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Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act

Litigation under the Fair Labor Standards Act (FLSA) roared back to life in the late 1990s after decades of relative silence. The number of FLSA cases filed in federal courts jumped from 1,562 in 1998 to 3,904 in 2002.[1] The sharp increase has continued in the years since, with 6,073 such cases filed in 2009.[2] At the heart of this resurgence have been collective actions—the FLSA's unique version of the class action suit. Between 1997 and 1998, the number of FLSA collective actions filed in federal courts doubled from just 31 to 60.[3] In 2010, at least 1,967 such actions were filed in federal courts.[4]

This explosion of litigation under a 70-year-old statute has a variety of causes. Employees can obtain certification of FLSA "class" actions with relative ease compared to employment discrimination class actions, and this ease of access has naturally drawn the attention of the plaintiffs' bar. FLSA's requirements are often convoluted, counterintuitive, and difficult for employers to follow. After years of relative inattention, there were many apparent violations to be found. The Supreme Court's high-profile decision in *IBP Inc. v. Alvarez*, the very first opinion issued by the Roberts Court, also cast a spotlight on what seemed to be a dusty issue.[5]

Decided in 2005, *Alvarez* involved two FLSA cases alleging "donning-and-doffing" claims. At their core, the cases asked a fundamental and often still confounding question: What is compensable work under the FLSA? The Supreme Court's answer to that question focused renewed attention on a host of FLSA issues that had fallen off the radar screens of many employees, employers, and attorneys. The decision introduced a wide audience to concepts such as the "principal activity" an employee is employed to perform (which is compensable), activities that are merely "preliminary" and "postliminary" to a principal activity (which are not compensable), and other activities that are "integral and indispensable" to a principal activity (which are also compensable).

The issues highlighted in *Alvarez* are now being litigated in cases across the country. Strictly speaking, donning-and-doffing claims focus on workers' punching time clocks, putting on and removing protective gear, and walking between locker rooms and production lines—all of which seem remote from the concerns raised in many workplaces today. However, the issues raised in these cases have wide import. Any business in which employees subject to the FLSA ("nonexempt employees") wear uniforms or handle company property outside their regular working hours or engage in "preparatory" work, such as turning on computers may be susceptible to donning-and-doffing type claims. Of particular importance will be how courts continue to develop the "de minimis" doctrine—the idea that some working time is so minimal and difficult to track that it does not need to be counted. Decisions involving that doctrine could have a tremendous impact on how courts resolve a distinctly modern workplace issue coming to the fore: whether employers must pay nonexempt employees for time they spend checking their BlackBerries, personal data assistants (PDAs), voicemails, and the like outside their regular workdays and on their "own time." That question may well constitute the next big wave in FLSA litigation.

The FLSA: A Brief Overview

Adopted at the height of the Great Depression, the Fair Labor Standards Act was the culmination of longtime efforts to enact legislation setting minimum standards for pay and working hours. The U.S. Supreme Court had repeatedly struck down such laws at the state and federal levels in previous years, ruling that these laws violated employees' and employers' constitutional right to freedom of contract. But in March 1937, the Court—perhaps feeling the pressure of President Roosevelt's threatened "court-packing" plan—abruptly changed course and upheld a minimum wage law passed by the state of Washington. Congress moved quickly to adopt national legislation, and just over a year later, on June 25, 1938, President Roosevelt signed the FLSA into law.[6]

Since its enactment, the FLSA has been subject to several amendments and expansions. But the law's two basic requirements for nonexempt employees remain the same: they must be paid a specified minimum wage and they must be paid at a time-and-a-half premium rate for all time worked beyond 40 hours in a workweek.

The statute grants employees a private right of action to recover back wages for violations of its minimum wage and overtime pay requirements. Such back pay is recoverable for either two or three years, depending on whether the violation is found to be

willful. The statute further authorizes courts to award employees liquidated damages equal to the amount of back pay they recover and to award them their attorneys' fees and costs. In addition, employees may pursue FLSA claims on a collective basis if the employees are "similarly situated." In most jurisdictions, courts apply a lenient standard to "conditionally certify" FLSA collective actions. Following full-blown discovery, the employer may move to "decertify" the collective action prior to trial.

