

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**CONCORDE ARTS ASSOCIATES, LLC and  
SONDRA LANDY GROSS,**  
**Plaintiffs,**

**TRIAL/IAS PART: 25**  
**NASSAU COUNTY**

**-against-**

**WEISBROD CHINESE ART, LTD., MICHAEL  
WEISBROD, ROBERT POOR and  
THOMAS FEIST,**

**Index No: 014427-04**  
**Motion Seq. No: 2**  
**Submission Date: 10/6/09**

**Defendants.**

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**The following papers have been read on this motion:**

**Notice of Motion, Affidavit, Attorney’s Affirmation and Exhibits.....X**  
**Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X**  
**Reply Affirmation in Support.....X**

This matter is before the Court for decision on the motion filed by Defendants Weisbrod Chinese Art, Ltd. and Michael Weisbrod on May 28, 2009 and submitted on October 6, 2009. The Court grants the motion in part and denies it in part. For the reasons set forth below, the Court 1) dismisses the seventh cause of action in the Complaint seeking attorneys’ fees; and 2) otherwise denies Defendants’ motion.

**BACKGROUND**

**A. Relief Sought**

Defendants Weisbrod Chinese Art, Ltd. (“WCA”) and Michael Weisbrod (“Weisbrod”) (collectively “Weisbrod Defendants”) move for an Order, pursuant to CPLR § 3212, granting the Weisbrod Defendants summary judgment with respect to the Complaint.

Plaintiffs oppose the Weisbrod Defendants’ motion.

## B. The Parties' History

Plaintiff Sondra Landy Gross ("Landy") is the sole shareholder of Concorde Arts Associates, LLC ("Concorde"), an art dealer. Plaintiffs allege that the Weisbrod Defendants sold ancient Chinese art, which was not authentic, to Concorde. Landy alleges that more than half of the purchases were not authentic and asserts causes of action sounding in contract, fraud, negligence and equity.

Landy dealt exclusively with Weisbrod for Concorde's Chinese art purchases. She asserts that she relied upon the representations of friend and art advisor Defendant Thomas Feist ("Feist") that WCA was an honest and reliable dealer. She avers that the Defendants repeatedly urged her to make further purchases in order to complete a collection and make her individual pieces more valuable, and to deal exclusively with Weisbrod in order to secure a better price for each piece.

From September of 1998 to May of 2003 Concorde purchased approximately \$11 million worth of ancient Chinese art from Weisbrod. Landy avers that the art was not authentic, and further that the appraisals that Weisbrod prepared were false and known to be false.

The Complaint contains thirteen (13) causes of action against the Weisbrod Defendants, as well as the non-moving Defendants. All the causes of action, except the eighth and ninth which are alleged only against Defendant Robert Poor ("Poor"), involve the Weisbrod Defendants. Those causes of action are:

First Cause of Action - against WCA for breach of contract related to Concorde's purchase of Chinese artwork from 1998 through 2003,

Second Cause of Action - against Weisbrod and WCA for breach of contract related to appraisals provided in connection with the purchases from 1998 through 2003,

Third Cause of Action - against WCA, Weisbrod, Robert Poor ("Poor") and Feist for fraud for alleged misrepresentations regarding the nature of the artwork,

Fourth Cause of Action - against WCA, Weisbrod, Poor and Feist for rescission of the parties' agreements based on unilateral mistake and fraud related to alleged misrepresentations regarding the artwork,

Fifth Cause of Action - against WCA, Weisbrod, Poor and Feist for rescission of the parties' agreements based on mutual mistake,

Sixth Cause of Action - against WCA and Weisbrod for unjust enrichment,  
Seventh Cause of Action - against all Defendants for attorneys' fees based on their allegedly fraudulent conduct,  
The Eighth and Ninth Causes of Action are alleged against only Defendant Poor,  
Tenth Cause of Action - against WCA and Weisbrod for negligent appraisal of the artwork,  
Eleventh Cause of Action - against WCA and Weisbrod for fraudulent appraisal of the artwork,  
Twelfth Cause of Action - against WCA and Weisbrod for fraudulent concealment concerning the authenticity of the artwork, and  
Thirteenth Cause of Action - against WCA, Weisbrod, Poor and Feist for negligent misrepresentation regarding the authenticity of the artwork.

