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Class certification; individual issues; reliance (GBL 349); damages; pecuniary harm; unjust enrichment. Action asserting claims under GBL 349 and for common law unjust enrichment based upon allegations of anti-competitive conduct by defendant Microsoft (conduct arising out of a monopoly in the operating system software market and the applications systems software market) sustained in two Federal cases. On a class certification motion, defendant argued that a 349 claim would involve primarily individual issues. Defendant argued, citing Solomon, 9 AD3d 49, that plaintiffs could not show that defendant had deceived each class member and that every customer had suffered damages. The court stated that, though proof of reliance may be needed in a false advertising case, it is not an element of a 349 matter; the plaintiff must prove causation, not reliance. The court held that the complaint adequately alleged the 349 elements. As to harm, the court distinguished Small, 94 NY2d 43. Plaintiffs alleged that defendant had passed inflated prices on to consumers. Also, plaintiffs claimed that class members had been deprived of a choice of products due to defendant's conduct; plaintiffs need not prove pecuniary harm. Where there are differences in damages suffered, the court stated, a court may try class aspects first and create subclasses or appoint a special master to address individual The court rejected defendant's contention that the only way an indirect purchaser could prove that defendant had been unjustly enriched would be to show that the alleged overcharge had passed through the chain of distribution, and thus that plaintiffs could not establish damages. The court granted the motion. Cox v. Microsoft Corp., Index No. 105193/2000, 7/05 (Moskowitz, J.).

Contracts; employment; interpretation; ambiguity; mistake; reformation; waiver; estoppel; individual liability. Action arose out of an employment agreement. Plaintiff was to perform medical services at defendants' clinic for a period of four years. The agreement specified that defendants were to pay plaintiff a base salary plus additional compensation consisting of a percentage of the aggregate money collected from medical services. Plaintiff commenced this action claiming that defendants had not paid the additional compensation during the term of plaintiff's employment. Plaintiff moved for summary judgment on the grounds that the employment agreement was unambiguous. Defendants argued that the parties had not intended to include in the aggregate revenue that generated by the practice's owner, the individual defendant. The court construed the agreement most strongly against defendants, who had prepared it, and held that the employment agreement was unambiguous. It provided, the court found, that aggregate money collections were to include all practice physicians and did not provide any exclusion for defendant. Had the parties intended an exclusion, the court stated, one could have easily been made. The court further determined that the evidence submitted by defendants demonstrated a unilateral mistake and was thus insufficient to invoke reformation. The fact that plaintiff had waited until the conclusion of her employment to raise the compensation issue did not amount to a waiver, nor was plaintiff estopped. The court further noted that the individual defendant had signed the parties' agreement solely in his capacity as president of the practice and dismissed the portion of plaintiff's complaint asserted against the individual defendant. Summary judgment on liability for plaintiff. Reina v.Kulchinsky, Index No. 390/2004, 5/25/05 (Emerson, J.).**

Contracts; employment; restriction against disclosure of proprietary information; doctrine of inevitable disclosure; irreparable harm; burden of proof. Plaintiff sought a preliminary injunction against defendants. The court held an evidentiary hearing after allowing limited discovery. The case arose out of a request by a branch of the US military for proposals for the manufacture of a satellite system. Bid proposals are confidential. Plaintiff sought to prevent the disclosure of confidential or proprietary information and to prevent defendants from providing services of any nature to a competing entity with respect to the project. Defendants had performed services for plaintiff for several years. A provision of an agreement stated that information not in the public domain and made available by plaintiff was to be considered proprietary and not to be disclosed without plaintiff's permission. The agreement did not contain a restrictive covenant against work for competitors. One defendant had worked as an independent contractor on systems that would form the basis for plaintiff's bid. Defendant ceased work for plaintiff and began to consult with a competitor. After a time, he worked on the bid project of that entity, and became involved in writing the proposal for the project, though he was not involved in design work. The court discussed the concept of inevitable disclosure of trade secrets and relevant caselaw. The court cited a Third Dept. case stating that the doctrine of inevitable disclosure is disfavored. Absent wrongdoing, mere knowledge of the intricacies of a business is not enough to support a finding of irreparable harm. The court held that plaintiff had failed to make the necessary showing here. However, defendants had retained proprietary information of plaintiff and the court ruled that that must be returned to plaintiff. As to plaintiff's demand that defendants be enjoined from working for the competitor, the court found that plaintiff was relying upon conjecture and speculation and had not produced evidence to support its fear that such work would lead to disclosure of plaintiff's proprietary information. Defendants were independent contractors and were allowed by the agreement with plaintiff to work for a competitor. The key defendant had worked in the industry for many competing entities. Plaintiff offered no evidence that defendants had disclosed plaintiff's information or threatened to do so. The court found insufficient plaintiff's assertion that, because defendants knew plaintiff's business, defendants could not perform work for the competitor on the project without disclosing plaintiff's confidential information. Motion denied. L-3 Communications Corp. v. Kelly, Index No. 14971/2005, 8/18/05 (Emerson, J.).**

Contracts; employment; restrictive covenants; stock option agreement; employee choice doctrine; forfeiture clause; rescission; consideration. Action involving restrictive covenant in stock option agreement. Plaintiff sought to apply the employee choice doctrine. However, the court stated, this would be the first case to apply the doctrine to a non-competition provision that lacked a forfeiture clause. The provision here was an unqualified bar (except as to time) against competition. The court held that the employee choice doctrine was not applicable and the question remained whether a reasonableness scrutiny (BDO Seidman) must be undertaken. Plaintiff tried to avoid this by reading into the stock option agreements the remedy of rescission for a material breach. The court said that plaintiff thus sought to apply a forfeiture provision that the agreement lacked. The court further found that, whatever the merit of plaintiff's view, the court could not make a determination whether a material breach had occurred supporting rescission because defendant had raised an issue of fact as to what the full consideration was for the issuance of the stock options. If the option agreements were part of a larger employment package, part of the consideration would be defendant's multi-year service to plaintiff, which had already been performed so that rescission would be impossible. Defendant asserted that his new employer was not in competition with plaintiff, but plaintiff had raised an issue of fact as to that. The court further held that defendant was not entitled to judgment as a matter of law awarding the stock and dividends because he had failed to establish as a matter of law the facts supporting his theory of consideration. Motion and cross-motion denied. Lenel Systems Int., Inc. v. Smith, Index No. 11302/2004, 7/5/05 (Fisher, J.).**

Contracts; interpretation; ambiguity; attached sampling as restricting coverage of relevant termination clause; construction that would render part of the clause meaningless; extrinsic evidence; waiver; burden of proof; damages. Procedure; motions; contention asserted for the first time at oral argument. Plaintiff and defendant entered into an agreement whereby plaintiff agreed to provide a cable television service to defendant's cable TV customers consisting of classic movies, older, mostly black and white movies. At issue on motions for summary judgment was the "content clause" of a 1993 agreement, extended in 2000. Defendant contended that plaintiff had changed the nature of its service materially by greatly reducing older, black and white films in favor of recent, colored ones, and that this breached the content clause. The programming was to consist of "classic motion picture films" first released during the 60 years prior to the date of the agreement, original programming regarding such films, and such other related material as plaintiff deemed appropriate. A "representative sampling" of service programming was attached. The clause further provided that if there was a material change in the "general quantity and quality" of the programming from that shown as of the date of the agreement, defendant had the right to terminate. The court held, rejecting plaintiff's interpretation, that, given the plain language and meaning of the clause, the sampling circumscribed the scope of the programming permitted. The court reasoned that plaintiff's position would render meaningless reference in the clause to programming as of the date of the agreement; provisions of a contract should not be construed as superfluous. Plaintiff's discretion only had to do with the third category of programming (related material). The court rejected plaintiff's assertion that, had the parties intended to limit programming as defendant urged, the parties would have provided a specific definition (mostly movies of the 1930's-50's). The court held that plaintiff, by significantly changing the mix of films, had materially breached the contract. Plaintiff also argued that defendant had waived its rights, despite a written waiver clause, by having renewed the agreement in writing in 2000. Uncontradicted testimony from defendant's executive indicated that defendant had not known of content change in 2000. The court ruled that plaintiff had failed to meet its burden of proof to show a knowing waiver and that it had not raised a material question of fact on that score. The court also rejected plaintiff's argument that defendant could not seek termination or damages since it had elected to continue performance. The court rejected as untimely an argument plaintiff made for the first time at oral argument. Plaintiff's motion denied; defendant's granted in part. American Movie Classics Co. v. Time Warner Entertainment, L.P., Index No. 603625/2003, 7/8/05 (Fried, J.).