The Supreme Court Expands the Scope of Compensable Time

Donning-and-doffing issues have reached the Supreme Court on repeated occasions. In 1946, in *Anderson v. Mt. Clemens Pottery Co.*, the Court was asked to decide whether the time employees spent walking on their employer's premises to and from their workstations and the time they spent engaged in various "preliminary activities" before their scheduled shifts had to be recorded and counted by their employer for purposes of overtime pay. To the shock of the business community and the apparent surprise of Congress, the Court answered "yes."[7]

The employees in *Mt. Clemens* were production workers in a pottery factory. The plant was massive—covering eight acres—requiring some employees to walk long distances to reach their workstations. Once at their stations, employees spent several minutes preparing for their shifts by putting on aprons, overalls, and finger cots; removing shirts; taping or greasing their arms; preparing their equipment for productive work; turning on switches for lights and machinery; opening windows; and assembling and sharpening tools.

Because the employer did not record employees' time spent walking to workstations and preparing for their shifts, the employees claimed they were being deprived of additional overtime premiums for time they worked beyond 40 hours in a workweek. The Supreme Court agreed, holding that the activities at issue generally constituted compensable work, because they involved exertion by the employees under the control—and for the benefit—of their employer.

At the same time, the Court cautioned that its decision did not "preclude the application of a de minimis rule," according to which the time employees' spent walking or performing preliminary activities was "such as to be negligible." The Court explained that the FLSA's 40-hour workweek had to be "computed in light of the realities of the industrial world." Therefore, "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." The Court elaborated that "[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act" and that it was "only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." The Court then remanded the case for the trial court to determine the amount of time employees spent walking and performing preliminary activities, "giving due consideration to the de minimis doctrine."

A dissenting opinion objected that the established custom in the industry and the plant at issue was not to treat walking time as compensable. The dissent also criticized the majority for imposing the difficult—and perhaps futile—burden on employers of tracking small amounts of time that employees spent in various "preliminary" activities when they were "of such a nature that the knowledge of them and the time spent in doing them rests particularly with the employees themselves." According to the dissent, an "obvious, long established and simple way to compensate an employee for such activities [was] to recognize those activities in the rate of pay for the particular job." The dissent argued that the Court had gone astray by trying to include in the FLSA's statutory workweek "items that h[ad] been customarily and generally absorbed in the rate of pay but excluded from measured working time."[8]

Congress Narrows the Scope of Compensable Work

Concerned that *Mt. Clemens* and similar decisions would set off a litigation firestorm, Congress promptly amended the FLSA to meet this "existing emergency" by passing the Portal-to-Portal Act of 1947. Congress found the FLSA had been "interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." According to Congress, leaving the FLSA to stand as it had been interpreted by the courts would lead to the financial ruin of many employers, create substantial economic uncertainty, provide employees with "windfall payments" for activities "performed by them without any expectation of reward beyond that included in their agreed rates of pay," and interfere with voluntary collective bargaining.[9]

To avoid these potentially disastrous effects, the Portal-to-Portal Act nullified FLSA claims premised on the judicial interpretations at issue.[10] The Portal-to-Portal Act also provided that, going forward, time employees spent "walking, riding, or traveling to and from" the place where they performed their "principal activity or activities," or the time employees spent engaging in "activities which are preliminary to or postliminary" to their principal activity or activities, was not compensable where this time occurred before the employees commenced, or after they ceased, their principal activity or activities for the day. The only exceptions were if a contract or custom and

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practice at the time required an employer to treat such activities as compensable.[11]

Congress amended the FLSA again in 1949 to further address donning-and-doffing issues. This additional change carved out a limited exception to the FLSA's general rules on compensability with respect to unionized employees. Codified at 29 U.S.C. § 203(o), the 1949 amendment provided that compensable time under the FLSA would exclude "any time spent in changing clothes or washing at the beginning or end of each workday" if that time was excluded "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."[12]

