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

FAOUZI JABER, Plaintiff, -against- REZA ZARRAB, Defendant.	Index No. 160812/2017

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT REZA ZARRAB'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Defendant Reza Zarrab respectfully submits this memorandum of law in support of his motion seeking dismissal of Plaintiff Faouzi Jaber's Complaint ("Complaint" or "Compl.") pursuant to Rules 3211(a)(5) and (7) of the New York Civil Practice Law and Rules ("CPLR").

PRELIMINARY STATEMENT

Defendant Reza Zarrab's recent testimony as a witness for the United States government in the Southern District of New York—testimony that incriminated numerous high-ranking people—has engendered enormous interest and controversy in Mr. Zarrab's home country of Turkey. Indeed, anticipating what Mr. Zarrab's testimony would be, efforts were undertaken to prevent it, and when those efforts failed and it became clear that Mr. Zarrab intended to testify as a witness for the United States government, he was threatened at knifepoint by an individual, who had been instructed to kill Mr. Zarrab for cooperating. The attempt on Mr. Zarrab's life was unsuccessful. Thereafter, the government of Turkey unleashed a series of attacks apparently designed to convince him to reverse course, destroy his reputation, or punish him for daring to testify: among other things, it announced that Mr. Zarrab was under criminal investigation, ordered the seizure of his assets and the assets of his relatives, and detained many individuals, including his employees, in connection with its investigation into Mr. Zarrab.

A draft of plaintiff Faouzi Jaber's Complaint, which accuses Mr. Zarrab of sexually assaulting Mr. Jaber while the two were inmates in a federal detention center in Manhattan, surfaced shortly before Mr. Zarrab took the stand in federal court, at the same time the Turkish government accelerated its orchestrated campaign to intimidate and harass Mr. Zarrab. The lawsuit is utterly baseless, and represents an apparent attempt to extract money from a man Mr. Jaber believes to be wealthy or to assist in the campaign of harassment.

The Complaint tells a story of a supposedly infirm and vulnerable victim exploited by a supposedly powerful predator. The story is, from start to finish, fiction. To begin with, the supposed victim is anything but the timid and vulnerable target he purports to be. Before his arrest and extradition to the United States, Mr. Jaber was a high-ranking Ivorian government official and, as prosecutors described him, a "sophisticated international criminal businessman"; he ran afoul of the law by arranging for the sale of military-grade weapons and drugs to a well-known terrorist organization. The federal judge who sentenced him thought he was anything but the pitiful victim he now purports to be—concluding that no mitigating factors were present, the judge sentenced Mr. Jaber to the statutory maximum term of imprisonment (15 years) and noted that but for the statutory ceiling, he would have been sentenced to a much longer term.

Like Mr. Jaber's description of himself, his allegations of sexual harassment and assault are wholly disconnected from reality and absolutely false. Indeed, many are patently incredible, such as the allegation that Mr. Zarrab purportedly perpetrated public sexual attacks while the men were living in dormitory-style housing where dozens of inmates sleep in bunk beds in close quarters without detection by other inmates or corrections officers. Should any claims survive this motion to dismiss, witness testimony will quickly establish the falsity of Mr. Jaber's allegations of sexual misconduct.

In addition to being factually baseless, Mr. Jaber's Complaint largely fails, as a matter of law, to state any viable claims. As discussed in detail below, Mr. Jaber's third and fourth causes of action must be dismissed in their entirety: under long-standing New York law, he is prohibited from bringing a claim for intentional infliction of emotional distress or prima facie tort when the conduct complained of falls within the ambit of other traditional tort liability, such as assault or battery. Furthermore, Mr. Jaber's first and second causes of action, for assault and

battery, are largely time-barred, and must be dismissed to the extent they are based on alleged conduct that occurred outside the limitations period.