The Weisbrod Defendants deny Plaintiffs' allegations and move for summary judgment dismissing the complaint against them. They address the merits of Plaintiffs' claims and raise the statute of limitations with regard to the contract causes of action addressing purchases prior to October of 2000.

In support of their motion, the Weisbrod Defendants offer the expert affidavit of Weisbrod. Weisbrod avers that he has been in the business of buying and selling Chinese art for more than thirty-five years, and is an authority in the commercial marketing and sale of Chinese art. He avers that Landy advised him that Concorde was a commercial art dealer, and provided him with a New York State sales tax exemption certificate reflecting that Concorde was a commercial art dealer purchasing goods for resale, who was thereby exempt from payment of sales tax.

Weisbrod affirms further that, at Landy's request, Weisbrod included his personal appraisal with each purchase that Landy made, at no charge to Landy. As Weisbrod explained to Landy, these appraisals were not intended to reflect current or fair market value. Landy advised Weisbrod that she understood this, and said that she only wanted the appraisals to ensure that, in the event of a loss, she would be insured against not only the cost of the article but also some of the potential profit.

Weisbrod also denies selling any item to Concorde that was different from the way that

Weisbrod represented it to be, and avers that he never issued an appraisal that was not in accord with Landy's request. He denies that he or WCA had a fiduciary duty to Plaintiffs, submitting that his relationship with Plaintiffs was solely a seller-purchaser relationship.

Weisbrod also submits that Plaintiffs' case is premised upon a fundamental misunderstanding of ancient art. He affirms that the artwork in question has, by its nature, been subject to wear, damage, repair, conservation, stabilization or restoration, and that these factors do not affect an article's authenticity. He disputes the claim of Concorde's expert, as outlined in the Complaint, that the use of modern methods of cleaning and restoration renders these articles inauthentic. As an example, Weisbrod avers that the restorative cleaning and piecing together of pottery shards derived from an ancient excavation do not render those items inauthentic.

Landy submits an Affidavit in Opposition, in which she disputes many of Weisbrod's contentions. She affirms, *inter alia*, the following:

Concorde began purchasing ancient Chinese art in 1998, at the recommendation of Feist, a friend of Landy. Feist had prepared transparencies of paintings for Landy, and assisted Landy with other art purchases. Landy affirms that Feist is well connected in the art world, due to his father's prior ownership of an art gallery.

In 1997 or 1998, Feist encouraged Landy to purchase Chinese art. Feist told Landy that, because of a decision by the Chinese Government to flood certain valleys containing tombs and burial grounds, certain existing artifacts would be rendered more valuable. Feist also urged Landy to purchase these items immediately, because political forces were going to make exportation from China more difficult.

Feist told Landy that he knew Weisbrod to be an honest and reliable dealer in ancient Chinese art who could assist Landy, and recommended that Landy employ Weisbrod's services. Feist introduced Landy to Weisbrod, and Concorde subsequently made approximately fifty (50) purchases of Chinese art from 1998 to 2003, on the recommendation of Feist and/or Weisbrod. Landy affirms that Feist regularly encouraged her to purchase objects from Weisbrod, and that Feist told Landy that he spoke with Weisbrod almost daily.

Landy affirms that Weisbrod and Feist introduced her to Defendant Poor, stating that he was an expert in the field of Chinese art, and Weisbrod, Feist and Poor regularly made recommendations to Landy as to items she should purchase. In addition, Weisbrod introduced

Landy to the curator of the Hillwood Museum, as well as other museums, regarding a possible exhibition of the collection.