Contracts; interpretation; ambiguity; matter of law; parol evidence; implied duty of good faith and fair dealing; consistency with contract. Breach of fiduciary duty; business relationship. Unjust enrichment; relationship to contract. Litigation arose out of a contract dispute between plaintiff Wilhelmina Artist Management and the recording artist and performer Beyonce Knowles. The parties had executed the first of two written contracts wherein Knowles agreed to engage plaintiff as her sole and exclusive representative in the field of commercial marketing activities, which included modeling, runway, fashion commercials, spokesperson deals, tour sponsorship, celebrity endorsements and merchandising, and was to include, without limitation, all licensing or other agreements with respect thereto. In return, Knowles had agreed to pay plaintiff a 10% commission and agreed that plaintiff would also be entitled to receive a service charge from some or all of the firms to which it introduced Knowles or her musical group, Destiny's Child. Later, Knowles' counsel had sought to renegotiate the first contract with regard to the 20% service charge. The parties had executed a second contract wherein Knowles agreed, *inter alia,* that plaintiff would be entitled to receive a service charge in the amount of 20% from some or all of the clients which utilized Knowles' or Destiny's Child's services. Such service charge was to have been in addition to the commissions plaintiff was to receive from Knowles under the agreement. The contract further specified that plaintiff's primary duty was to Knowles and Destiny's Child, not to the clients which utilized their services. During the term of the contract, plaintiff had negotiated with L'Oreal for a celebrity endorsement and tour sponsorship on behalf of Knowles and Destiny's Child. The agreement with L'Oreal had been for an initial two-year term and three additional option terms of one year each. Although L'Oreal had paid all of its scheduled installments during the initial term, Knowles had failed to pay plaintiff its 10% commission and the 20% service charge for the final two payments of the initial term. Plaintiff brought suit to recover its commission and a declaration with regard to its right to the 20% service charge from the L'Oreal contract. Plaintiff further sought a judgment declaring that Knowles' statements that she would not pay the 10% commission in the future if L'Oreal exercised its option for second and third option terms constituted an anticipatory breach of the contract. Knowles counterclaimed that plaintiff had breached the covenant of good faith and its fiduciary duty by failing to disclose accurately L'Oreal's financial offer to her in order to recover a service charge. Plaintiff also claimed that Knowles would be unjustly enriched as a result of her wrongful actions. Knowles counterclaimed that plaintiff had breached the covenant of good faith and fair dealing by only reporting 80% of the true financial value of L'Oreal's offer while securing 20% for plaintiff and further breached its fiduciary duty to her. Knowles also alleged that plaintiff had been unjustly enriched in retaining the 20% service charge from the L'Oreal account. The court held first that both the second contract and the L'Oreal contract were clear and unambiguous and could be interpreted as a matter of law. The court stated that those agreements entitled plaintiff to a 10% commission, as well as the 20% service charge. The court rejected Knowles' attempts to introduce parol evidence in support of the position that the agreement's provision relating to the 20% service charge contemplated a two-step negotiation process (first as to the full sum due defendant, and then as to plaintiff's service charge). The court stated that an omission in a contract would not constitute an ambiguity. Whether an ambiguity exists must be ascertained from the face of the agreement without regard to extrinsic evidence. The court pointed out that Knowles had been represented by counsel, as well as her father, and neither had sought to negotiate such a two-step process into the second contract. The court then addressed Knowles' counterclaims. The implied duty of good faith and fair dealing cannot be implied where inconsistent with other terms of the agreement. The court found that Knowles' allegation that plaintiff had concealed the amount of L'Oreal's offer to her was contradicted by the documentary evidence. Defendant engaged in speculation not borne out by the record in asserting that L'Oreal had been offering her $2 million, particularly since she had agreed that plaintiff would be entitled to the service fee and the contract acknowledged that plaintiff would not breach a duty of loyalty in seeking such a fee. Thus, it would be contrary to the terms of the agreement to imply an obligation on plaintiff's part not to seek a fee from third parties. Defendant's contention that L'Oreal never had agreed to pay such service fees was negated by the fact that it had agreed to pay and had not rejected plaintiff's request in this case, and by testimony that it had paid fees to other agents. Since the second contract unambiguously entitled plaintiff to the service charge, there was no factual issue as to plaintiff's duty of good faith. Finally, the court found that Knowles' allegation of breach of fiduciary duty raised no triable issue. The court explained that there were no extraordinary circumstances present in the parties' conventional business relationship such as to give rise to a relationship of confidence or trust sufficient to find the existence of a fiduciary duty. Such a relationship is generally not implied between parties to a commercial transaction who are represented by counsel and other professional advisers. The court relied on Dove v. L'Agence, Inc., 250 A.D.2d 435. As there was a valid contract here, recovery in quasi contract for unjust enrichment was precluded, the court ruled. The court further found that plaintiff was also entitled to a declaration based on clear contractual language that Knowles was obligated to pay the 10% commission for any additional amounts paid for a second or potential third option term under the L'Oreal agreement, as well as a service charge. Summary judgment was granted to plaintiff and Knowles' counterclaims dismissed. Wilhelmina Artist Management, LLC. v. Beyonce Knowles, Index No. 601151/2003, 6/6/05 (Cahn, J.).

Contracts; interpretation; construction project; ambiguity; construction against the drafter. Plaintiff, contractor for reconstruction of portions of the Niagara extension of the New York State Thruway, sued its subcontractor and the surety, issuer of a performance bond. Contract documents provided in one clause that the contractor would perform planting maintenance work for one year after completion of the planting, but in another place stated that work would continue for two years. The subcontract provided that the subcontractor would be under the same obligations as the contractor. The court found a contradiction in the contract documents. The court ruled that in the event of ambiguity, the language must be construed most strongly against the drafter. Applied here, that meant that a one-year period governed. The surety's motion for summary judgment was granted. Oakgrove Construction, Inc. v. Genesee Valley Nurseries, Inc., Index No. 3675/2002, 8/1/05 (Fahey, J.).**

Contracts; interpretation; construction; statute of limitations; ambiguity; avoiding absurd results in rendering promises meaningless; courts; effect of Federal case law. Quantum meruit; existence of contract. Action arising out of public improvement construction project. Plaintiff contractor sought damages for extra work and delays. Plaintiff sought to avoid defendant's statute of limitations defense by arguing that the clause relied upon by defendant was limited to actions involving "the contract," consisting of an agreement and other documents. Plaintiff relied upon a Second Circuit decision so holding with regard to an identical provision. The court stated that the case (Perini) was not binding precedent. It did not have to do with a Federal statute or the Constitution, where a Federal court ruling may be considered persuasive or useful authority. The court rejected the Perini interpretation that the agreement made careful distinctions between the contract and the agreement. Any other interpretation, the court found, would lead to an absurd result whereby the agreement could be terminated but the remainder of the contract could continue. A parallel formulation in another provision would, by plaintiff's interpretation, mean that the Americans with Disabilities Act would not apply to any contractor operating under the contract despite language otherwise. Courts must avoid interpretations that render contractual provisions meaningless, especially longstanding ones designed to advance the important public policy of discouraging stale and fraudulent claims. If there was any ambiguity in the documents, plaintiff was required by bid conditions to raise that with the commissioner. Plaintiff had failed to do that. Plaintiff's action was time-barred. Further, a quantum meruit claim could not lie where a contract existed. Claims dismissed. Delidakis Construction Co. v. City of New York, Index No. 603462/2004, 8/05 (Moskowitz, J.).