BACKGROUND

I. The Plaintiff

Plaintiff Faouzi Jaber is 62 years old and an Ivorian national. Compl. ¶ 5. He is currently serving a 15 year sentence in the United States for facilitating the sale of drugs and military-grade weapons—including surface-to-air missiles, assault rifles, and grenades—to the Fuerzas Armadas Revolucionarias de Colombia (the "FARC"), a foreign terrorist organization dedicated to the violent overthrow of the Colombian government. *See* Affirmation of Robert J. Anello dated March 16, 2018 ("Anello Aff.") Ex. A; Anello Aff. Ex. B at 36:3-8. In April 2014 he traveled to the Czech Republic to finalize the transaction, and was arrested by Czech authorities at the request of the United States. Anello Aff. Ex. A at 5. After fighting extradition for nearly two years, he was ultimately extradited to the United States in April of 2016.[1] *Id.* at 10.

On August 16, 2017, Mr. Jaber pled guilty in the United States District Court for the Southern District of New York to conspiracy to provide material support or resources to a foreign terrorist organization. *See* Anello Aff. Ex. B at 3:4-10. On February 1, 2018, he appeared for sentencing. At the sentencing hearing, defense counsel—who also represents Mr. Jaber in the instant action—acknowledged that Mr. Jaber was "essential" and "integral" to the

[1] The United States also sought to extradite Mr. Jaber's co-conspirators, one a drug trafficker and the other an arms dealer with ties to Hizballah, who were arrested with Mr. Jaber in the Czech Republic in April 2014. Anello Aff. Ex. A at 5. While in custody in the Czech Republic, however, one of Mr. Jaber's co-conspirators apparently arranged for five Czech citizens in Lebanon to be kidnapped, and then used the Czech citizens as leverage to secure his own release and the release of Mr. Jaber's other co-conspirator to Lebanon. *Id.* at 5; *see also* Anello Aff. Ex. C at 4:19-5:7 & Ex. D.

charged conspiracy, and that but for Mr. Jaber, "the crime could never have occurred." *Id.* at 15:24-16:3. Having reviewed the presentence report prepared by the probation officer and the parties' sentencing memoranda, and heard the arguments of counsel and a statement by Mr. Jaber himself, the presiding United States District Judge concluded that Mr. Jaber was a "man . . . fully willing to make sure that killers could buy the implements of killing; happy to do it[] [a]s long as it solve[d] his money problem." *Id.* at 33:11-14. The judge observed that "Mr. Jaber is a very talented man at very bad things," and concluded: "I really don't see any mitigating factors here." *Id.* at 33:3-15. The judge sentenced Mr. Jaber to the maximum sentence provided by statute—15 years—and noted that he was "lucky" the operative statute prevented her from imposing a longer sentence. *Id.* at 33:20-34:2, 36:3-8.

Prior to his arrest, Mr. Jaber was a well-connected and high-ranking Ivorian government official, and served as the assistant to the president of the Ivory Coast. *Id.* at 8:22-9:2; Anello Aff. Ex. A at 8-9 (describing Mr. Jaber as a "sophisticated international criminal businessman").

II. The Defendant

Defendant Reza Zarrab is a 34-year-old citizen of Iran, Turkey, and Macedonia. *See* Anello Aff. Ex. E at 260. He has lived most of his life in Turkey. *Id.* In March 2016, while on a family vacation in Florida, Mr. Zarrab was arrested by FBI agents and charged with crimes stemming from his involvement in a scheme to help Iran bypass sanctions imposed by the United States government. *See id.* at 262, 264.

While awaiting trial, Mr. Zarrab decided to plead guilty,[2] cooperate with the United States government, and testify as a witness against his co-defendants. His cooperation was not

[2] Mr. Zarrab pled guilty to six crimes stemming from the scheme to evade United States sanctions. *See* Anello Aff. Ex. E at 264. He also pled guilty to bribing a federal corrections officer to let him use the officer's cell phone and bring him alcohol in the prison. *Id.* at 266-67.

made public in advance of trial, but nevertheless much speculation existed about whether he had agreed to become a government witness,[3] and at the Metropolitan Detention Center ("MDC") in Brooklyn, an individual threatened Mr. Zarrab with a knife and told him that he had been instructed to kill Mr. Zarrab because he had heard Mr. Zarrab was cooperating, *see* Anello Aff. Ex. G at 1048. Despite the threat against his life, Mr. Zarrab continued to cooperate with the government. He was removed from the MDC and moved to an undisclosed location for his protection. Anello Aff. Ex. E at 266.