Landy disputes Weisbrod's characterization of their relationship as merely buyer and seller, averring that she and Weisbrod agreed early-on that Weisbrod would take an active role in creating Concorde's collection. Landy also affirms that she regularly dined and otherwise saw Weisbrod socially, and that Poor sometimes accompanied them on excursions including boating trips. In addition, Weisbrod claimed that he was putting special objects aside for Landy, and participated actively in developing and displaying Concorde's collection.

Landy affirms that in 2003, she retained Anatoly Krishtul ("Krishtul") to clean a particular item that she had purchased at the Defendants' behest. Krishtul questioned the authenticity of the item, and Landy paid him \$6,000 to research the matter further. Krishtul concluded that the item was not authentic, and Landy demanded her money back from Weisbrod. Weisbrod initially resisted, but eventually agreed to take the item back and give her credit for other items, which Landy also affirms were not authentic.

In light of her concerns regarding other items in the collection, Landy hired Dr. Richard Pegg ("Pegg"), a Chinese art historian, to draft a catalogue of the collection, which Poor was hired, but neglected, to do. Pegg refused to include six items in the catalogue based on his conclusion that the items were not authentic.

Landy then contacted counsel, and retained an expert, John Twilley ("Twilley") to evaluate the objects that she purchased from the Defendants. Landy provides charts that Twilley prepared, outlining his concerns regarding the authenticity of numerous items. Landy disputes Weisbrod's suggestion that the restoration and cleaning at issue do not affect the authenticity of the items. Rather, Landy submits, "compounds" and "shards" from unrelated objects were artificially applied to the objects to make them appear older, which cannot properly be characterized as restoration.

Landy also affirms that Weisbrod represented himself as an appraiser of Chinese art, and led Landy to believe that his appraisals reflected the fair market value of the items. She also affirms that Weisbrod provided these appraisals as a separate service, disputing Weisbrod's claim that he provided those appraisals for free, as an accommodation. In sum, Landy submits that the Defendants exploited Landy's lack of knowledge, and their friendship, to induce her to

purchase inauthentic artwork for highly inflated sums.

In their Reply Affirmation, Defendants note the absence of an affidavit from any of the experts on whom Plaintiffs rely in support of Plaintiffs' claims that 1) the questioned objects are in fact not genuine; and 2) the appraisals given are thus, necessarily, false appraisals. Defendants submit that Plaintiffs' failure to provide affidavits of the experts on whom they rely is fatal to their opposition to Defendants' motion. Plaintiffs also submit that the failure of Landy's affidavit to identify specifically the objects regarding which Defendants allegedly made false representations renders her affidavit insufficient to defeat Defendants' motion.

### C. The Parties' Positions

Defendants argue that 1) the first and second causes of action, sounding in breach of contract, are barred by the statute of limitations as they relate to articles that Plaintiff purchased and appraisals that Defendants provided prior to October 2000; 2) the third cause of action, sounding in fraud, fails to identify specifically the fraudulent acts that the Weisbrod Defendants allegedly committed; 3) the fourth cause of action, based on unilateral mistake, fails to establish a cause of action; 4) Plaintiffs have failed to plead sufficient facts to support the fifth and sixth causes of action; 5) the seventh cause of action must fail because it is simply a prayer for additional relief, rather than an independent cause of action; 6) the allegations in the tenth cause of action, which make reference to a breach of fiduciary duty, are time-barred regarding purchases made more than three years prior to the commencement of the action; and 7) the twelfth and thirteen causes of action simply re-state claims made in prior causes of action and, therefore, are unsustainable.