Contracts; interpretation; law firm partnership agreement; Partnership Law 40(8); DR 2-108(A). Declaratory judgment; justiciable controversy. Action by retired partners against law firm alleging that plaintiffs had had rights to receive on retirement a share in accounts receivable and work in process, a portion of contingency fees collected after departure, and return of capital by the end of the fiscal year. After standstill agreements, the partners amended the partnership agreement to lengthen the period for repayment of capital and to introduce a special distribution in place of the other income. Plaintiffs asserted breach of contract and other claims. At the center of the case was the validity of an amendment of the agreement. The court noted that the agreement contained a broad provision authorizing resolution of questions of interest by majority vote. The court rejected plaintiffs' argument that this provision would not encompass changing the payment structure. The court found that it would include the question of dissolution so it would be anomalous to restrict it as plaintiffs contended. Further, the agreement clearly specified instances in which something other than a majority vote would govern. The provision that was changed by the amendment did not change the provision governing majority vote. Reading the provisions together, the court stated, it was clear that the agreement allowed for an amendment regarding amount and timing of payments to a withdrawing partner to be made by majority vote. The changes here had been made by majority vote first as to the standstill agreements, and then as to the payment provision. The question then was whether statute, common law or public policy would prohibit the changes. Plaintiffs asserted that Partnership Law 40(8) barred the changes made, but the court disagreed, holding that it only fills gaps and that the agreement would control when explicit on a point. The court found that case law was not to the contrary. The court held, further, that the amendment did not run afoul of DR 2-108 (A) since the amendment applied to all withdrawing partners and did not discriminate against partners who might compete with the firm. A claim for declaratory judgment was dismissed because, as there was no counterclaim asserted, no justiciable controversy had been presented. Complaint dismissed. Bailey v. Fish & Neave, Index No. 650132/2004, 5/12/05 (Fried, J.).

Contracts; interpretation; mandatory prepayment provision of credit agreement; waiver; benefit to non-waiving party. Pleading; defeasement of a debt. Action arising out of loans of $430 million to defendant, company headquartered in Missouri and engaged in operation of electrical and gas distribution utilities. Defendant prepaid loans and paid a prepayment fee of 2% under a mandatory repayment revision. Plaintiffs contended that defendant should have paid a higher make-whole premium under a different provision of the credit agreement. Plaintiffs argued that plaintiffs had waived defendant's obligation to make the mandatory prepayment. Plaintiffs relied upon a provision of the credit agreement that allowed the lenders to waive any of the "requirements" of the agreement or any default or event of default. The court ruled that the prepayment provision was not a mere requirement, nor did it pertain to a default, but was a significant part of the parties' bargained-for rights and obligations and a waiver would change the nature of the contract. Even if obligatory, prepayment was a right and plaintiffs did not have the ability to waive a benefit to the non-waiving party. The court stated that a fair reading of the relevant provision established that the parties had not intended to permit unilateral waiver of a term of benefit to defendant, the non-waiving party. The issue remained whether the complaint validly alleged that defendant had defeased senior notes, which would have precluded defendant from prepaying under the mandatory provision it had relied upon. The court held that the complaint failed to allege with specificity that defendant had defeased the senior notes. It only alleged that defendant had stated an intention to use available sums to retire debt, without an affirmative act, which would not constitute economic or legal defeasement of a debt. Complaint dismissed. BBT Fund v. Aquila, Inc., Index No. 603267/2004, 5/16/05 (Fried, J.).

Contracts; interpretation; merger transaction; post-closing price adjustment; breach of warranty; price inflation; ADR provisions not precluding indemnification claims; mirror image relief. GAAP; consistency of application. Partnerships; long-arm jurisdiction. The defendants, two partnerships and individuals, moved to dismiss all but one of the claims, which stemmed from allegations that they had artificially inflated by $20 million the purchase price of a company sold to the plaintiff's predecessors. The merger agreement had tied the company's price to a formula for calculating its value on the closing date. The plaintiff, after paying $99 million for the company, had, pursuant to provisions for post-closing price adjustments, reviewed its balance sheet as of the closing date, including statements of working capital and indebtedness. The plaintiff had subsequently tendered to the defendants an audited closing balance sheet and asked for a minor reduction in the purchase price. The defendants, however, had disputed the way the plaintiff's statement dealt with revenue from Wal-Mart, among other things, and sought an increase to the purchase price. The merger agreement contained an ADR provision that required disputed closing balance sheet calculations to be submitted to a nationally recognized accountant, and the parties at the time of this decision were engaging Deloitte & Touche to serve as arbitrator. The agreement also provided that the defendants would indemnify the plaintiff up to $10 million for losses, damages and expenses caused by the defendants' misrepresentation or breach of warranty, with no cap for losses caused by knowing breaches in representation. After receiving the defendants' Working Capital Dispute Notice, the plaintiff had served the defendants with an indemnification notice, and, when the defendants had disputed it, brought suit. The defendants contended that the plaintiff had been required to raise all disputes related to the closing working capital at the tender of its audited balance sheet and that the indemnification claims composing the bulk of this case were just post-closing adjustments that the plaintiff either did raise or should have raised under the ADR provision. They pointed to instances in which the plaintiff had raised the same accounting item, such as the booking to Wal-Mart, in both the adjustments and indemnification claims. Their significance was not identical in each, though, the court found. The counts in the indemnification claim embodied GAAP violations, asserting breach of the defendant's warranty that the financial statements had complied with GAAP. The court cited In the Matter of Westmoreland Coal Co., 100 NY2d 352. In Westmoreland, the company brought valuation objections as claims under purchase price adjustment provisions that involved ADR. The company asserted that a closing certificate had failed to apply GAAP consistently; its assertions concerned accounting conventions common to different elements of the purchase agreement, which, reading the agreement as a harmonious whole, were warranted to comply with GAAP. The court found that the valuation objections asserted a breach of the warranty and had to proceed under the indemnification provisions. The court noted the narrowness of the ADR provision in Westmoreland. But the merger agreement here clearly stated that the

ADR provision did not prevent claims for indemnification, nor did it say that a claim working its way through accountant review would preclude an indemnification claim, even if the two might overlap. The court disagreed with the defendants that claims proceeding in two fora could result in duplicate damages. However, because the independent accountant's findings would narrow the disputes before this court, the court granted the defendants' request to stay the action except for one count. The court also granted the individual defendants' and one partnership's motion to dismiss all the claims against them for lack of personal jurisdiction, leaving one defendant that had consented to the court's jurisdiction. Lincoln Snacks Holding Co., Inc. v. Brynwood Partners III L.P., Index No. 603890/2004, 7/13/05 (Moskowitz, J.)