Mr. Zarrab took the stand as a government witness on November 29, 2017. *See* Anello Aff. Ex. E at 260. Shortly thereafter, the media reported that on December 1, 2017, the Turkish government announced that Mr. Zarrab was under investigation by the Terror and Organized Crime Bureau of the Istanbul Public Prosecutor's Office and moved to seize Mr. Zarrab's assets and the assets of his relatives.[4] Days later, the news reported that Turkish police detained seventeen people, including Mr. Zarrab's employees, in connection with its investigation into Mr. Zarrab.[5] Around the time Mr. Zarrab first took the witness stand, Mr. Zarrab's counsel learned that Mr. Jaber intended to file the instant Complaint. *See* Anello Aff. ¶ 2. The Complaint was filed a week later. *See* Compl.

After the trial, Mr. Zarrab's whereabouts remained undisclosed to the public to protect his safety. A process server working for Mr. Jaber nevertheless was able to not only locate but visit Mr. Zarrab without warning at the Westchester County Jail.

[3] *See, e.g.*, Anello Aff. Ex. F.

[4] *See, e.g.*, Anello Aff. Ex. H.

[5] *See, e.g.*, Anello Aff. Ex. I.

III. The Plaintiff's Allegations[6]

According to the Complaint, Mr. Jaber met Mr. Zarrab in May of 2016 while they were both housed in Unit 7 South at the Metropolitan Correctional Center ("MCC") in Manhattan. Compl. ¶¶ 8-10. In Unit 7 South, inmates shared a common area during the day and slept in locked two-man cells at night. *Id.* ¶¶ 8-9. Mr. Zarrab and Mr. Jaber, both Shia Muslims, became friends—in part because of their shared religion and in part because Mr. Jaber was "impressed" with Mr. Zarrab's apparent wealth.[7] *Id.* ¶¶ 9-10. In August of 2016 Mr. Zarrab supposedly arranged for Mr. Jaber to move into his cell. *Id.* ¶ 12. After the two men became cell-mates Mr. Zarrab allegedly began to sexually harass and assault Mr. Jaber, first allegedly masturbating in front of Mr. Jaber, then purportedly poking Mr. Jaber in the anus with his finger, and finally, in November of 2016, allegedly raping Mr. Jaber twice. *Id.* ¶¶ 13-15.

In December of 2016 Mr. Zarrab was moved to another unit in the MCC, Unit 11 South, and in January of 2017, he allegedly arranged for Mr. Jaber to be moved to the same unit. *Id.* ¶ 17. Unit 11 South had dormitory-style rather than cell-style housing, so "there [was] less privacy and inmates [could] hear much more of what other inmates [were] doing." *Id.* ¶ 17. Nevertheless, Mr. Zarrab supposedly continued to poke Mr. Jaber in the "buttocks and anus with his finger," and in the first week of March "jumped in [Mr. Jaber's] bed and started to insert a cucumber . . . in [Mr. Jaber's] rectum." *Id.* ¶ 18. On March 8, 2017 Mr. Zarrab allegedly "again attacked" Mr. Jaber in the dormitory of Unit 11 South, but Plaintiff "yell[ed] and [made] noise,"

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[6] This section summarizes the allegations set forth in the Complaint, which, solely for purposes of this motion, are presumed to be true, unless "inherently incredible or flatly contradicted by documentary evidence." *Caniglia v. Chicago Tribune—N.Y. News Syndicate*, 204 A.D.2d 233, 233-34, 612 N.Y.S.2d 146, 146 (1st Dep't 1994). Mr. Zarrab disputes in the strongest possible terms the allegations in the Complaint.

[7] The Complaint also alleges that Mr. Zarrab gave money to Mr. Jaber and his family. *See* Compl. ¶ 12. Mr. Zarrab disputes Mr. Jaber's characterization of the facts..

which caused other inmates to complain to MCC staff. *Id.* ¶ 18. Mr. Jaber also complained to MCC staff, and on March 10, 2017 Mr. Zarrab was moved to another unit while MCC staff investigated Mr. Jaber's complaint. *Id.* ¶ 19. In April of 2017, Mr. Zarrab was placed in the MCC's Special Housing Unit and subsequently transferred to the MDC. *Id.* ¶ 20.

