THE COMMERCIAL DIVISION LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

Hon. Jonathan Lippman
Chief Judge of the State of New York

Hon. A. Gail Prudenti
Chief Administrative Judge of the State of New York

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Arbitration; authority of arbitrator to independently subpoena witness; CPLR § 7505. Petitioner moved to confirm and respondent to vacate an arbitration award of $1,948,186 plus interest. Respondent had asked the arbitration panel to subpoena a witness, petitioner's former employee, which the panel had done. On the hearing's last day, respondent told petitioner it did not intend to call the witness, and petitioner said it wished to call him as a rebuttal witness. When petitioner, too, subsequently decided not to call the witness, the arbitration panel said that it wanted his testimony. Respondent conducted direct examination, petitioner did not cross-examine, and then the panel questioned the witness. Here, respondent argued that the award to petitioner must be vacated because the panel committed a prejudicial procedural defect by calling the witness. The court noted that AAA Rule 31(d) states that an "arbitrator or other person authorized by law to subpoena witnesses ...may do so upon the request of any party or independently." Respondent interpreted Rule 31(d) as prohibiting the panel from independently issuing subpoenas, contending that New York lacks a statute specifically empowering arbitrators to call witnesses if the parties have not asked them to. The court remarked that the question of whether arbitrators may independently subpoena witnesses under Rule 31(d) has not arisen in New York, probably because there are CPLR provisions that grant arbitrators subpoena power. But, for example, in Pennsylvania before 1983 arbitrators presiding over common-law, as opposed to statutory, arbitrations had no subpoena power and could not subpoena witnesses under Rule 31(d); on the other hand, statutory arbitrators in Pennsylvania could subpoena witnesses under the rule because Pennsylvania's arbitration statute explicitly granted them subpoena power. The court observed that Rule 31(a), which provides that parties "shall produce such evidence as the arbitrator may deem necessary...to a determination of the dispute," and continues, "conformity to legal rules of evidence shall not be necessary," grants arbitrators the authority to independently demand production of evidence not otherwise proffered by the parties. Given this authority to demand evidence, the most logical reading of 31(d) was that it allowed arbitrators to independently subpoena witnesses provided that the arbitrators were authorized by law to issue subpoenas. In New York, arbitrators are so authorized under CPLR § 7505. The court emphasized that AAA Rules exempt arbitrators from the rules of evidence that constrain judges. It agreed with respondent that arbitrators could not base awards on ex parte discussions or independent investigation unless authorized by the parties, but the arbitrators here had not pursued either course. The witness was on respondent's list, and respondent had conducted the direct examination. The court confirmed the award. Petry Holding, Inc. v. The Rural Media Group, Inc., Index No. 651578/2011, 4/25/12 (Bransten, J.). **

Breach of fiduciary duty; shareholders in close corporation. Contract interpretation; ambiguity. Covenant of good faith and fair dealing. Counterclaim defendant moved to dismiss claims that he had breached fiduciary duties owed to his fellow shareholder and counterclaim plaintiff (since deceased and succeeded by his estate) in closely held company and had breached the implied covenant of good faith and fair dealing in negotiating the buyout of a lease. Counterclaim defendant had negotiated the buyout, for which the closely held company would receive approximately $15 million in proceeds with $4 million to be reinvested in the company. Counterclaim plaintiff alleged that treating his half of the $4 million as a capital contribution rather than a loan was breach of fiduciary duty because counterclaim defendant should have known that counterclaim plaintiff, who had been gravely ill for several years, would not live long enough to enjoy the benefits of capital reinvestment. The court disagreed. Although counterclaim defendant negotiated the lease buyout without informing or consulting counterclaim plaintiff, he did present a proposal that counterclaim plaintiff considered, with the benefit of counsel, for approximately five weeks before signing. In these circumstances, the court found that counterclaim defendant's actions may have been dilatory, but did not constitute a breach of fiduciary duty. The court also rejected the claim that counterclaim defendant breached his fiduciary duty by not treating the counterclaim plaintiff's share as a loan. Looking at the four corners of the contract, the court found there could be no breach of fiduciary duty because the buyout agreement unambiguously provided for the money to be treated as a capital contribution due to the absence of any standard loan terms, such as interest rate or maturity date. The court found that the implied covenant of good faith and fair dealing could not be enforced in a manner inconsistent with the provisions of the contract. Accordingly, the counterclaims were dismissed. Lower Manhattan Dialysis v. Lantz, Index No. 602547/2007, 4/16/12 (Kapnick, J.).