The Supreme Court Clarifies the Portal-to-Portal Act's Exclusions

Donning-and-doffing issues were back before the Supreme Court within a few years of the passage of the Portal-to-Portal Act. In companion cases decided in 1956, *Steiner v. Mitchell* and *Mitchell v. King Packing Company*, the Court was called upon to elaborate on the Portal-to-Portal Act's distinction between noncompensable "preliminary" and "postliminary" activities on the one hand and compensable "principal" activities on the other.[13]

Steiner involved employees who worked in a battery factory where "chemicals permeate[d] the entire plant and everything and everyone in it." As a result of their exposure to toxic materials, these employees had to change into old work clothes before their shifts and change out of them and shower after their shifts because of "vital considerations of health and hygiene." *King Packing* involved employees in a meatpacking plant who had to keep their knives "'razor sharp' for the proper performance of the work" and who sharpened their knives everyday before or after their scheduled shifts. In neither case was the employees' time before or after their shifts being counted by their employers as time worked under the FLSA.

In the *Steiner* ruling, the Court found that the Portal-to-Portal Act's reference to "principal activity or activities" was "not free from ambiguity." Relying on statements in the act's legislative history, the Court added to the ambiguity by concluding that activities employees performed before or after their shifts—like changing clothes or showering—continued to be compensable time under the Portal-to-Portal Act if the activities were found to be "an integral part of and indispensable to [the employee's] principal activities."

Applying this rule in the cases before it, the Court held that the employees' work before and after their shifts had to be counted as compensable in both instances. The Court explained in *Steiner* that it would be "difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." In *King Packing*, the Court found "the knife-sharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed."

The Supreme Court Further Defines the Compensable Workday

Donning-and-doffing issues did not reappear on the Supreme Court's docket until almost 50 years later. In 2005, two cases—consolidated for appeal as *Alvarez*—reached the Court. The Court was asked to decide whether time employees spent walking to their workstations or waiting in lines—time that the Portal-to-Portal Act made noncompensable when it occurred *before* employees commenced or after they had ceased their "principal activity" for the day—was transformed into compensable time when it occurred *after* employees had performed some activity "integral and indispensable to" their primary activity. When did an employee's workday begin for purposes of the Portal-to-Portal Act's exclusions in those circumstances?

In both cases, the employees at issue worked in meat processing plants, where they donned and doffed special protective gear such as chainlink metal aprons, vests, plexiglass armguards, special gloves, and the like. In their arguments to the Supreme Court, the parties assumed that the employees' donning-and-doffing activities were integral and indispensable to their primary activities and thus compensable under *Steiner* and *King Packing*. But the parties disputed whether the time employees spent walking between their locker rooms and their workstations was also compensable. Both employers argued that the Portal-to-Portal Act said that time spent for this purpose was not compensable, because that law expressly excludes time for walking before and after shifts and other preliminary and postliminary activities. The Supreme Court disagreed, building on the expansion of "compensable time" that began in *Steiner*.

According to the Court, the Portal-to-Portal Act's exclusions from compensable time apply only to the time before employees commence or after they cease their principal activities for the day. The Court reasoned that when employees engage in activities that are integral and indispensable to their principal activity—donning special protective gear, for example—*that* activity is itself a "principal activity."

Once employees begin their "principal activity," the Portal-to-Portal Act exclusions become irrelevant;

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instead, the "continuous workday rule" applies. Under that rule, and with the exception of certain breaks during which the employee is relieved of all work-related obligations, once the workday begins, all of an employee's time is compensable under the FLSA until the workday ends. Under the continuous workday rule, time spent walking to and between workstations where employees perform their principal activities or time spent waiting in line is compensable.

