the state action could have preclusive effect in this litigation—would have been a foreseeable reality for Champagne Demolition.

There is no question that Champagne Demolition mounted a comprehensive defense at the state trial. *See* Peterson Aff. ¶¶ 12, 16-17, 19-20, 27. CDLLC made motions to dismiss the case during and after the trial, *see id.* ¶¶ 17, 27; it presented seven defense witnesses to the jury, *id. at* ¶ 19; introduced 17 exhibits into evidence, *id.* at ¶ 20; and cross examined Mr. Miles and all of the witnesses who testified on his behalf, *id.* at ¶ 16. Simply put, Champagne Demolition already had its day in court. Thus, this case is easily distinguishable from the cases where courts have determined that a party did not have a full and fair opportunity to litigate its claims. *Compare Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 735-36 (2d Cir. 2001) (party appearing *pro se* party in hearing with no discovery process and no opportunity to cross examine witnesses did not have a full and fair opportunity to litigate); *Gilberg v. Barbieri*, 53 N.Y.2d 285, 293 (1981) (the "brisk, often informal" nature of proceedings and the "relative

insignificance of the outcome" gave party "neither opportunity nor incentive to litigate thoroughly or as thoroughly as he might if more were at stake."); *with Schwartz*, 24 N.Y.2d at 72 (full and fair opportunity to litigate found where each plaintiff was a "full participant" in earlier cases, had full opportunity to "tell his story," had adequate representation, and did not show prejudice); *Wisniewski, supra.*

ii. A Pending Appeal Does not Foreclose Collateral Estoppel

Whether Champagne Demolition had a full and fair opportunity to litigate the issues for which preclusion is sought does not hinge on whether it exercises its right to appeal the state court judgment. As of the date of this filing, Champagne Demolition has not exercised its right to appeal the state court judgment. Even if CDLLC does appeal the judgment, that fact does not defeat preclusion. The majority of courts in New York do not consider a party's decision to appeal as one of the factors indicative of whether that party has had its day in court for collateral estoppel purposes. *Access 4 All. Inc. v. Trump Int'l Hotel and Tower Condo.*, 2007 WL 633951, at *10, n.5 (S.D.N.Y. Feb. 26, 2007) (noting also that under federal collateral estoppel principles appeal does not foreclose preclusion). Federal courts routinely follow the majority rule when applying New York's collateral estoppel principles. *See DiSorbo v. Hoy*, 343 F.3d 172, 183 (2d Cir. 2003) (applying collateral estoppel despite pending appeal of state court decision); *see also, e.g., Sanchez v. Abderrahman*, 2013 WL 8170157, at *8, n.10 (E.D.N.Y. July 24, 2013) (applying collateral estoppel even though appeal pending), *report and recommendation adopted in part*, 2014 WL 1276570 (E.D.N.Y. Mar. 25, 2014) (citing cases); *Fortunatus v. Clinton County*, 937 F. Supp. 2d 320, at 332-33 (N.D.N.Y. 2013) (applying collateral estoppel despite pending appeal of Article 78 judgment); *Access for All*, 2007 WL 633951, at *10, n.5. As discussed above, when determining whether a party has had a full and fair opportunity to litigate,

the majority of New York courts as well as the federal courts emphasize the realities of litigation in the original proceeding.[2] Here, there is no question that CDLLC had a full and fair opportunity to litigate all of the issues on which the Secretary seeks collateral estoppel. *See supra.* Accordingly, the bare fact that Champagne Demolition may appeal the state court decision cannot defeat the preclusive effect of the state court's conclusion that CDLLC retaliated against Mr. Miles.

C. The Issues that the State Court Decided in *Miles v. Champagne Demolition, LLC* Are Determinative in the Secretary's Federal Discrimination Action.

There is no question that the issues decided in the state court are determinative in the Secretary's 11(c) action. According to the Second Circuit, the third element of collateral estoppel—that an issue already litigated is decisive in the present action—is established if the issue already litigated "would prove or disprove, without more, an essential element of any of the claims set forth in the complaint." *Curry*, 316 F.3d at 332. Here, each of the four issues discussed above corresponds to an essential element of the Secretary's Section 11(c) claim.