Contract; breach; construction. Accounting; fiduciary relationship; disclosure; scope. In a motion for partial summary judgment, the court denied each cause of action and counterclaim as follows. In the first several counterclaims, defendant construction manager alleged it was due a share of the profits generated by two construction projects from plaintiff general contractor. Defendant argued the court should award at least the contractual 15% share on summary judgment, reserving the determination of further amounts due for later stages of trial. The court denied the motion, noting that a party is excused from complying with its contractual obligations where the other party has committed a material breach, and plaintiff raised an issue of fact as to whether its obligation to pay was excused for defendant's alleged incomplete performance of its obligations. The court found that summary judgment on the 15% share was further precluded by conflicting affidavits over the timing of the payments

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and the amounts due. The court found plaintiff's claims and defendant's counterclaims to be "inextricably intertwined," precluding summary judgment, and it held that the motion was premature because plaintiff had not had the chance to depose all necessary witnesses. Additionally, unresolved issues of fact precluded a determination of whether a loan plaintiff made to an employee of defendant could offset any amount of shared profit due. Defendant also sought to compel an accounting on the two projects. Since the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship, the court held that the motion was premature because it had not yet been determined whether the parties shared the necessary confidential or fiduciary relationship. Finally, the court held that discovery demands relating to other companies that worked on the two projects were proper in scope based on the test of usefulness and reason, but only within the context of those projects. MJM Construction Services, LLC v. Sosa, Index No. 701025/2011, 4/26/12 (Grays, J.).**

Contract; breach; declaratory judgment; implied covenant of good faith and fair dealing; replevin; conversion; indemnification; bond. Baruch College of the City University of New York retained defendant Dormitory Authority of the State of New York (DASNY) to provide construction services for some of its buildings. DASNY entered into a contract with plaintiff as the general contractor to manufacture and install a canopy at the college. Plaintiff then retained cross-claim and counterclaim defendant Turner Construction Company as a subcontractor, and Turner retained defendant Sure Iron Works, Inc. ("SIW") as a sub-subcontractor to provide on-site labor for the project. Pursuant to the contract with DASNY, plaintiff was required to provide a labor and materials payment bond to secure prompt payment of subcontractors should plaintiff fail to pay them. Cross-claim and counterclaim defendant U.S. Specialty Insurance Co. ("U.S. Specialty") served as surety for the Bond. Plaintiff created a mock-up of the canopy and conducted two performance tests. When the mock-up failed both tests, DASNY issued a stop work directive to plaintiff, terminated the contract "for convenience," and paid plaintiff compensation contractually required by the termination. Plaintiff, however, claimed entitlement to additional compensation on account of a finder's fee it paid to non-party Allied Development Corp. ("Allied"), bank fees incurred to secure the bond, and additional expenses associated with the alleged failure of DASNY to return the bond upon termination. Plaintiff's complaint sought: a declaratory judgment that SIW had no valid claim against the bond; declaratory judgment that DASNY had no lawful basis to retain the bond; declaratory judgment that if DASNY lawfully retained the bond, the amount should be reduced; damages for breach of implied covenant of good faith and fair dealing based on DASNY's refusal to release the bond; replevin for DASNY unlawfully keeping the bond; damages for conversion from DASNY unlawfully keeping the bond; and damages for breach of contract for failing to compensate plaintiff for costs incurred as a result of work performed on the Baruch Project. SIW interposed cross-claims against Turner and U.S. Specialty for work performed in connection with preparation of engineering shop drawings and modifications to SIW's shop. SIW's counterclaim against plaintiff related to the same work. Turner cross-claimed against plaintiff for indemnification as to SIW's claims against it. DASNY moved for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moved for summary judgment on all counts of its second amended complaint against DASNY and SIW. Turner moved for summary judgment dismissing the breach of contract cross-claim of SIW and cross-moved for summary judgment for a declaration that plaintiff was contractually obligated to indemnify it against SIW's claim. In its opposition, plaintiff requested Turner's cross-claim be dismissed. The court granted DASNY's motion for summary judgment dismissing plaintiff's breach of contract claim, holding that financing costs to obtain the bond were not reimbursable under the contract. The court also held that the contract did not provide for payment for work done by Allied as this was merely a cost of doing business. The court denied plaintiff's motion dismissing SIW's cross-claim against plaintiff and U.S. Specialty, but agreed that SIW had no valid claim against the bond for shop upgrade work. The court found that SIW was obligated to prepare engineering shop drawings, but that the contract between Turner and SIW did not provide for a facility upgrade and did not obligate Turner to pay for shop modifications. The court denied plaintiff's motion for summary judgment to cancel the bond entirely because DASNY remained exposed to liability for the outstanding claim against plaintiff by SIW, but granted the motion to reduce the bond. It denied plaintiff's summary judgment motions on its replevin and conversion claims because plaintiff failed to make the required showing that DASNY was in wrongful possession of the bond. As such, DASNY's motion for summary judgment dismissing plaintiff's causes of action to cancel the bond entirely, for breach of implied covenant of good faith and fair dealing, and for replevin and conversion, were granted. The court further found that plaintiff's cause of action for breach of good faith and fair dealing must be dismissed as duplicative of its breach of contract claim. Finally, the court granted Turner's summary judgment motion on SIW's breach of contract cross-claim to the extent SIW sought compensation for shop upgrade work and further granted Turner's cross-motion for summary judgment for a declaration that plaintiff was obligated to indemnify Turner against SIW's claims. <u>Frener & Reifer America Inc. v. Dormitory Authority of the State of New York</u>, Index No. 603679/2009, 4/6/12 (Sherwood, J.).