Since *Alvarez* was decided, scores of collective actions alleging donning-and-doffing claims have been filed in federal courts on behalf of tens of thousands of employees. Many of these claims—more than 100 at minimum—have involved employees in meatpacking, poultry processing, and other food processing plants.[14] But employees in other industries are pursuing such claims as well—ranging from workers in foundries and nuclear power plants to security guards and police officers.[15] Although these disputes center on small increments of time, when those increments are aggregated across hundreds or thousands of workers over several years, the amounts at stake could easily reach into the millions of dollars.

The Case of Unionized Employees

Section 203(o) of the FLSA, which Congress added as a result of *Mt. Clemens* and similar decisions, has become crucial in the dozens of donning-and-doffing actions covering unionized employees filed in the wake of *Alvarez*. That amendment made "any time spent in changing clothes or washing at the beginning or end of each workday" noncompensable if that time was excluded under a collective bargaining agreement.[16]

Courts now find themselves wrestling with a number of unresolved issues relating to § 203(o). The first is: What does the reference to "changing clothes" in § 203(o) encompass? The U.S. Department of Labor has wavered on this question, issuing and withdrawing a number of conflicting opinions. Some courts, including the Ninth Circuit, have taken the position that the reference means ordinary street clothes; time spent donning and doffing personal protective equipment like ear plugs, safety glasses, hair nets, aprons, arm guards, and so on is beyond the scope of § 203(o), and such time remains compensable under the FLSA irrespective of any collective bargaining agreements to the contrary if it is either a principal activity or integral and indispensable to an employee's principal activity. Other courts, including the Fourth, Sixth, Seventh, and Eleventh Circuits, have taken the broader view that the reference to "changing clothes" does not categorically exclude personal protective equipment—at least not "standard" equipment. But even these courts leave open the possibility that there may be heavier forms of safety equipment that might not count as clothing under § 203(o).[17]

Although, in many cases, § 203(o) would appear to insulate unionized employers from many donning-and-doffing claims, two other developments in the case law may limit its effect. First, courts are being asked whether "changing clothes" activities that are made noncompensable under § 203(o) may, nevertheless, commence an employee's workday pursuant to *Alvarez*. If so, then the employees' walking time spent after donning and and before doffing clothing or gear would still be compensable. On this issue, some courts are concluding that § 203(o) addresses only the compensability of changing clothes but not whether those activities are "integral and indispensable" under *Steiner*. When they are, those activities commence the workday and employees' time spent walking and engaging in otherwise preliminary and postliminary activities becomes compensable. The Sixth Circuit recently took this position in *Franklin v. Kellogg Co.*, in which the court remanded the case for further litigation over the extent of unionized employees' walking time irrespective of § 203(o)'s exclusion of the time spent changing clothes.[18]

In another potentially significant development, the Seventh Circuit recently held that exclusions to § 203(o) do not pre-empt states' wage and hour laws. Therefore, unionized employees may still premise donning-and-doffing claims on changing and washing clothes before and after shifts under state laws that do not contain the equivalent of § 203(o).[19]

The De Minimis Doctrine

In all these cases, the de minimis doctrine is often key. As the Supreme Court noted in *Mt. Clemens,* under this doctrine, some periods of compensable time may be so small "as to be negligible," and, when time consists of "only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." There's no bright-line rule, but courts have often deemed daily periods of time of about 10 minutes to be de minimis if that time cannot, as a practical administrative matter, be precisely recorded for payroll purposes.

One looming issue may be how the de minimis doctrine interacts with the continuous workday rule of *Alvarez*. If an employee engages in an integral and indispensable activity that would be de minimis standing alone, does that activity still commence his or her workday? If it does, time spent walking, waiting, and performing other activities before or after the shift that would otherwise be excluded by the Portal-to-Portal Act may become compensable work.