The jury's finding that Mr. Miles was an "employee [of Champagne Demolition] who reported" an "actual violation [of New York State's asbestos regulations]" to his supervisor, *see* Bowles Decl., Ex. B at 1, Ex. C at 845-46, proves, without more, the first and second elements of the Secretary's claims of retaliation, *i.e.*, that Mr. Miles was an employee of CDLLC and that he engaged in activity protected by the OSH Act. *See Hoy Shoe, supra; see also* 29 U.S.C. § 660(c)(1); 29 C.F.R. § 1977.9(c) (complaint to employer about an "occupational safety and health matter" is protected by Section 11(c)). The state jury's finding that CDLLC "discharged"

[2] These courts also recognize that even if the underlying judgment is reversed on appeal, the party against whom collateral estoppel was applied is not without recourse. Federal Rule of Civil Procedure 60(b)(5) permits a court to "relieve a party . . . from a final judgment" if "it is based on an earlier judgment that has been reversed or vacated." Fed.R.Civ.P. 60(b)(5); *see also, e.g., Abderrahman*, 2013 WL 8170157, at *8, n.10 (citing *Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt*, 2012 U.S. Dist. LEXIS 43280, at *3 (E.D.N.Y. Mar. 28, 2012)).

Mr. Miles, *see* Bowles Decl., Ex. B at 1; Ex. C at 845-46, proves, without more, the next element of the Secretary's retaliatory discharge case, *i.e.*, that defendants subjected Mr. Miles to an adverse action. *See Hoy Shoe, supra; see also* 29 U.S.C. 660(c)(1) ("No person may discharge or otherwise discriminate…."). Finally, the jury's finding that CDLLC's "reason for discharging him was motivated by his reporting of the violation," *see* Bowles Decl., Ex. B at 1, Ex. C at 846, proves, without more, the last element of the Secretary's retaliatory discharge case, *i.e.*, that a causal connection exists between Mr. Miles' protected activity and defendants' adverse action. *See Hoy Shoe, supra.* Accordingly, each of the issues for which the Secretary seeks collateral estoppel is decisive in this action.[3]

* * *

In sum, the Secretary has met each of the elements necessary to invoke the doctrine of collateral estoppel by showing that issues identical to those pending before this Court were litigated and decided by the state court in *Miles v. Champagne Demolition, LLC*; that CDLLC had a full and fair opportunity to litigate those issues in the state forum; and that these issues are determinative in this case. To permit CDLLC to relitigate the same issues it already fully and fairly litigated to a state jury for a second time before a federal jury will result in significant inefficiencies and unfairness. Collateral estoppel is based on principles of equity, namely the simple concept that "it is not fair to permit a party to relitigate an issue that has already been decided against it." *Kaufman*, 65 N.Y.2d at 455-56; *see also Conte v. Justice*, 996 F.2d 1398, 1400 (2d Cir. 1993) (same). Those equitable concerns apply here and should bar defendant

[3] The Secretary notes that the state court's determination of the back wages due to Mr. Miles is not binding of the Secretary. The Secretary clearly did not have any opportunity to litigate that issue, as he was not a party to the state action. *See supra* § II.B. *Compare Am. Motorist Ins. Co. v. Morris Goldman Real Estate*, 2004 WL 1396260, at *4 (SDNY June 18, 2004) (collateral estoppel on damages where defendant was the same in both actions and had an opportunity to contest the methodology of damage calculation and did not do so) *with First Nat. Bank of Boston v. Chase*, 1988 WL 80149, at *3 (SDNY July 26, 1988) (no collateral estoppel on damages because they were not a party to the first litigation).

Champagne Demolition from relitgating before a federal jury those same issues that a state court jury already heard and decided against it.

III. THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES DEFENDANT JOSEPH CHAMPAGNE FROM RELITIGATING IN THIS COURT ISSUES IDENTICAL TO THOSE THAT THE STATE JURY DETERMINED.

The findings of the state court should apply with equal force to bar defendant Joseph Champagne from relitigating in federal court the same issues that his company Champagne Demolition fully and fairly litigated in front of a state court. That Joseph Champagne was not a named party to the state court action is immaterial. "Under New York law, it is fundamental that a judgment in a prior action is binding not only on the parties to that action, but on those in privity with them." *Ruiz v. Comm'r of Dep't of Transp.*, 858 F.2d 898, 903 (2d Cir. 1988) (citing *Green v. Santa Fe Indus.*, 70 N.Y. 2d 244, 253 (1987)). Where, as here, a federal court is asked to determine whether collateral estoppel bars relitigation of issues decided by a state court, the question of privity is governed by state law. *See, e.g., Ruiz,* 858 F.2d at 903.