Contract; breach; rescission; reformation; specific performance; fraud; concealment; misrepresentation; disclaimer; down payment. Plaintiff bought a hotel at auction and subsequently discovered that its major hotel chain license would not be assigned, materially affecting the value of the property. Defendant did not deny that it had knowledge of the license's non-assignability prior to the sale, but asserted it had no duty to disclose. Plaintiff refused to close on the sale and sought to recover the down payment. The complaint asserted two theories, breach of contract and fraudulent concealment, and sought multiple forms of relief under each. Defendants, the bank that held the promissory note on the auction sale and its loan servicer, moved to dismiss the complaint. The court dismissed all three causes of action under the breach of contract theory because it was undisputed that plaintiff itself had not performed its obligations under the agreement. Though plaintiff claimed it refused to close until the issue of fraudulent concealment was resolved, it had no right to unilaterally adjourn the closing. The court also found independent reasons to dismiss the rescission and specific performance causes of action. As to rescission, the court held that plaintiff did not demonstrate that it could not be adequately compensated by damages. The court found plaintiff's claim for "specific performance with an appropriate adjustment in price" to be merely an improper request for reformation of the contract, which was available only where mutual mistake or fraud can be clearly established. The remaining causes of action, based on the theory of fraudulent concealment, sought four alternative remedies. Defendants argued that all four causes of action must be dismissed because defendants did not owe plaintiff a fiduciary duty and therefore plaintiff was not entitled to rely on any misrepresentation or omission. In support of its claim for monetary damages based on fraud, plaintiff argued that under the special facts doctrine a duty to disclose exists even in the absence of a fiduciary relationship. The special facts doctrine requires the material fact to be within the knowledge of the defendant and not discoverable by the plaintiff through the exercise of ordinary intelligence. Prior to the auction, several documents were made available to potential purchasers, including two letter agreements between the original owner and the hotel chain regarding franchise terms and conditions. These letters stated, in part, that the licensor would consent to assignment so long as the assignee met certain conditions. Plaintiff claimed that making these documents available amounted to misrepresentation of material facts and that defendant's omission of contrary information it knew to be true before the auction amounted to fraud in the concealment. The court determined that where a contract is formed by two sophisticated parties, the disclaimer must show a clear indication that the disclaiming party has knowingly disclaimed reliance on the specific representations that form the basis of the fraud claim. Broad or boilerplate disclaimers regarding reliance on statements outside the transactional documents were ineffective. Since the disclaimers were overbroad and the information contained in the letter agreements gave assurance in direct contravention of the information allegedly within the defendant's knowledge, the disclaimers did not bar plaintiff's claim for monetary damages based on fraud. The court summarily disposed of the rescission and unjust enrichment causes of action, rescission because of the possibility of adequate compensation by damages and unjust enrichment because the existence of a valid contract precluded recovery in quasi contract. However, the court preserved plaintiff's equitable estoppel cause of action since plaintiff alleged defendant's intentional misrepresentation and its own reasonable reliance on the misrepresentation to its detriment. With respect to the cause of action for mutual mistake, plaintiff was entitled to plead in the alternative and, because issues of fact as to mistake remained, the court denied defendant's motion to dismiss this cause of action. However, the court dismissed plaintiff's claim for legal fees under the terms of the sale agreement because plaintiff did not contest that it failed to close the sale. <u>Hotel Capital LLC v. Wells Fargo Bank, N.A.,</u> Index No. 18319/2011, 4/26/12 (Demarest, J.).**