Plaintiffs oppose Defendants' motion, submitting that 1) the first and second causes of action are not time-barred in light of the Weisbrod Defendants' fraudulent concealment of the facts giving rise to Plaintiffs' causes of action; 2) the factual allegations support the existence of a fiduciary relationship between Plaintiffs and Defendants; 3) the causes of action sounding in breach of contract are not time-barred in light of the appraisals, which constitute warranties of future performance; 4) the third cause of action, sounding in fraud, provides adequate detail regarding the Weisbrod Defendants' allegedly fraudulent conduct; 5) Plaintiffs have properly pled the fourth cause of action, based on unilateral mistake, in light of their claim that Defendants fraudulently misled Plaintiffs regarding the items they were purchasing; 6) Plaintiffs

have properly pled the fifth cause of action for mutual mistake; 7) the sixth cause of action, for unjust enrichment, is appropriate because, *inter alia*, a finding of fraud would vitiate any contract between the parties; 8) in the seventh cause of action, Plaintiffs properly seek counsel fees as an independent cause of action based on Defendants' alleged fraud; 9) Plaintiffs have provided sufficient allegations to support the tenth and eleventh causes of action for negligent and fraudulent appraisal respectively, and those causes of action are not time barred; and 10) the twelfth and thirteenth causes of action, for fraudulent concealment and negligent misrepresentations respectively, are independent and viable causes of action, which are not improperly duplicative of other causes of action.

### RULING OF THE COURT

#### A. Summary Judgment Standard

To grant summary judgment, the court must find that (1) there are no material, triable issues of fact, (2) the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and (3) the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.* Thus, the Court must determine whether, as a matter of law, Defendants have met their *prima facie* burden to negate factual issues that Plaintiffs have raised regarding the authenticity of the subject art.

#### B. The Breach of Contract Claims are not Time Barred

The Uniform Commercial Code ("UCC"), rather than the CPLR, controls with regard to contracts for the sale of goods. *American Trading Co. v. Fish*, 42 N.Y.2d 20, 27 (1977). The UCC provides for a four year limitations period, UCC § 2-725(1), and a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *Itakura v. Primavera Galleries*, 2009 WL 1873530, \*2 (S.D.N.Y. 2009); U.C.C. § 2-725(1).

Defendants sold the first article to Concorde on September 24, 1998 and the final article on or about May 22, 2003. Plaintiffs filed the Complaint on or about October 19, 2004. Accordingly any claims regarding purchases made prior to October of 2000 would generally be time-barred.

Plaintiffs submits, however, that a toll of the limitations period is appropriate, based upon Defendants' alleged misrepresentations. A misrepresentation tolls the contract limitations period if it conceals the facts giving rise to the plaintiff's cause of action and induces plaintiff to delay commencing suit within the limitations period. *See Simcuski v. Saeli*, 44 N.Y.2d 442 (1978). Landy testified at her deposition that the parties had an agreement that the appraisal itself was a representation that the particular item to which it pertained was authentic (Ex. A to Aff. in Opp., Tr. 574). Landy testified, further, that she wanted to take the appraisals "to other dealers or Christie's or Sotheby's" and Weisbrod counseled her against that, staying that "you burn the piece if you do because it is not good to bring a piece around if you go to sell it or you are forming this aggregate pieces [sic] for a traveling museum exhibit. Don't show them" (Tr. 574). Landy also testified that Weisbrod told her that, "[i]f someone has appraised it, it is not good to show it, and they might low ball you on the price. Because they didn't sell it to you or if you go to sell it singularly, they will feel they could buy it at a lower price. He gave me all these reasons why I shouldn't bring it to anybody to have it appraised" (Tr. 574).