Contracts; NY law; GOL § 15-701, 15-301; e-mail; equitable estoppel; reliance; unconscionable injury; mutual departure; accord and satisfaction. Plaintiff and defendant moved for summary judgment in a contract dispute. The parties' written contract specified that plaintiff be retained to act as defendant's exclusive sales agent and representative for the solicitation of orders for framed art for a specified commission. The contract provided that it could only be amended in a signed writing. Plaintiff proceeded to work. About two years later, defendant advised plaintiff in an e-mail that it was reducing plaintiff's commission from that set in the contract, retroactively by a few months. Plaintiff e-mailed a response asking to discuss the message. Subsequent discussions between the parties about the reduced commission did not result in a formal agreement and defendant terminated its contract with plaintiff. Plaintiff brought suit to recover the difference between the commission provided for in the parties' written agreement and the lower commission paid to plaintiff over several months. Defendant counterclaimed for alleged overpayments to plaintiff. The court found that NY law was intended to govern, though the contract had been negotiated, signed and performed in Texas. The court ruled that GOL 5-701, relied on by defendant, did not control, but rather GOL 15-301.The court determined that, under GOL § 15-301, the plaintiff's e-mailed response to defendant's proposal to reduce the commissions was insufficient to qualify as a writing signed by the plaintiff, but rather merely reflected an agreement by plaintiff to discuss defendant's proposal. Further, the court found that defendant's estoppel argument failed as there had been no reasonable reliance by defendant on plaintiff's claimed oral agreement when defendant agreed to a contract with J.C. Penney for more than $2 million dollars of net billings. Defendant had suffered no unconscionable injury. The parties' conduct did not evidence an indisputable mutual departure from the written contract. Finally, the court held that plaintiff's acceptance of the reduced commission checks from defendant had not worked as an accord and satisfaction of the parties' dispute because there was no proof that plaintiff had been advised that the checks were offered in settlement of the parties' dispute. A&S Reps, LLC, v. North American Enclosures, Inc., Index No. 15496/2003, 5/16/05 (Emerson, J.).**

Contracts; oral agreement; modification; consideration; GOL 5-1103; part performance. Plaintiffs were trustees of a trust established to provide workers' compensation benefits to employees. Defendants provided claims administration services to the trust for an annual flat fee. A plaintiff had approached defendant Sedgwick about the filing of loss-transfer claims. Defendants had undertaken the filing of loss transfer claims on behalf of the trust for certain claims, but stated that this was done only in anticipation of reaching a final written agreement with plaintiffs on the issue of loss-transfer claims, among other things. Defendants had submitted proposals, which had been rejected, and the parties had failed to reach an agreement. Defendants had then advised plaintiffs that they would be unable to process any new claims after a set date. Plaintiffs brought the instant action alleging, inter alia, that defendants had breached their agreement with the trust by failing to timely file loss-transfer claims. Both sides moved for summary judgment. The court first noted that the parties' initial oral agreement had not included loss-transfer services, and, although the parties had purported to modify their oral agreement to include the filing of loss-transfer claims, they had not reduced that modification to a writing. The court determined that, pursuant to GOL§ 5-1103, the oral modification was unenforceable as defendants had received no new or additional consideration for their processing of loss-transfer claims. The court addressed plaintiff's contention that defendants had breached an executed contract and ruled that part performance of an unenforceable oral agreement would properly render relief to the party that performed, not the party that benefitted. Here, defendants had performed. Summary judgment granted to defendants on the cause of action. Baumann v. Sedgwick Claims Management Services Inc., Index No. 26110/2001, 5/9/05 (Emerson, J.).**

Contracts; suretyship; interpretation; conditions precedent; ambiguity; conditions implied-in-fact; surety's failure to investigate; extension of surety's obligations. Fraudulent concealment; duty of surety to inquire; reliance. Action on a surety bond. Plaintiff entered into an agreement with the principal for the marketing of natural gas in western New York. Defendant insurance company sought rescission and a declaratory judgment based on plaintiff's alleged failure to disclose material facts about the financial status and dealings of the principal, which went bankrupt, and about three confidential payment agreements between plaintiff and the principal entered into when the principal was having difficulty fulfilling payment obligations. On a motion for summary judgment by the surety, it argued that the obligee's obligation to notify the surety was a condition precedent. The court noted that a suretyship contract should be construed favorably to a claimant. The court determined that the clause cited by defendant as establishing a condition precedent was ambiguous. The court found that the language of the bond did not indisputably set up a notice of default as a condition precedent. As to whether it was an implied-in-fact condition precedent, the court stated that there is a preference for construing doubtful language as embodying a promise or constructive condition rather than an express condition; this preference is especially strong where there would be an increased risk of forfeiture by the obligee. After a review of cases, the court concluded that the bond here was ambiguous and, discovery not being complete, summary judgment was denied. Further, the court ruled that even if the clause were unambiguous and required timely notice as a condition precedent, the court would find that plaintiff had raised an issue of fact as to whether it had complied with the condition. With regard to arrearages that defendant asserted plaintiff had improperly failed to disclose, the court held that the fault for defendant's lack of awareness was its own, the arrearages having existed when defendant executed the bond. Also, defendant had requested no information from plaintiff prior to a renewal of the bond. Defendant contended that plaintiff had improperly, by secret agreements, extended defendant's responsibility to plaintiff. The obligation of a surety cannot be extended, without the surety's consent, to cover performance of a different contract. The court ruled that the agreements cited did not extend the maturity of the debt to plaintiff, but constituted leniency in enforcing the debt to which defendant had acquiesced. Defendant also argued that plaintiff had fraudulently concealed the principal's indebtedness to plaintiff until after defendant had renewed the bond. But, the court stated, the surety bears the burden of making inquiries and informing itself of the state of affairs of the principal. Defendant urged that caselaw on this point was inapposite because the bond here had a notification requirement, in contrast with the cited authority, and that, where a surety requests information, silence can amount to fraudulent concealment. The court held that defendant had failed to establish as a matter of law that plaintiff had had a duty to disclose certain agreements with the principal before renewal, whereas plaintiff had shown as a matter of law that defendant had failed to request any information from plaintiff about the principal's financial condition before defendant had initially executed the bond. Defendant had also failed to obtain that information from the principal. Further, the court held that plaintiff could not prove reliance. Summary judgment for defendant denied. Certain defenses/counterclaim dismissed. National Fuel Gas Distribution Corp. v. Hardford Fire Ins. Co., Index No. 258/2003, 8/05 (Fahey, J.).**

Conversion; tangible property; "virtual property;"computerized data; independent contractor. Intentional infliction of emotional distress. Bailment. Trade secret. The plaintiff, an "independent contractor" at the defendant real estate agency, had twice in five years won awards there for generating large annual sales. The plaintiff alleged that the defendant and a vice president, also a defendant, had at the time of terminating her converted two business lists she had maintained. One was a handwritten contacts list, the other a detailed list of deals she had brokered before and during her association with defendants, which she had maintained on computer. The defendants had allegedly changed the computer access code right before she had left to keep her from getting the electronic list. The plaintiff sought $3 million in damages, and the defendants moved for summary judgment to dismiss the complaint. The court noted that initially the tort of conversion had supplied a remedy for physical theft of tangible personal property. As the concept of property has expanded, courts have held that usurpation of interests in property with less tangible qualities may be remedied through other causes of action, which may entail added elements of proof. The Court of Appeals took a step in the evolution of the cause of action of conversion when the Court applied it to stock theft in Hartford Accident & Indem. Co. v Walston & Co., Inc., 21 NY2d 219. More recently, a federal court held that the theft of an Internet domain name stored in electronic form was susceptible to a conversion claim. Here, the plaintiff's hand-written contacts list, a "literal" document, was clearly susceptible to conversion. The conversion concept also applied to the computerized list of deals, which with a key press could become a "literal" document, the court found. It cited a case in which the court had upheld a conversion claim arising out of the theft of an idea for a web-based business, because, although the idea alone could not have been converted, it could have been converted once put into practice. That the computer was supplied to the plaintiff by the defendants could not absolve them of the consequences of conversion if the plaintiff succeeded in proving the elements required just as would be the case for a claim involving a non-electronic document. Plaintiff had been an independent contractor, not an employee. The computer and the paper containing the handwritten list were in the nature of items licensed to the plaintiff to facilitate her independent contract with the defendant. The plaintiff's claim of infliction of emotional distress did not derive from behavior by the defendants that could be deemed "outrageous," except for pressure they had allegedly brought on her to provide perjured testimony perjury in a lawsuit against them. The court struck the lesser grievances, but upheld the claim regarding the testimony, it being inappropriate for resolution on summary judgment. A claim of breach of bailment, premised on lawful possession in the first instance, contradicted the factual basis for the conversion cause, but modern pleading practice allows alternative assertion of inconsistent causes of action. The plaintiff adequately stated the claim, arguing that she had entrusted her lists on the computer and notepaper to the defendants for as long as she and they were affiliated. Thus, allegedly the lists constituted a bailment, the defendants' failure to return them a breach of it. The plaintiff also claimed that the defendants had misappropriated her proprietary information. The court found that, giving every favorable inference to the plaintiff's assertion that she had invested extraordinary effort in the lists, they might warrant protection as trade secrets. The defendants contended that her own deposition testimony describing their crowded offices demonstrated that she could not have maintained the secrecy of the lists, while the plaintiff said that she had, based on her understanding that she alone had her computer's password. These issues of fact regarding efforts to maintain secrecy were a matter for trial. The court dismissed a claim for interference with prospective business relations. Summary judgment was otherwise denied. Shmueli v. Corcoran Group, Index No. 104824/2003, 7/25/05 (Cahn, J.).