Contract; breach; tortious interference with business relations; unfair competition; best efforts clause. Defendant, a seller and distributor of consumer electronic products, imported and sold, among other products, DVD players purchased from its affiliate. Plaintiff alleged that it had a patent licensing agreement with defendant's affiliate that allowed for manufacture of DVD players that would otherwise infringe on plaintiff's patents. Plaintiff asserted a breach of contract cause of action and defendant asserted counterclaims for tortious interference with business relations and unfair competition. Plaintiff and defendant entered into a number of re-seller agreements and letter agreements related to the re-seller agreements whereby defendant was obligated to pay the royalties on such licenses in the event defendant's affiliate failed to do so. Defendant alleged that it was the first United States company to agree to enter into a re-seller agreement with plaintiff for DVD players. Defendant also alleged that it was pressured to enter the subject agreements under threats by plaintiff to pursue $10 million in royalty payments for the past sales of DVD players infringing on plaintiff's patents, as well as the threat of US customs seizures of inbound DVD players. To ensure that defendant was not placed at a competitive disadvantage relative to other companies that sold DVD players, the letter agreements contained "most favorable conditions" and "best efforts clauses." Based on these clauses, defendant understood that plaintiff would make its best efforts to enter into agreements with all sellers of DVD players in the United States and it executed the re-seller agreements based on this understanding. Defendant alleged that it notified plaintiff and/or plaintiff was aware of unauthorized re-sellers who were selling unlicensed DVD players in the United States in competition with defendant, and based on plaintiff's willful inaction, plaintiff had effectually granted those manufacturers and re-sellers royalties equal or close to zero. As such, defendant contended that by requiring it to pay royalty amounts at a rate exceeding that paid by third parties, plaintiff breached the material obligations under the agreement. Plaintiff commenced an action for breach of contract, alleging more than $20,000,000 in damages flowing from claimed breaches by defendant of the re-seller agreements. Defendant moved for summary judgment to dismiss the complaint. Plaintiff opposed the motion and cross-moved for partial summary judgment on its breach of contract claim and to dismiss defendant's counterclaim. The court denied defendant's motion for summary judgment, which was based on the argument that plaintiff breached the contract, and therefore, defendant was excused from its performance under the re-seller and side letter agreements. According to defendant, plaintiff breached either the best efforts clause by not entering into re-seller agreements with all distributors, or, plaintiff breached the invoicing clause of the re-seller and side letter agreements. Plaintiff argued that the best efforts clause was unenforceable as vague and ambiguous. The court held that a best efforts clause was not unenforceable as a matter of law, and that the objective criteria in the best efforts clause were not ambiguous. Since the best effort clause required a review of whether plaintiff pursued all reasonable methods of signing additional distributors, the issue of enforcement presented a question of fact not appropriate for summary judgment. There also were clear questions of fact on whether any breach by plaintiff was substantial. Defendant also argued that because plaintiff never provided it with invoices required by the invoicing clause, there was no basis for liability against defendant. The court held that because plaintiff's ability to issue invoices was dependent on defendant's issuance of truthful quarterly royalty reports, there was a triable issue of fact on whether their failure to do so frustrated plaintiff's ability to perform its obligation. The court also denied plaintiff's motion for summary judgment on its breach of contract claims since it raised the same issues of fact as defendant's motion for summary judgment. The court denied plaintiff's motion to dismiss defendant's counterclaims for tortious interference with business relations and unfair completion. Defendant had alleged that plaintiff notified retailers and other distribution centers that defendant's affiliate was an unlicensed supplier of DVD players that was infringing on plaintiff's patent, and the court held that the truth of these statements and whether defendant lost sales as a result raised triable issues of fact. Koninklijke Philips Electronics N.V. v. Coby Electronics Corp., Index No. 14936/10, 5/12/12 (Scheinkman, J.).**