IV. The Filing of the Complaint

Two days before Mr. Zarrab took the stand as a government witness, more than eight months after the last alleged contact between the two men, Plaintiffs' counsel informed counsel for the Defendant that Mr. Jaber intended to commence the instant action. *See* Anello Aff. ¶ 2. The Complaint was filed the following week, on December 6, 2017. *See* Compl.

ARGUMENT

Mr. Jaber's claims for intentional infliction of emotional distress and prima facie tort should be dismissed pursuant to CPLR R. 3211(a)(7). As discussed in detail below, neither cause of action can be sustained where the conduct complained of falls within the scope of traditional categories of tort. Moreover, his claims for assault and battery must be dismissed pursuant to CPLR R. 3211(a)(5) to the extent they rely upon acts that are time-barred.

I. Mr. Jaber's Claim for Intentional Infliction of Emotional Distress Fails

"The tort of intentional infliction of emotional distress is a departure from the common law," and the history of the tort "reflects the acknowledgment by the courts of the need to afford relief where traditional theories of recovery do not." *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 270, 682 N.Y.S.2d 167, 169 (1st Dep't 1998). Accordingly, New York courts have long held that "intentional infliction of emotional distress is a theory of recovery that is to be invoked only as a last resort" when no traditional tort remedy is available, and consistently reject attempts to recover on a theory of intentional infliction of emotional

distress for the supposed emotional distress caused by a traditional tort. *Id; see also Herlihy v. Metro. Museum of Art*, 214 A.D.2d 250, 263, 633 N.Y.S.2d 106, 114 (1st Dep't 1995) (dismissing plaintiff's cause of action for intentional infliction of emotional distress where the offending conduct "[fell] within the ambit of other traditional tort liability," as reflected in the plaintiff's causes of action for defamation based upon the same alleged conduct).

Mr. Jaber's cause of action for intentional infliction of emotional distress is an attempt to do precisely what New York courts prohibit: recover on a theory of intentional infliction of emotional distress for the emotional distress caused by an alleged assault and battery. Indeed, his cause of action for intentional infliction of emotional distress explicitly is premised upon the same allegations that form the basis for his assault and battery claims. *See* Compl. ¶ 27. Because the offending conduct gives rise to traditional tort liability, Mr. Jaber's cause of action for intentional infliction of emotional distress is precluded, and must be dismissed. *Herlihy*, 214 A.D.2d at 263, 633 N.Y.S.2d at 114; *Mohammed v. Great Atl. & Pac. Tea Co., Inc.*, 44 Misc. 3d 396, 400, 986 N.Y.S.2d 796, 800 (Sup. Ct. N.Y. Cnty. May 19, 2014) ("[W]here there is an alternative remedy . . . a cause of action for intentional infliction of emotional distress will be dismissed.").

II. Mr. Jaber's Claim for Prima Facie Tort Fails

Mr. Jaber's claim for prima facie tort must also be dismissed. The cause of action known as "prima facie tort" consists of four elements: (i) the intentional infliction of harm (ii) resulting in damage (iii) without excuse or justification (iv) by an act or a series of acts that would otherwise be lawful. *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 1232 (1977). That the predicate acts are lawful but for the actor's intent to harm is integral to the doctrine of prima facie tort: the tort exists solely to provide a remedy where a remedy would

otherwise not exist. *See Ruza v. Ruza*, 286 A.D. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955) ("The need for the doctrine of prima facie tort arises only because the specific act relied upon—and which it is asserted caused the injury—[is] not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable."); *see also Morrison v. Nat'l Broad. Co.*, 24 A.D.2d 284, 287, 266 N.Y.S.2d 406, 409 (1st Dep't 1965), *rev'd on other grounds*, 19 N.Y.2d 453, 227 N.E.2d 572 (1967) ("[P]rima facie tort . . . covers disinterested malevolence, that is, the intentional malicious injury to another by otherwise lawful means . . . solely to harm the other.") (internal citation and quotation marks omitted). Consequently, when a plaintiff claims to have been injured by unlawful and tortious acts, "the remedy is not in prima facie tort" but in "traditional . . . categories of tort," and a claim for prima facie tort does not lie. *Ruza*, 286 A.D. at 769-70, 146 N.Y.S.2d at 811.