The relevant questions for privity in this context is "whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion," and whether preclusion would be fair. *Buechel v. Bain,* 97 N.Y. 2d 295, 303-04 (2001), *cert. denied* 535 U.S. 1096 (2002); *see also Amadsau v. Bronx Lebanon Hosp. Cent.*, 2005 WL 121746, at *8 (S.D.N.Y. Jan. 21 2005) ("Contemporary courts have broadly construed the concept of privity, far beyond its literal and historical meaning, to include any situation in which the relationship between the parties is sufficiently close to support preclusion.") (internal quotation omitted), *report and recommendation adopted by* 2005 WL 954916 (S.D.N.Y. Apr. 26, 2005), *aff'd* 225 Fed. App'x 32 (2d Cir. 2007); *McCarroll v. Bureau of Prisons,* 2012 WL 3940346, at *8 (D. Conn. 2005) (same) (citing cases). The New York Court of Appeals has used

the following "guidelines" to assess whether parties are in privity in the context of collateral estoppel, *Ruiz*, at 903: privity "includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action." *Id.; see also Buechel*, *supra*, 303-04 (same) (quoting *Matter of Juan C. v. Cortines*, 89 N.Y.2d 659, 667-68 (1997)); *see also Watts v. Swiss Bank Corp.*, 27 N.Y. 2d 270, 277 (1970) (same).

The undisputed facts show that Joseph Champagne and Champagne Demolition "have a relationship that [justifies] preclusion." *Buechel, supra,* at 305. Mr. Champagne explained to the state jury in no uncertain terms: "It's my company." *See* Bowles Decl., Ex. C at 439:23-24. That testimony echoes statements Mr. Champagne made to employees before the start of a job in 2010: "When you're wearing a Champagne Demolition T-shirt…[y]ou represent me." *See id.* at 436:8-10. Although Mr. Champagne is one of two partners that formed Champagne Demolition in 2007, *see* Bowles Decl., Ex. E at 666:23-25; Ex. F at 4:14-17; 5:16-6:12, Mr. Champagne identified himself as the managing member of Champagne Demolition, *see id.,* Ex. E at 729:16, and his partner as a silent member or as a "financier," *see id.*, Ex. F at 13:14-20. *See also id.* Ex. E at 669:7-670:3.

Mr. Champagne was not only an "owner" of Champagne Demolition, but also the "boss" and "operations manager." *See id.*, Ex. E. at 729:13-19, Ex. F 4:14-5:6. During the approximately six years the company bid jobs, the company paid Mr. Champagne a weekly salary of $2,000 plus health benefits. *See id.*, Ex. E at 663:14-665:14, 647:22-648:6. "Courts have long recognized that privity exists between coemployees or employees and their employers for *res judicata* purposes." *McCarroll,* 2012 WL 3940346, at *8 (concluding that privity exists between an entity and its employee) (citing cases); *see also, e.g., Amadsau v. Bronx Lebanon*

Hosp. Cent., 2005 WL 121746, at *8 (same in collateral estoppel context); *Geraci v. Bauman, Greene & Kunkis*, 171 A.D. 2d 454 (1st Dep't 1991) (collateral estoppel barred employee from relitigating issue of his negligence where the issue had been decided in a prior suit against his employer), *appeal dismissed* 78 N.Y.2d 907 (1991). The undisputed facts about Mr. Champagne's work for CDLLC are sufficient proof that privity exists between this employer-employee in separate suits over the same tortious acts that occurred during the course of Mr. Champagne's tenure as operations manager at Champagne Demolition.

More specifically, according to Mr. Champagne's testimony at trial and deposition, he put in place the management team to get his asbestos abatement business up and running, *see* Bowles Decl., Ex. C at 408-418; he "oversaw the company," *id.*, Ex. E at 729:19; and he alone had the authority to hire and fire employees, *see id.*, Ex. C at 439:18-440:5, Ex. F 13:2-13. Mr. Champagne also oversaw the company's legal affairs, including Champagne Demolition's defamation lawsuit against Mr. Miles. *See id.*, Ex. E at 664:2-8; 280:2-3. Finally, at least one former Champagne Demolition employee reported that he and others performed work at Mr. Champagne's private residence for free during the course of their employment. *See id.*, Ex. H at 58:18-59:16; Ex. E at 584:16-585:4.

Even after the company stopped bidding for jobs in December 2012, Mr. Champagne continued to control Champagne Demolition. As of July 2013, the date of Champagne Demolition's deposition in this action, Mr. Champagne was the only employee who remained on staff at Champagne Demolition. *See id.*, Ex. E at 695:6-10; *see also id.*, Ex. F at 5:4-6. For at least seven months after the company ceased demolition work, the company continued to pay Mr. Champagne the $2,000 weekly salary it had paid him while the company was fully operational, *see id.*, Ex. E at 663:14-665:14, as well as his health benefits, *id.* at 647:22-648:9.