Corporations; alleged waste and minority freeze-out; dissolution and receivership; oppression; "entire fairness." Choice of law; place of incorporation; "center of gravity." Shareholders derivative claims. Corporate waste and minority freeze-out action. Plaintiff sought dissolution of defendant corporation or a fair-market buyout and asserted claims for breach of contract, sought appointment of a receiver, and other things. Dissolution, the court held, and the related appointment of a receiver could only be directed by a Delaware court as the corporation was incorporated there. The court held that it had subject matter jurisdiction to address lesser or alternative relief where a corporation is incorporated elsewhere but has significant ties to NY. Here, the corporation did no business in Delaware but was headquartered in NY and had other contacts with NY. However, issues of corporate governance are controlled by the law of the state of incorporation; thus, Delaware law controlled. Plaintiff argued for a "center of gravity" test, which, the court said, has been applied in rare circumstances to displace the law of the state of incorporation. The place of incorporation is the key contact and plaintiff and other founders had agreed to govern the corporation's affairs by Delaware law. The corporation's business was not limited to NY, but was being done in many states. Thus, the court held, Delaware law would govern substantive corporate governance issues**;** NY law would control other issues and procedural matters. Under Delaware law, oppression may be found where there is a violation of the reasonable expectations of the minority or where there occurs burdensome, harsh and wrongful conduct. The court held that plaintiff's assertion of wrongs, such as defendants' refusing to let him play a role in management or to keep him informed, fell short of the standards. The "entire fairness" test, the court ruled, did not require a different conclusion. The court found that plaintiff had not raised a triable issue supporting plaintiff's claim that the corporation had improperly issued or sold stock. A waste or mismanagement claim could only be brought as a derivative claim. Although plaintiff could assert a claim for injury separate and distinct from that suffered by other shareholders or for violations of rights granted him under the by-laws, plaintiff had failed to present proof of waste or mismanagement in this category sufficient to raise a triable issue. Allegations of improper termination of employment and board membership failed since plaintiff had been an at-will employee and had been owed no special fiduciary duty as a shareholder regarding employment. Plaintiff was aware of by-laws that made board membership dependent on a majority vote of the shares. Partial summary judgment to defendants. Sokol v. Ventures Education System Corp., Index No. 602856/2002, 6/27/05 (Lowe, J.).

Corporations; Limited Liability Corporation Law 609, 610; standing; member's rights; individual liability; piercing the veil. Contracts; duress. Misrepresentation; intention not to perform; remedies; election. Fiduciary duty; LLC members. Defamation; slander in connection with business; particularity. Procedure; motion to dismiss; standard. Action for breach of contract, fraud and other wrongs arising out of formation of an LLC. Plaintiff claimed to be the owner of a business, which he had wished to expand. He and defendant Taylor had agreed to form an LLC. The two had retained co-defendant attorney to draw up the necessary papers. Plaintiff alleged that, on the day of the grand opening, Taylor and the attorney had met with plaintiff and insisted he sign modified versions of the papers though he had not had time to review them. Plaintiff had objected to signing and indicated he would need an attorney. Taylor then allegedly had told him to sign or he would bankrupt him. The documents effectively stripped plaintiff of any managerial authority. The new manager, appointed by Taylor, had fired various employees, including, not long after, plaintiff. Taylor argued on a motion to dismiss that plaintiff was not the proper person to sue for a declaratory judgment that a grid note and general security agreement were void because any claim belonged to the LLC. The court held that LLC Law 610 allowed a member to enforce a member's rights against the LLC. Defendant asserted that he as manager had authorized plaintiff to sign the note and agreement so that they were not void. The court ruled, however, that as the complaint alleged facts from which a trier could find that plaintiff's will had been improperly overcome, the claim stood. On a claim for fraud as to the operating agreement, the court held that it related to the formation of the LLC by plaintiff and Taylor and Taylor's obligations to plaintiff thereunder. This was not a claim of liability solely by virtue of defendant's being a member of or acting for the LLC (LLC Law 609(a)). A court might also pierce the veil when a member users an LLC as an alter ego to commit fraud. The court held that plaintiff had sufficiently alleged that defendant had made false promises with an undisclosed intention not to perform, thereby inducing plaintiff to enter into a contract. This would constitute fraud. It is true, the court stated, that a plaintiff cannot both rescind and recover damages for fraud, but plaintiff need not elect at the pleading stage. The court held that a claim for breach of fiduciary duty would lie where the parties loaned money, worked in concert and were to manage a two-person LLC, analogously to a joint venture or partnership. The court upheld this claim despite defendant's argument that it overlapped with a breach of contract claim. The court upheld a slander claim that alleged that defendant had told the employees that plaintiff had been removed because he was mentally and physically ill. The court held that the allegations were sufficiently particular. The court reached the same result as to a co-defendant where plaintiff had alleged that she had made statements imputing dishonesty to him; since these had been stated in connection with his business, no special damages need have been alleged. Claims for tortious interference, dissolution and other wrongs also were upheld. Zulawski v. Taylor, Index No. 12400/2004, 7/1/05 (Fahey, J.).**

Corporations; shareholders derivate action; standing; unincorporated association; BCL 626, 720; minority "freeze-out"; pleading. Preliminary injunction; freezing out shareholders; waste; **BCL 1104; inspection of corporation records.** Shareholders derivative action alleging waste, fraud, etc. by directors and officers of corporation operating a nature preserve and private hunting club on more than 260 acres. The court rejected defendants' argument that plaintiffs lacked standing. Plaintiffs had shown that they were members of an unincorporated association suing on behalf of themselves and all other members of their minority shareholders association and that they had been shareholders at the time of the alleged wrongs and when the action was commenced, thus allowing claims to be brought under BCL 626 and 720. The court found that the gist of plaintiffs' allegations was that defendants' actions, including the increase in membership dues each year, was directed at extinguishing the interests of the minority, thereby freezing out and oppressing them, at the corporation's expense. The court held that the allegations stated a cause of action, despite documents cited by defendants to show that plaintiffs had been informed of the actions and expenses of the corporation. The court, however, dismissed portions of the complaint wherein plaintiffs asserted fraudulent statements by defendants regarding the right to vote of shareholders in default on dues and assessments in view of a by-law so providing. Certain claims were held to be time-barred. Various claims of misconduct by defendants were sustained as pleaded with adequate particularity pending discovery; the papers showed that essential facts to justify opposition may exist, but could not then be stated (CPLR 3211(d)). Defendants opposed certain claims by asserting that the board had voted, but the court found that the minutes failed to show the total number of shares outstanding from which two-thirds could be calculated. The court ruled that plaintiffs had made the necessary showing to support their request for a preliminary injunction. They had shown that defendants' practice of raising membership fees rather than selling new shares had effectively frozen plaintiffs out from participating in meetings and in a potential shareholder vote on the sale of the preserve's assets; that if defendants were not enjoined the preserve would be lost; and that the balance of the equities required intervention**.** Plaintiffs had shown a likelihood of waste by defendants. BCL 1104 did not provide an adequate alternative. A receiver would be appointed, but the court denied plaintiffs' request that defendants be barred from acting in any capacity on behalf of the corporation. The court ordered that plaintiffs be allowed to inspect corporate records as they had rights as shareholders to do so as the records were sought for valid purposes and no showing of bad faith had been made. The existence of the litigation would not preclude inspection. North Fork Preserve Inc. v. Kaplan, Index No. 27167/2004, 6/9/05 (Emerson, J.).**