The Supreme Court's holding in *Barbar Foods v. Tum* (the case consolidated and decided with *Alvarez*) seemed to assume de minimis activity

would be sufficient to trigger the continuous workday rule. In *Tum*, the district court had submitted to the jury the question of whether employees' donning-and-doffing activities were compensable. In doing so, the court had excluded walking and waiting time because it considered such activities noncompensable. The jury returned a verdict finding that the time spent donning and doffing was de minimis. The Supreme Court reversed the decision in part and remanded the case, concluding that the trial court's exclusion of walking and waiting time was incorrect in light of the continuous workday rule. Notably, the Court did not appear to question the jury's factual finding that the donning-and-doffing activities alone were de minimis. If de minimis activities were insufficient to bring the continuous workday rule into play, the remand would seem to have been pointless. But the Supreme Court did not discuss the role of the de minimis doctrine, so that the implications of the holding are unclear.

In an opinion authored by now Justice Sonia Sotomayor, the Second Circuit noted in a footnote that "a *de minimis* principal activity does not trigger the continuous workday rule," but the court did not discuss the issue at length. How courts come out on this question will determine the continuing importance of the de miminis doctrine in donning-and-doffing and similar cases.[20]

Implications for the Modern Workplace

Questions about the continuous workday rule and the de minimis doctrine can arise whenever nonexempt employees perform work-related activities in advance of the official start of their workdays—whether those activities take place in the office, in the field, or at the employee's home. Thanks to modern technology and the evolution of a 24/7 workplace, such work outside the office is increasingly common for many employees.

The donning-and-doffing cases make walking to the production floor compensable if an employee engages in an integral and indispensable activity in the locker room. But what about a field-based employee who starts the workday at home by logging onto the employer's computer systems to check work assignments? Does the driving time from home to the location of the first assignment become compensable? Or what about an employee who carries a BlackBerry and checks it throughout the evening at home and on weekends? Is that time compensable? Is it simply de minimis? When does that employee's workday begin and end? A growing number of cases are raising just such questions.

In *Rutti v. Lojack Corporation Inc.*, for example, the plaintiff was a technician who was employed to install and repair alarms in customers' cars. Most of his installations and repairs occurred at customers' locations, and he was paid an hourly wage beginning when he arrived at his first job location and ending when he completed his last job of the day. The plaintiff also engaged in activities at home in the morning before leaving for his first job, including logging onto a handheld computer device that informed him of his jobs for the day, mapping his routes to his assignments, prioritizing his jobs, and filling out some paperwork. In the evening, after returning home and when he was off-the-clock, the plaintiff was required to use a modem to upload data from a portable data terminal he carried to his employer's computer system. The plaintiff sought compensation under the FLSA for the time he spent commuting to worksites and the time he spent on work activities at his home.

The Ninth Circuit found that most of the plaintiff's claims failed under the FLSA, ruling that the activities performed at home before the workday started were all either merely preliminary, and not integral and indispensable, or de minimis. The court also rejected the plaintiff's claim that time spent driving to his first job was compensable on the ground that he did not engage in any principal activities that were not de minimis at home to commence the continuous workday rule. The court did find, however, that the plaintiff's work at home in the evening uploading data to his employer's computer system was integral and indispensable. Also, evidence suggested that this task took between five and 15 minutes per day and that the plaintiff was required to check the computer device after some period of time to make sure the data had uploaded properly. The court concluded such activity might be compensable and remanded the case for further proceedings.

Cases are also now appearing in which employees are seeking compensation under the FLSA for time they spend checking BlackBerries and other personal data assistants. In *Allen v. City of Chicago*, for example, a police sergeant is pursuing a collective action alleging that his employer issues BlackBerries and similar PDAs to employees and requires them to use these devices outside their normal working hours without compensation. The plaintiff claims that, by carrying such devices, employees are effectively working 24 hours per day, seven days per week, accessing and responding to work-related e-mails, voicemails, and text messages. In another case—*Rulli v. CB Richard Ellis Inc.*—an employee is pursuing a collective action on behalf of maintenance workers who allege that their employer gave them "BlackBerries, smart phones, cell phones, pagers, or other communications devices which they are required to use outside their normal working hours without receiving any compensation for such hours." These employees also claim that they were working 24 hours per day, seven days a week thanks to the PDAs. In addition, sales representatives of T-Mobile and AT&T Mobility have recently filed col-