Further, Mr. Champagne testified on Champagne Demolition's behalf at depositions in both the federal and state cases, or as late as September 2013, and represented CDLLC at the state trial. *See id.*, Exs. E-F; *see also* Peterson Aff. ¶ 21-22. According to Mr. Champagne's testimony, his plan was to restart the company once litigation involving Mr. Miles ended. *See* Bowles Decl., Ex. F at 9:11-21. Until that time, the company's records and computers were relocated to "Joe Champagne's property in Schodack," New York. *See id.*, Ex. G at 23:10-19, 29:6-25, 51:3-7, 111:3-4; Ex. F at 11:8-13. Given the above evidence, privity would be fair.

Three additional factors weigh in favor of privity between Champagne Demolition and Joseph Champagne. First, Mr. Luibrand's joint representation of both defendants in this action, combined with his representation of Champagne Demolition in the state action, supports a finding of privity. *See id.*, Ex. E at 15:14-23. That is because "the appearance of the same attorney in both actions," as here, "creates the impression that the interests represented are identical." *See, e.g. Fulani v. Bentsen*, 862 F. Supp. 1140, 1148 (S.D.N.Y. 1994) (quoting *Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir. 1993)). Second, Mr. Champagne actively participated in the state court trial. *See* Peterson Aff. at ¶¶ 19, 21-22. Mr. Champagne was the sole representative of Champagne Demolition at the state trial, and was seated at counsel's table every day; he represented Champagne Demolition in unsuccessful settlement discussions during trial; and he was Champagne Demolition's first witness at trial. *See id.* at ¶¶ 21-22. Third, regardless of the parties named in each suit, it is Mr. Champagne's personal conduct that is plainly at the heart of both cases. Accordingly, the defense used Mr. Champagne's testimony as a vehicle for establishing Champagne Demolition's credibility in the state action, *see, e.g.*, Bowles Decl., Ex. C at 751:17-756:3, as it presumably will in this federal action. *See, e.g., Geraci*, 171 A.D. 2d 454 at 455 (privity exists where employee seeking to relitigate issue "was a prime

witness in the [prior] litigation" and his "interests were intimately related to that of his employer").

Given the totality of the circumstances, it follows that Mr. Champagne's interests were "adequately represented" at the state trial. Put another way, the undisputed evidence of Mr. Champagne's close relationship with Champagne Demolition—or that Joseph Champagne *is* Champagne Demolition—is sufficient to invoke the principles of collateral estoppel against Joseph Champagne as well as his company.

IV. SUMMARY JUDGMENT IS APPROPRIATE AS TO THE SECRETARY'S RETALIATORY TERMINATION CLAIM BECAUSE COLLATERAL ESTOPPEL APPLIES TO PRECLUDE ALL OF THE ISSUES THAT THE SECRETARY MUST PROVE TO PREVAIL ON THIS CLAIM.

Giving preclusive effect to the four issues the state court decided, *supra*, must result in summary judgment in this action. The state court resolved all of the elements of the Secretary's case of retaliatory termination: (1) Mr. Miles engaged in protected activity; (2) Champagne Demolition subsequently subjected him to adverse action; (3) there is a causal connection between the protected activity and the adverse action; and (4) Mr. Miles was an employee of Champagne Demolition when he engaged in protected activity. *See Hoy Shoe, supra*. More specifically, as discussed above, the state court decided each of these issues against Champagne Demolition and its privy, Joseph Champagne. *See supra* § II.A-C. It follows that, at least as to this claim, there is nothing for a federal jury to determine that the state court has not already determined. Simply put, there is no genuine issue of material fact that requires a federal trial on this point. Judgment as a matter of law is appropriate: Champagne Demolition's termination of Mr. Miles constitutes unlawful retaliation under Section 11(c) of the OSH Act.

V. PARTIAL SUMMARY JUDGMENT IS APPROPRIATE AS TO THE SECRETARY'S CLAIM OF RETALIATORY LITIGATION BECAUSE COLLATERAL ESTOPPEL APPLIES TO PRECLUDE RELITIGATION OF TWO OF THE ISSUES THE SECRETARY MUST PROVE TO PREVAIL ON THIS CLAIM.