Misrepresentation; tortious interference; pleading. GBL 349; "consumer." Unjust enrichment; standing. Class actions; dismissal; commonality; typicality. Purported class action wherein plaintiff asserted claims for common law fraud, consumer fraud under GBL § 349 and tortious interference. Plaintiff alleged that defendant AT&T or its telemarketing agents had willfully transferred plaintiff's phone service from nonparty Verizon to itself without plaintiff's permission (illegal "slamming"). Defendant moved to dismiss, contending that plaintiff's common law fraud and consumer fraud claims were fatally defective as plaintiff had not alleged facts demonstrating misrepresentation or misleading conduct by AT&T or reliance by plaintiff. The court held that plaintiff's claims for common law fraud and tortious interference were properly pled and viable. Plaintiff, the court found, had asserted a scheme by defendant using deliberate misrepresentations regarding the service and the ability to cancel it, resulting in a transfer of service away from the chosen provider, with loss of business and incurring of unnecessary fees. The court dismissed the claim for consumer fraud under GBL § 349, finding that plaintiff as a corporation had purchased the telephone service in its corporate capacity for business use rather than as a "consumer." The court next denied plaintiff's request for leave to amend its complaint to add an unjust enrichment claim, finding that plaintiff lacked standing to bring the claim because it did not allege that the enrichment to defendant through misappropriation of customers came at the expense of plaintiff or the class. Finally, the court granted defendant's motion to dismiss plaintiff's class claims. The court ruled that it was appropriate to consider defendant's motion to dismiss the class claims; dismissal is appropriate where a complaint, on its face, cannot support a class action. The court held that the proposed class as defined by plaintiff lacked commonality with respect to the specific fraudulent conduct used by defendant in improperly or illegally changing putative class members' phone service and their damages. The situation would be the same in the tortious interference claims. Moreover, plaintiffs' own claims were not typical of the putative class members. Dismissal granted in part. Baytree Capital Associates LLC. v. AT&T Corp., Index No. 602817/2004, 5/31/05 (Cahn, J).

Partnerships; business judgment rule; fraud and self-dealing; burden of proof; indemnification; alter ego; fraudulent conveyances; Debtor & Creditor Law. Misrepresentation; deceit; reliance; summary judgment.

Plaintiffs brought a derivative action on behalf of a domestic partnership. Plaintiffs sought recovery on promissory notes issued by various defendants, and on indemnification and alter ego theories. The court had previously granted summary judgment against one defendant, but plaintiffs' attempts to enforce that judgment had been unsuccessful. Plaintiffs moved for summary judgment on an amended complaint alleging, *inter alia,* breach of fiduciary duty and common law fraud. The court determined that plaintiffs were entitled to summary judgment against one defendant partner, finding that he had not met his burden of establishing that his actions were protected by the business judgment rule. The rule does not protect partners who engage in fraud or self-dealing, or corporate fiduciaries when they make decisions affected by a conflict of interest. The burden shifts to the defendant to prove the fairness of the challenged acts. The court held that this defendant had failed to do so. The conduct here was not justified economically or otherwise. Defendant relied upon a purported management agreement, but the partnership agreement barred salary for services rendered to the partnership, and the former agreement had not been executed by all partners. Further, the court held that two of the plaintiffs were entitled to indemnification from the defendant partner for over $300,000 they had contributed to facilitate the closing of the sale of the business' real property. The court rejected the defendant's argument that no partner was obliged to indemnify plaintiffs since there had been no agreement among the partners to increase capital contributions as set forth in the agreement. The court relied upon a provision of the partnership agreement that the net profits and losses would be borne by each partner except that all losses caused by the wrongful act or gross negligence of a partner would be charged to him in full. The court denied summary judgment to plaintiffs on the alter ego theory because plaintiffs had failed to provide sufficient documentary evidence to establish their claim that a defendant had fraudulently conveyed assets to a new entity in order to avoid satisfying obligations to plaintiffs on the promissory notes pursuant to the court's summary judgment order. Finally, the court denied summary judgment to plaintiffs on their claim of fraud, finding that determination of defendant partner's intent to deceive and whether plaintiffs' reliance on defendant partner's misrepresentations had been reasonable were questions for the jury. Kantor v. Mesibov, Index No. 13960/2001, 5/23/05 (Austin, J.).**

Partnerships; winding up; Partnership Law 112; return of capital; interpretation of agreement; harmonization with certificate; excess contributions. Accounting. Plaintiffs demanded the winding up of a partnership pursuant to the agreement and distribution of plaintiffs' share of the assets. The court held that a winding up was required. There was a dispute as to how much plaintiffs were entitled to. Defendants, citing Partnership Law 112(1), argued that plaintiffs, heirs of a limited partner, would only be entitled to return of capital contributions. The court held that Section 112 applied only absent a valid subsequent agreement as to distribution on winding up, which would control. With regard to defendants' contention that there was no "subsequent agreement" because the partnership agreement had been executed before the partnership was established, the court found that the partnership agreement and the certificate of partnership had been executed simultaneously and would have to be construed together and harmonized. The statute could not override the agreement the parties made. The court found that the agreement provided that a limited partner would receive 21/2% of the net assets for each $750 invested. The court noted the specificity of the agreement. The agreement controlled. The court rejected defendants' reference to provisions of the certificate, alleged to be inconsistent. The certificate was not required to set forth a distribution formula and was not inconsistent. It provided for a return of capital, which would not preclude a participation in assets as well, but went on to provide that the latter would be deemed to satisfy the former. Another provision of the certificate, that the interest of a limited partner would be returned in cash, out of partnership assets, would not preclude adherence to the terms of the agreement and had to be read in harmony therewith. The partnership agreement, as the more specific document, would control. Further, the court found, defendants' interpretation would render paragraphs of the agreement meaningless. Defendants argued that they were entitled to be repaid for certain excess contributions made by them before any distributions to plaintiffs. The court found that defendants' assertion that such contributions had been made and not repaid was conclusory. An accounting is a statutory right of limited partners and the court therefore directed one. Partial summary judgment to plaintiffs. Polner v. Monchik Realty Co., Index No. 19971/2004, 8/19/05 (Demarest, J.).**

Preliminary injunction; irreparable harm; loss of opportunity to control corporation. Plaintiffs sought a preliminary injunction barring defendants from utilizing allegedly confidential, sensitive information entrusted to defendants in connection with a restructuring transaction inconsistent with a plan of reorganization of a plaintiff approved by a Canadian court for the recapitalization of that plaintiff. Expedited discovery occurred. Defendants were retained to assist a Portuguese company to find investors. Defendants were also retained to do work for plaintiffs. The court ruled that plaintiffs had an adequate remedy at law. Plaintiffs' claim was that defendant's involvement in the restructuring of the Portuguese entity might result in its being sold to a third party, thereby depriving plaintiffs of their opportunity to obtain control. Plaintiffs relied upon cases that, the court stated, recognized that the existence of a controlling interest is important to calculating a stock's value, but not that the value of such ownership interest is incalculable. There may be situations involving shareholders where a remedy at law is inadequate, but the plaintiffs here were not shareholders or parties to an agreement with the entity, nor would they become such under an amended plan of reorganization of a plaintiff. Absent irreparable harm, the motion was denied. Cable Satisfaction Intl., Inc v. Rothschild, Inc., Index 600127/2005, 5/23/05 (Fried, J.).