The Court concludes that Weisbrod's alleged misrepresentations regarding the wisdom of Plaintiffs' obtaining third party appraisals potentially acted to conceal the nature of their completed transactions with plaintiffs. In so concluding, the Court is guided by the logic of *Balog v. Center Art Gallery-Hawaii*, 745 F. Supp. 1556 (D. Hawaii 1990). In *Balog*, the defendant gallery made continuing representations concerning the value and authenticity of the artwork alleged to be by Salvador Dali. The defendant continued to provide updated appraisals showing increased value in the artwork. The *Balog* court concluded that the defendants' conduct in continuing to send to plaintiffs a purported certificate of authenticity regarding the artwork in question prevented plaintiffs from discovering defendants' misrepresentations and warranted the application of the doctrine of fraudulent concealment, and the denial of summary relief. *Id.* at 1569. Here, the allegations before the Court suggest that Weisbrod provided misleading appraisals and improperly dissuaded Landy from seeking third party appraisals. Accordingly, the Court concludes that Defendants are not entitled to summary judgment on the breach of

contract causes of action, based on their statute of limitations claim.

Plaintiffs also rely on the breach of warranty tolling provision of UCC § 2-725, which provides that a “breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.” This section is not applicable to an art appraisal, *e.g.*, where the lack of authenticity is readily apparent to the trained eye of an art expert. *Rosen v. Spanierman*, 894 F.2d 28, 32 (2d Cir. 1990). Plaintiffs’ own submissions reveal that the alleged defects were detectable to the trained eye of Plaintiffs’ expert Anotoly Krishtol, and to an art historian who refused to enter six of Plaintiffs’ pieces into a catalogue. Accordingly, the Court concludes that this tolling provision is inapplicable to the matter at bar.

C. Plaintiffs are not Entitled to Counsel Fees

The Plaintiffs’ cause of action for attorneys’ fees must be dismissed. Attorneys’ fees are incidents of litigation, and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule. *Glenn v. Hoteltron Systems*, 74 N.Y.2d 386, 393 (1989), quoting *Matter of A.G. Ship Maint. Corp. v Lezak*, 69 N.Y.2d 1, 5 (1986). Fraud does not provide a basis for attorneys’ fees absent statutory authority or an exception to the ordinary rule (*see Central Trust Co., Rochester v. Goldman*, 70 A.D.2d 767 (4<sup>th</sup> Dept 1979) (legal expenses necessarily incurred in carrying on a lawsuit may not be recovered as general or special damages). Given that there is no agreement regarding counsel fees, or specific statutory authorization, the Court dismisses the seventh cause of action seeking counsel fees.

D. Defendants Have Failed to Sustain Their Burden of Proof Sufficient to Warrant the Entry of Summary Judgment on Plaintiffs’ Remaining Claims

The process of attributing works of art to a particular period of Chinese antiquity is by its very nature an inexact science. *Dawson v. G. Malina*, 463 F. Supp. 461, 467 (S.D.N.Y. 1978). In *Dawson*, the court issued its ruling on a bench trial concerning plaintiff’s claims for rescission, or damages for breach of warranty, regarding certain items of Chinese art that plaintiff purchased from defendant art sellers. *Id.* at 463. At trial, the parties testified and also

called art experts to testify on their behalf. *Id.* at 464. The *Dawson* court, in determining whether defendants were liable for breach of warranty, concluded that the appropriate standard was “whether the representations furnished [by individual defendant to plaintiff] with respect to each of these objects can be said to have had a reasonable basis in fact, at the time that these representations were made, with the question of whether there was such a reasonable basis in fact being measured by the expert testimony provided at trial.” *Id.* at 467. The court concluded that plaintiff had met his burden of proof as to some items, but not others. *Id.* at 464, 467-471.

The Weisbrod Defendants have offered only the self-serving affidavit of Weisbrod, an acknowledged expert, but clearly an interested party. Weisbrod’s affidavit raises numerous issues, including 1) the disparity between his description of the relationship between him and Landy as merely seller-purchaser, and Landy’s description of him as a friend and confidant, 2) the questionable plausibility of Weisbrod’s claim that he provided appraisals to Landy for no charge, and did not expect her to consider them a reflection of the article’s market value, and 3) the generality of his affidavit, which does not make specific reference to the purported authenticity of the particular items to which the Complaint refers. In light of the 1) disputes as to certain facts that Weisbrod asserts in his affidavit, 2) the lack of specificity in his affidavit, and 3) the complexity of the field of art appraisal, the Court concludes that his affidavit does not conclusively establish the Defendants’ case as to any of the remaining causes of action and entitle them to summary judgment.