The preclusive effect of the state court judgment also bears on the Secretary's claim that Champagne Demolition violated the OSH Act when it filed a defamation lawsuit against Mr. Miles. To prevail on this claim, the Secretary must prove (1) Mr. Miles engaged in protected activity; (2) Champagne Demolition subsequently subjected him to adverse action; (3) there is a causal connection between the protected activity and the adverse action; and (4) Mr. Miles was an employee of CDLLC when he engaged in protected activity. *See Hoy Shoe, supra.* At trial, the Secretary will demonstrate that CDLLC's defamation lawsuit constituted adverse action[4] and was connected to Mr. Miles' protected activity, *i.e.* the reporting of unlawful asbestos removal procedures at Gloversville High School on June 10, 2010 to Champagne management. However, as explained above, the state court's finding that Mr. Miles was an employee who reported an actual violation of asbestos regulations to his supervisor, *supra,* bars relitigation of two parts of the Secretary's claim that the lawsuit was retaliatory: protected activity and employee status. Therefore, pursuant to Federal Rule of Civil Procedure Rule 56(a), summary judgment is

[4] Lawsuits filed with the intent to punish or dissuade employees from exercising their statutory rights are a well-established form of adverse action. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (Finding that a lawsuit that was both objectively baseless and subjectively motivated by an unlawful purpose could violate the National Labor Relations Act's prohibition on retaliation); *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 472 (S.D.N.Y. 2008) ("Courts have held that baseless claims or lawsuits designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory actions."); *Spencer v. Int'l Shoppes, Inc.*, 902 F. Supp. 2d 287, 299 (E.D.N.Y. 2012) (Under Title VII, the filing of a lawsuit with a retaliatory motive constitutes adverse action). At trial, the Secretary will show that the defendants' defamation lawsuit was retaliatory and legally baseless. The state court's findings that Champagne Demolition committed an actual violation of New York State Code Rule 56, *see* Bowles Decl., Ex. B at 1; Ex. C at 845-46, will demonstrate that defendants' lawsuit lacked merit. Specifically, defendants' claim that Mr. Miles defamed them by accusing them of illegal asbestos removal, *see* Exhibit N and footnote 13 to Sec'y Opp'n (Dkt. No. 63), is contradicted by the state court's conclusion that Champagne Demolition *was* actually violating New York's asbestos code; that Mr. Miles spoke the truth is fatal to defendants' assertion of defamation. *See, e.g., Chao v. Mount Sinai Hosp.*, 2010 WL 5222118, at *6 (S.D.N.Y. Dec. 17, 2010) *aff'd sub nom. Hengjun Chao v. Mount Sinai Hosp.*, 476 F. App'x 892 (2d Cir. 2012) (A claim for defamation in New York must allege a false statement about the complainant). Therefore, the Secretary will also introduce the findings of the state court regarding CDLLC's actual violation of the law in furtherance of the Secretary's argument that the defamation lawsuit was baseless.

appropriate on these parts of the Secretary's retaliatory lawsuit claim.[5] *See* Fed.R.Civ.P. 56(a) (Parties may move for summary judgment on "part of each claim or defense.")

VI. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Giving preclusive effect to the state court's findings in *Miles v. Champagne Demolition, LLC* also compels the denial of defendants' pending motion for summary judgment (Dkt. No. 63). Defendants' sole argument in favor of judgment as a matter of law is that Mr. Miles did not engage in "protected activity" under the Act because he could not satisfy the statute's "good faith" requirement. *See* Defs. Amd. Mem. of Law. for SJ at 8-9; *see also* Sec'y Opp'n at 7-8, 15-17 (to satisfy Section 11(c)'s "good faith" requirement, the Secretary need only show that Mr. Miles had a reasonable belief that asbestos was being removed illegally.). However, a state jury already determined that Mr. Miles was an employee of CDLLC who reported an "actual violation" of state asbestos regulations, and that the violation presented a "substantial and specific danger to the public health or safety." Bowles Decl., Ex. B at 1. The state court jury's finding is more than sufficient to meet Section 11(c)'s good faith requirement, which does not require that an employee report an actual violation as long as the employee acted with a reasonable belief that a violation of law occurred. *See* Sec'y Opp'n at 7-8, 15-17. Thus, a finding of collateral estoppel on this issue, as discussed above, requires a finding that Mr. Miles engaged in "protected activity," and defendants' pending motion for summary judgment must be denied.[6]

[5] If the court does not grant of summary judgment on any one of the Secretary's claims or parts of claims, pursuant to Federal Rule of Civil Procedure 56(g), the Secretary requests an order stating that the material facts underlying the claims are established for purposes of this case. Fed. R. Civ. P. 56(g).

[6] To the extent the Court finds that Mr. Miles engaged in activity protected by the Act, *i.e.*, that he in good faith reported a concern about asbestos to his employer, that finding also undermines defendants' argument that the Secretary's complaint should be dismissed as a sanction, as defendants' bid for sanctions was also predicated on Mr. Miles' alleged lack of "good faith." *See also generally* Sec'y Opp'n at 17-24.

CONCLUSION

For the reasons stated above, the Secretary's Motion for Partial Summary Judgment should be granted.

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New York, New York

Respectfully submitted,

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