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lective actions against their employers alleging that employees are working an additional 10 to 15 hours a week responding to e-mails and phone calls on their PDAs—work that is outside their regular shifts and is uncompensated.[21]

Conclusion

Following the developments in donning-and-doffing litigation, courts in these cases undoubtedly need to determine whether employees' responding to e-mail on PDAs during off-hours is integral and indispensable to their principal activities. They are likely to need to decide whether time spent in this activity is de minimis, whether and how that time should be aggregated for purposes of the de minimis analysis, and whether the continuous workday rule applies in some way.

How principles enunciated in industrial settings over the course of 50 years will be applied remains to be seen; more trips to the U.S. Supreme Court seem likely. But if employees routinely begin filing collective actions seeking overtime pay under the FLSA for time allegedly working around the clock because they carry BlackBerrys and smart phones, *Alvarez* and its continuous workday rule may begin looking a lot like *Mt. Clemens* just before the Portal-to-Portal Act was passed. **TFL**

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Endnotes

[1]*Judicial Business of the United States Courts 2002*, Table C-2A at 134, available at www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2002.aspx.

[2]*Judicial Business of the United States Courts 2009*, Table C-2A at 146, available at www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx.

[3]*Judicial Business of the United States Courts 1998*, Table X-5 at 403, available at www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness1998.aspx.

[4]This figure is based on an analysis of data from CourtLink. Recent issues of the annual report, *Judicial Business of the United States Courts*, no longer include data on the number of collective actions filed.

[5]*IBP Inc. v. Alvarez*, 546 U.S. 21 (2005).

[6]*See generally* Jonathan Grossman, *Far Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, available at www.dol.gov/oasam/programs/history/flsa1938.htm.

[7]*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

[8]*Id.* at 695–98.

[9]28 U.S.C. § 251.

[10]*Id.* § 252(a).

[11]*Id.* § 254.

[12]29 U.S.C. § 203(o).

[13]*Stiener v. Mitchell*, 350 U.S. 247 (1956); *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956).

[14]This figure is based on a review of filings in cases identified in CourtLink and news accounts. It may understate the total.

[15]For just several examples, see *Sandifer et al v. (Surma) United States Steel Corporation,* 2:07-cv-00443 (N.D. Ind.) (steelworkers); *DeKeyser v. ThyssenKrupp Waupaca Inc.,* 1:08-cv-00488 (E.D. Wis.) (foundry workers); *Dager v. City of Phoenix*, 2:06-cv-01412 (D. Ariz.) (police officers); *Haight v. The Wackenhut Corp.*, No. 03 Civ. 9870 (S.D.N.Y.) (security guards); and *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010) (police officers).

[16]29 U.S.C. § 203(o).

[17]*See Alvarez v. IBP Inc.*, 339 F.3d 894, 905 (9th Cir. 2003); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 956–958 (11th Cir. 2007); *Sepulveda v. Allen Family Foods Inc.*, 591 F.3d 209, 214–216 (4th Cir. 2009); *Spoerle v. Kraft Foods Global Inc.*, 614 F.3d 427, 428 (7th Cir. 2010); *Franklin v. Kellogg Co.*, 619 F.3d 604, 612–16 (6th Cir. 2010).

[18]*Franklin v. Kellogg Co.* at 604, 618–20.

[19]*Spoerle v. Kraft Foods Global* at 427.

[20]*Singh v. City of New York*, 524 F.3d 361, 371 n.8 (2d Cir. 2008).

[21]*Allen v. City of Chicago*, No. 10-CV-03183 (N.D. Ill.); *Rulli v. CB Richard Ellis Inc.*, No. 09-CV-00289 (E.D. Wis.); *Agui v. T-Mobile USA Inc.*, 1:09-cv-02955 (E.D.N.Y.); *Zivali v. AT&T Mobility LLC et al.*, 1:08-cv-10310 (S.D.N.Y.).