The Court also denies Defendants’ motion to dismiss count four sounding in unjust enrichment. The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 (2007) citing *Paramount Film Distributing Corp. v. State of New York*, 30 N.Y.2d 415, 421, *cert. den.* 414 U.S. 829 (1973). A claim for unjust enrichment does not lie to relieve a party of the consequences of the party’s own failure to exercise caution with respect to a business transaction. *Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403 (1st Dept. 2008); *Charles Hyman, Inc. v. Olsen Industries, Inc.*, 227 A.D.2d 270 (1st Dept. 1996).

The court is mindful that a quasi-contract only applies in the absence of an express agreement, and is not really a contract, but rather a legal obligation imposed to prevent a party’s

unjust enrichment. *Clark-Fitzpatrick Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Where there exists an express agreement between plaintiff and defendant, the contents of which govern the subject matter underlying the claims for unjust enrichment, the Plaintiffs are precluded from maintaining an action in quasi-contract. *Metropolitan Electric Mfg. Co. v. Herbert Constr. Co.*, 183 A.D.2d 758 (2d Dept. 1992). Under these circumstances, however, in which 1) Plaintiffs have sought rescission of their agreement with Defendants; and 2) Defendants dispute that they provided the appraisals as a separate service for which they were compensated, the Court concludes that dismissal of the unjust enrichment claim is unwarranted, and denies Defendants' motion to dismiss that cause of action.

Finally, the Court concludes that, in light of the disputed issues of fact set forth above, the Court must deny Defendants' motion for summary judgment as to the remaining counts alleging negligent appraisal, fraudulent appraisal, fraudulent concealment and negligent misrepresentation. Moreover, to the extent that these claims rely upon the existence of a fiduciary duty that Defendants breached, summary judgment is even more inappropriate. The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). With respect to any causes of action dependent upon a fiduciary relationship, an informal fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and may be found to exist, in appropriate circumstances, between close friends or where the confidence is based upon prior business dealings. *Apple Records v. Capitol Records*, 137 A.D.2d 50, 57 (1<sup>st</sup> Dept 1988). The "exact limits' of such relationship are impossible of statement" (*Penato v. George*, 52 AD2d 939, 942 (2d Dept 1976), *app. disp.* 42 NY2d 908 (1977) and are "fact specific" (*Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 115 (1<sup>st</sup> Dept 1998). Here, Landy affirms that she was friendly and socialized regularly with Weisbrod. Weisbrod confirmed this when he testified at his deposition that "a close relationship started developing between [Landy] and I [sic] even before we really started to talk about the catalog. We became very friendly" (Ex. B. to Aff. In Opp., Tr.357). He also testified that he "considered her to be a close friend" until the time when he "suddenly didn't hear from her again" (Tr. 435).

Concorde's extended business relationship, and Landy's personal relationship, with Weisbrod, coupled with Weisbrod's superior expertise, their exclusive sales relationship, social engagements, and his advice regarding purchases, collection building, catalogue recommendations and exhibitions are sufficient to raise an issue of fact regarding the existence of a fiduciary relationship, and to withstand the motion for summary judgment. While Plaintiffs may well have to establish, at trial, a specific point in time when the alleged fiduciary relationship came into being, they have alleged sufficient facts to raise an issue and prevent complete dismissal of all fiduciary claims at this time.

Accordingly, the Court 1) grants Defendants' motion to dismiss the seventh cause of action in the Complaint which seeks an award of counsel fees; and 2) otherwise denies Defendants' motion to dismiss the remaining causes of action in the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court for a Certification Conference on January 14, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

November 30, 2009

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HON. TIMOTHY S. DRISCOLL  
J.S.C.