Here, then, Mr. Jaber's claim for prima facie tort fails because he has failed to allege that he was injured by *otherwise lawful* conduct rendered unlawful only by Mr. Zarrab's "malevolence." On the contrary, the alleged conduct that forms the basis for the Plaintiff's prima facie tort claim—that is, purported sexual assault and abuse—is unambiguously unlawful. Sexual assault does not constitute "lawful" conduct under any circumstances, whatever the attacker's intent. *See Chen v. United States*, 854 F.2d 622, 629 (2d Cir. 1988) (dismissing plaintiff's prima facie tort claim where the defendant was alleged to have engaged in racial harassment and federal procurement violations, acts which "can never constitute 'lawful' conduct whatever the consequences intended or the means used").

Furthermore, like a cause of action for intentional infliction of emotional distress, a cause of action for prima facie tort cannot be sustained where it is predicated upon allegations of specific tortious conduct that falls within the scope of traditional categories of tort.

"[P]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative." *Kickertz v. New York Univ.*, 110 A.D.3d 268, 277, 971 N.Y.S.2d 271, 280 (1st Dep't 2013). Accordingly, "once a traditional tort is established the cause of action for prima facie tort disappears." *See Curiano v. Suozzi*, 63 N.Y.2d 113, 117, 469 N.E.2d 1324, 1327 (1984). Mr. Jaber's cause of action for prima facie tort is entirely duplicative of the claims for assault and battery, and pled merely as a prohibited "catch all alternative." It therefore must be dismissed.

III. Mr. Jaber's Claims for Assault and Battery Are Time-Barred to the Extent They Arise From Conduct Alleged to Have Occurred Before December 6, 2016

An action brought to recover damages for an intentional tort is generally subject to a one-year statute of limitations, including an action arising from alleged sexual abuse. *See* CPLR § 215(3); *Cordero v. Epstein*, 22 Misc. 3d 161, 167, 869 N.Y.S.2d 725, 729 (Sup. Ct. N.Y. Cnty. 2008) ("Under CPLR 215(3), an action asserting an intentional tort must be commenced within one year of the event, and such limitation has been held applicable to a sexual assault.") (citing *Krioutchkova v. Gaad Realty Corp.*, 28 A.D.3d 427, 814 N.Y.S. 2d 171 (2d Dep't 2006)). The statute of limitations is extended to five years if the action seeks to recover for injuries sustained as a result of one of the following sexual offenses: (1) rape in the first degree, as defined in Penal Law § 130.35; (2) criminal sexual act in the first degree, as defined in Penal Law § 130.50; (3) aggravated sexual abuse in the first degree, as defined in Penal Law § 130.70; or (4) a course of sexual conduct against a child, as defined in Penal Law § 130.75. *See* CPLR § 213-c. A plaintiff who seeks to rely upon the five-year limitations period set forth in CPLR § 213-c must allege facts sufficient to bring his or her claims within the ambit of one or more of the relevant criminal statutes. *See Monaghan v. Roman Catholic Diocese of Rockville Ctr.*, 2016 WL

10516233, at *2 (Sup. Ct. Nassau Cnty. May 25, 2016) ("In order to avail itself of [CPLR § 213-c's] extended limitation period, a party must allege conduct that violates Penal Law §§ 130.35, 130.50, 130.70 or 130.75.").