Procedure; collateral estoppel; prior ruling on personal jurisdiction; binding effect on liability; full faith and credit. Plaintiff internet ad company sought financing from defendant and for that purpose supplied defendant with documents on plaintiff's business plan and other sensitive information. Defendant declined to provide financing, but plaintiff alleged that employees of defendant gave the business plan and other documents to a competitor of plaintiff. Plaintiff asserted claims for misappropriation of trade secrets and other wrongs. Plaintiff had first commenced an action against defendant in Massachusetts based on the same facts. Defendant here moved to dismiss on grounds of collateral estoppel founded on a decision in the prior case regarding personal jurisdiction over defendant. The court there had rejected the plaintiff's assertion of jurisdiction on a respondeat superior theory, holding that the proof showed that the employees had not been acting within the scope of their employment. The court here ruled that plaintiff had had a full and fair opportunity to litigate the issue of corporate liability. Although the context of the court's ruling was a challenge to personal jurisdiction, the factual findings in the prior order disposed of the merits of the question of corporate liability, the court held. The court rejected plaintiff's arguments that collateral estoppel did not apply because Massachusetts gives such effect only to determinations on the merits and that full faith and credit could not be given to the order because the court had lacked jurisdiction over defendant. All that mattered, the court stated, was that resolution of the facts was material to the first case and essential to the decision therein. Challenges to the correctness of the order had to be made to a Massachusetts court. Case dismissed. Cartesian Broadcasting Network, Inc. v. Robeco USA, Index No. 602089/2004, 6/6/05 (Ramos, J.).

Procedure; comity; forum non conveniens; sealing. Motion to seal the complaint because it contained information gleaned from documents that had been designated confidential in a proceeding in Delaware, motion to dismiss and other motions. Plaintiffs sued past and present shareholders of plaintiff corporation, their agents and alleged co-conspirators because of alleged fraudulent and tortious conduct relating to the sale of stock in the corporation owned by certain defendants. The selling defendants had received information from plaintiffs under a confidentiality agreement to assist defendants in valuing the shares they wished to sell. Defendants had concluded that plaintiffs had given inaccurate and incomplete information and had commenced an action in Delaware. That case was settled and an order and judgment was issued by the Delaware court. Plaintiffs alleged in this case that defendants had engaged in improper conduct, in violation of a confidentiality agreement, designed to interfere with plaintiffs' business. Defendants moved to dismiss on forum non conveniens grounds. The court found that that was not an appropriate basis, but that the case should be dismissed on grounds of comity and collateral attack. The court noted that the order and judgment plaintiffs claimed they would never have entered into but for defendants' fraud was a product of the Delaware case. The court there had made rulings on the issues underlying this case, the court stated, and that state had procedures to vacate judgments and settlements alleged to be the product of fraud. This court should not, in effect, vacate an order of another court in a different jurisdiction. The court recognized that plaintiffs were asserting claims other than for fraudulent inducement, but there was no reasonable way to separate claims that only involved the order and judgment. Thus, the records here would be sealed to the same extent as the Delaware court had sealed them and the case was dismissed. Weinstein Enterprises, Inc. v. Orloff, Index No. 602497/2004, 7/29/05 (Moskowitz, J.).

Procedure; enforcement of judgment; restraining notices; foreign assets; turn-over order (CPLR 5225); service on agent by consent; termination; order directed to bank deposits; foreign property; comity; foreign anti-suit orders. Motion for a turnover order. The court vacated restraining notices because the defendants were foreign corporations (jurisdiction was present because of consent in an indenture) and restraining notices do not reach property in other jurisdictions. The court, however, rejected defendants' argument that it could not direct them to deliver property regardless of where located. Defendants challenged service of the turnover motion (CPLR 5225 (a)). Plaintiff judgment creditors used various means, including mailing to defendants at their business addresses and mailing by certified mail, return receipt requested, to CT Corp. The court held that defendants were contractually obligated to accept such service, defendants having agreed to provisions in the indenture appointing CT as agent and providing for notice to defendants. Parties to a contract may waive right to statutory service and agree to some other form. Defendants claim that they had discharged CT as agent, as the indenture allowed, prior to service, which CT had recognized. However, the court ruled, the termination was ineffective because defendants had breached their obligations under the indenture by failing to inform the trustee that they were discharging the agent and to replace the agent immediately. Further, the court ruled that plaintiffs could not seek turnover of defendants' money in bank accounts; to reach the deposits, a special proceeding against the banks would be required. The court denied plaintiffs' request to receive property of the debtors' subsidiaries and corporate affiliates. A delivery order could reach shares of affiliates defendants owned and possessed, but not affiliates' shares of third companies. Plaintiffs had shown no ground to pierce the corporate veil. The court ordered a turnover of shares of subsidiaries and affiliates of one defendant. Defendants invoked principles of international comity. They argued that the order would jeopardize a restructuring, which would adversely affect other creditors, export credit agencies of foreign countries. The court was dissatisfied with defendants' explanation of how the claimed disruption would occur. Defendants also stated that an order affecting property in Indonesia would conflict with anti-suit injunctions issued by the Indonesian courts. But, the court stated, orders by a foreign court enjoining and restraining parties in matters in that court would not affect NY courts and proceedings here. Thus, the court could issue an order to turn over property in Indonesia, but would stay that aspect of the order since defendants apparently were able to satisfy the judgment by delivering assets located outside Indonesia. Order to be issued. Gryphon Domestic VI, LLC v. APP Intl. Finance Co., B.V., Index No. 603315/2002, 5/23/05 (Freedman, J.).

Procedure; forum non conveniens; NY action arising out of Brazilian lawsuit concerning control of Brazilian companies; conflicts of laws; internal affairs doctrine. Plaintiff entities, emerging markets fund managers, invested in Brazilian securities. Plaintiffs were domiciled abroad and in Delaware; none was a resident or domiciliary of New York. Plaintiffs here sought damages based upon an allegedly frivolous lawsuit commenced in Brazil against plaintiffs. Defendant had not commenced that suit; entities in which plaintiffs had purchased shares did. The suit concerned alleged failure to comply with local regulations in the acquisition of the shares. Plaintiffs here alleged that defendant had sought to compel minority shareholders of the Brazilian companies to sell shares to defendant at a below-market price, thereby depriving them of tag-along rights. Defendant had allegedly caused the suit to be commenced as part of this scheme. Plaintiffs asserted a claim for tortious interference with prospective economic advantage. Defendant moved to dismiss on forum non conveniens grounds and the court granted the motion. This was a case, the court noted, brought by 17 non-NY parties based on a Brazilian lawsuit; the relevant facts had occurred in Brazil, where documents and witnesses were to be found. Brazilian law would control. There was no nexus to NY. Brazil would have the paramount interest in disputes relating to control over Brazilian companies. Plaintiffs' reliance on a demand made on it by a certain person in NY did not assist it here since it had not acceded to the demand and had suffered no harm. Defendant's likely inability to compel critical witnesses to testify here would prejudice defendant. The internal affairs doctrine weighed in favor of a Brazilian forum. Brazil is an adequate forum, the court ruled, noting that Federal and State cases have so held. The fact that defendant is headquartered here did not mean that NY was the proper forum. Case dismissed. Globalvest Management Co. L.P. v. Citibank, N.A., Index No. 603386/2004, 5/12/05 (Fried, J.).

Real property; commercial lease; rent abatement; ambiguity; waiver; intent to waive; voluntary payment doctrine. Equitable estoppel; reliance. Action arising out of commercial lease. Plaintiff claimed entitlement to a rent abatement under a clause providing therefor if defendant landlord did not rent to a "single-user equivalent replacement tenant" in the entire space if original tenant moved out of the shopping center. When the tenant moved out, plaintiff claimed the abatement. The court held that the lease was unambiguous that a single user would be required to operate in the entire original space; since there were two tenants, not one, in the space, defendant had breached the lease and plaintiff was entitled to an abatement. There was an ambiguity as to the term "equivalent," but the court determined that that was not material since breach of the single-user portion of the term alone entitled plaintiff to summary judgment. Defendant argued that plaintiff in renewing the lease had created a course of conduct showing an intent to waive the provision. Plaintiff had renewed and paid rent months after the change from a single user, without objection by plaintiff. The court held that there was no showing that plaintiff had intended to waive the provision. Plaintiff showed without contradiction that it (other than lower-level employees who could not bind it) had not known of the change. Payments made under a mistake of fact are not covered by the voluntary payment doctrine. Defendant raised no issue of fact that it had relied to its detriment on the payments. A defense of equitable estoppel failed since defendant had not reasonably relied on plaintiff's actions; it knew the facts. Plaintiff was entitled to an abatement and a judgment. Fashion Bug #2100 of Batavia, Inc. v. 425 West Main Associates, Index No. 3103/2004, 6/05 (Fisher, J.).**

Shareholders derivative action; demand on the board; futility; fiduciary duty of director. Shareholders derivative action. Defendants moved for summary judgment dismissing the complaint. Defendants urged dismissal for failure of plaintiff to satisfy BCL 626 (c). The court found that the complaint was deficient in that it failed to allege that plaintiff had made a demand upon the board or that a demand would have been futile. The pleading was thus defective as a matter of law and had to be dismissed. Plaintiff cited a voting trust as a bar to board approval. However, the court stated, the trust assigned to the trustees the right to vote the shares of the corporation, but did not restrict the votes of the members of the board. A special meeting of directors had been held. The plaintiff and another director had been present and it appeared that a majority of the board under the certificate would constitute a quorum (BCL 707) and the majority vote of the board where a quorom is present would constitute board action (BCL 708(d)). Thus, with two of three directors present, the board could have taken board action by voting to approve this suit. Further, plaintiff claimed that defendant director had breached a fiduciary duty to the corporation when he failed to disclose that the mortgage on certain property, on which the corporation had an option to purchase at a below-market price, was in default and that an action to foreclose thereon had been commenced, which ended in the corporation's loss of its interest. Defendant argued that the corporation had lost the interest not because of a breach of fiduciary duty, but because the corporation had been served but had defaulted. The court concluded that, for that reason, plaintiff could not establish a breach of fiduciary duty claim. There had been a traverse on jurisdiction and plaintiff could not re-litigate the issue of how and why its interest in the property had been terminated. Plaintiff asserted that two defendant entities had had a duty to pay the mortgage on the property, and had a duty to inform plaintiff of the commencement of the action, and breached those duties. The court held, however, that the duty to notify plaintiff had rested upon the mortgagee (RPAPL 1311), that the corporation had been served, and that it had failed to exercise its right of redemption. The corporation's inaction not the claimed failures of the defendant entities had caused the loss. Further, the defendants had not had a duty to pay the mortgage. One of these defendants had taken the property subject to the mortgage, but had not assumed it. The other defendant entity was a managing agent that had never had an interest in the property or a duty to pay the mortgage. Summary judgment for defendants granted, but denied on the third-party complaint due to issues of fact. Danzy v. NIA Abstract Corp., Index No. 4836/2003, 5/12/05 (Austin, J.).**

Tortious interference with contract; loss of future business. Interference with prospective economic advantage; economic competition; wrongful conduct. Injurious falsehood. Unfair competition; distribution rights akin to a protected property interest. GBL § 340 (Donnelly Act). Unjust enrichment. The plaintiffs alleged that the key defendant, their competitor in the beer distribution business, was trying to drive them out of business by unlawfully competing with them to distribute certain beer brands and brand extensions. The defendant made a motion to dismiss, requesting that the court treat the motion, alternatively, as one for summary judgment; the court declined. The plaintiffs claimed that the defendant's tortious interference with their contracts with several brewers had led the brewers to breach. They alleged that the defendant had used economic pressure on the brewers and had acted in concert with certain of them to devise strategies for them to breach. The court dismissed that portion of the claim regarding threatened termination of the plaintiffs' distributor agreements, or rights that plaintiffs might lose in the future, and upheld it insofar as it concerned new products and brand extensions that the plaintiffs had allegedly not received during the three-year statute of limitations. The defendant contended that the brewers had had good cause to terminate some agreements, but this presented issues of fact for trial, the court found, as did questions about whether the plaintiffs had been otherwise compensated. In opposition to a claim of tortious interference with prospective economic advantage, the defendant argued that it was in competition with the plaintiffs, and that the complained-of conduct on its part did not amount to a crime or independent tort. But the court noted that being a competitor is not protection when wrongful means are alleged. Wrongful conduct must usually amount to an independent tort or crime, but can include extreme and unfair economic pressure directed at a third party. The defendant also argued that it was not alleged to have acted solely out of malice. The plaintiffs used the word "malice" repeatedly in the claim. But the court found that its basis really was the defendant's alleged use of economic pressure against the brewers and the plaintiffs' customers. The claim was upheld. A claim of prima facie tort had not been properly stated, the plaintiffs conceded. The court granted their request to view it as one of injurious falsehood. The plaintiffs alleged that the defendant had falsely told some brewers that plaintiffs were no longer viable wholesalers, with a result that the plaintiffs were deprived of specific brand and brand extension distribution rights that they should contractually have been given. The court found that some of the allegations fell outside the statute of limitations and some were too vague to allege the necessary special damages. The claim was, however, adequately stated as far as it related to the brand extensions allegedly not granted during the three year statute of limitations. A claim of unfair competition relied on facts that did not conform to the pattern typical of the claim. Contrary to the defendant's contentions, though, the tort is not limited to infringement, dilution, or exploitation of proprietary information or confusing suppliers and customers. The U.S. Supreme Court, for example, has extended the tort to cover a news agency's quasi-property rights to a news story, which the defendant had in effect sold as its own goods, so that the unfair competition was in misappropriation rather than misrepresentation. Here the claim took shape in the plaintiffs' argument that they had invested skills and expertise in developing markets for products and that their right to the products was, consequently, akin to a protected property interest. The court upheld it. On a claim of unjust enrichment, the defendant argued that the plaintiffs failed to allege that any customers were confused about the origin of goods or services. But the court found the claim viable in that the plaintiffs identified that they had spent time, labor, and money on product development in their distribution territories and that the defendant was receiving the fruits of their effort without adequately compensating them. The court dismissed the plaintiffs' claim of a violation of the Donnelly Act. Even assuming that the plaintiffs alleged a proper relevant market, they did not specifically name the defendant's alleged co-conspirators, nor did they identify specifically how any alleged agreement or arrangement had had a negative impact on trade. Boening Bros. v. Manhattan Beer Distributors, Inc., Index No. 29830/2004, 8/8/05 (Emerson, J.).**.

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**The PDF copy of the decision posted on the Division's website is not an exact image of the original, signed decision filed with the County Clerk.

THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE COMMERCIAL DIVISION AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION ON SEPTEMBER 30, 2005 COVERING DECISIONS ISSUED MAY - AUGUST 2005.