Mr. Jaber's Complaint does not allege conduct that violates any of the criminal statutes set forth in CPLR § 213-c. In order for an individual to violate sections 130.35, 130.50, or 130.70 of the Penal Law,[8] he or she must engage in a sexual act "[b]y forcible compulsion" or with a person who is "incapable of consent by reason of being physically helpless." "'Forcible compulsion' means to compel by either: (a) use of physical force; or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury." NYPL § 130.00(8). "'Physically helpless' means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to act." NYPL § 130.00(7). Mr. Jaber alleges that he "felt helpless" and "unable to fight off the younger and stronger [Mr. Zarrab]," Compl. ¶ 15, but does not allege that he was physically unable to give (or withdraw) consent, and certainly does not allege that Mr. Zarrab used physical force or threats of death or injury—express or implied—to compel Mr. Jaber to engage in sexual acts. Furthermore, Mr. Jaber's claim that Mr. Zarrab "anally raped" him is not a factual allegation but a legal conclusion, and not, therefore, sufficient to allege conduct in violation of the relevant criminal statutes. *See Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233, 612 N.Y.S.2d 146, 147 (1st Dep't 1994) ("On a motion addressed to the sufficiency of a complaint . . . allegations consisting of bare legal conclusions" are not "presumed to be true."); *see also Monaghan*, 2016 WL 10516233, at *2 (rejecting the plaintiff's invocation of CPLR § 213-c where the plaintiff asserted that the defendant "commit[ed] sexual abuse"); *Young v. New Covenant Christian Sch.*, 2015

[8] Penal Law § 130.75 is excluded from this analysis as it applies only to sexual conduct against a child.

WL 2450608, at *1, *2 (Sup. Ct. Bronx Cnty. Apr. 14, 2015) (concluding that CPLR § 213-c was not applicable where the plaintiff alleged that the defendant "sexually assaulted, abused and battered her," but did not set forth any specific factual allegations).

Mr. Jaber's assault and battery claims are thus subject to the one-year statute of limitations generally applicable to actions sounding in intentional tort. *See* CPLR § 215(3). A cause of action for assault or battery accrues on the date of the alleged tortious act. *See Plaza v. Estate of Wisser*, 211 A.D.2d 111, 118, 626 N.Y.S.2d 446, 451 (1st Dep't 1995) (battery claim accrues on the date of the alleged physical contact); *Grullon v. City of New York*, 222 A.D.2d 257, 257, 635 N.Y.S.2d 24, 25 (1st Dep't 1995) (assault claim accrues on the date of the alleged assault). The instant action was commenced on December 6, 2017. *See* Compl.; CPLR § 203(c). Any conduct that took place before December 6, 2016 cannot, then, form the basis for an assault or battery claim. *See Foley v. Mobil Chem. Co.*, 214 A.D.2d 1003, 1004, 626 N.Y.S.2d 906, 907 (4th Dep't 1995) (holding that any acts that occurred more than one year before the action was commenced were time-barred and could not form the basis for the plaintiff's cause of action for battery).

In this case, the vast majority of the alleged misconduct—including the alleged rapes—occurred prior to December of 2016. *See* Compl. ¶¶ 14-17. According to Mr. Jaber, the parties were cell-mates only through November of 2016, because in December of 2016 Mr. Zarrab was moved to another unit, Unit 11 South. *See id.* ¶ 17. In Unit 11 South, inmates lived in dormitory-style housing and there was very little privacy to engage in activity undetected, so Mr. Zarrab's alleged abuse was confined "primarily . . . [to] poking [Mr. Jaber's] buttocks and anus with his finger," and on one occasion, Mr. Zarrab allegedly inserted a cucumber into Mr. Jaber's rectum. *Id.* ¶ 18. Otherwise, Mr. Zarrab's purported attempts to attack Mr. Jaber in Unit 11

South were, by Mr. Jaber's own admission, thwarted because of the presence of other inmates. *Id.* ¶ 18 (alleging that Mr. Zarrab attempted to attack Mr. Jaber on March 8, but Mr. Jaber "yell[ed] and [made] noise" and "other inmates complained"). Mr. Jaber's claims for assault and battery can proceed only insofar as they are premised upon these non-time-barred allegations of misconduct that occurred after December 6, 2016.

CONCLUSION

For the reasons stated above, Mr. Jaber's third and fourth causes of action should be dismissed entirely pursuant to CPLR R. 3211(a)(7), and his first and second causes of action should be dismissed pursuant to CPLR R. 3211(a)(5) to the extent they are based upon time-barred allegations.

Dated: New York, New York
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