Discovery; computer source codes; affirmative identification of trade secrets; identification of trade secrets by identification of those aspects not claimed to be secret. Plaintiffs, providers of sophisticated software used in the global financial market, alleged misappropriation of trade secrets against their former employee and his new employer. At a discovery conference the issue had arisen whether plaintiff, in response to defendants' interrogatories, had to affirmatively identify its trade secrets, or only the components of the source codes it did not claim were secrets. The court, at that early point, ruled that plaintiffs needed only to identify source components that were (1) covered by third party licenses (2) in the public domain (3) not claimed to be secrets. It then ordered the parties to address the issue in letter briefs, which it analyzed to come to the decision here. Plaintiffs argued that the court's ruling that allowed plaintiffs to identify what parts of its source code it claimed to be trade secrets by identifying those aspects *not* claimed to be trade secrets, was cost effective and legally sufficient. Plaintiffs further contended that identifying the entire source code as a trade secret in their interrogatory responses was adequate because the code underlying their products was a compilation and sequencing of component parts. But the court distinguished a case in which plaintiffs had asserted that their trade secret was the entire combination; plaintiffs here, by contrast, also admitted parts were in the public domain and parts licensed. Further, plaintiffs also alleged a number of trade secrets beyond the compilation theory. Merely providing a "reference library" to show what portions of plaintiffs' code was in the public domain shifted to defendants the burden of clarifying plaintiffs' claims. The court quoted from a case where a plaintiff was ordered to state with specificity what information it considered a trade secret, otherwise the plaintiff could not proceed on the theory its information was secret, because defendants had a right during discovery to test whatever plaintiff's theory was. Nor did plaintiffs' disclosure enlighten either defendants or the court as to what sequencing of publicly known components or licensed components constituted trade secrets. Moreoever, it would be unfair to let plaintiffs discover defendant employer's trade secrets before they revealed their own; once privy to defendant's source codes, plaintiffs could tailor their theory of misappropriation to defendant's work, even misappropriate defendant's work. In sum, the court was persuaded that the law requires a trade secret plaintiff to identify trade secrets with reasonable particularity early in its case. Plaintiffs therefore were ordered to identify the trade secret components of their source code. MSCI Inc. v. Jacob, Index No. 651451/2011, 4/20/12, (Kornreich, J.).

Fraud; aiding and abetting fraud; unjust enrichment; money had and received; piercing the corporate veil; personal jurisdiction; churning scheme. Plaintiffs Vikas Goel ("Goel") and Rainforest Trading, Ltd. ("Rainforest") sued defendants Anush Ramachandran ("Ramachandran"), Bunge, Ltd. and Bunge, S.A., in connection with Goel's transfer of a large amount of personally owned stock to Rainforest, a holding company. The transfer occurred in connection with Goel's attempt to raise capital for his wholly owned company, eSys. Goel transferred his eSys stock to Rainforest, becoming a 49% shareholder while Teledata, controlled by defendant Ramchandran, owned 51%. Teledata also was to deposit a large sum of cash into Rainforest, which would obtain a loan from the State Bank of India to benefit eSys. Plaintiffs alleged that Ramachandran and other Teledata representatives made fraudulent representations regarding Teledata's cash reserves and asserted causes of action against Ramachandran for fraud, and against the Bunge defendants for aiding and abetting fraud, money had and received, unjust enrichment, and tortious interference with contract. They also sought recourse from Bunge Ltd. by piercing the corporate veil. The Bunge defendants moved to dismiss based on lack of jurisdiction and failure to state a cause of action. After rejecting plaintiffs' argument that Bunge S.A. did business in New York in its own right, the court found that plaintiffs had shown the existence of facts that, if proven at trial, formed a basis for exercising jurisdiction over Bunge S.A. based on the activities of its parent, Bunge Ltd., under a department or agency theory. In applying this theory, the court explained that the only essential factor is common ownership established through a parent-subsidiary relationship. The three other factors to be considered – financial dependency, the degree to which the parent interfered with the selection of subsidiary's executive personnel, and the parent's degree of control over marketing and operational policies – are important but not essential for a finding of jurisdiction. In this case, the court determined that the first factor was met and that the three additional factors weighed in favor of plaintiff. Since the court found evidence sufficient to support the mere department theory, it denied the jurisdictional branch of defendants' motion. As to failure to state a cause of action, the court held that plaintiffs had adequately pleaded their unjust enrichment claim by alleging that the Bunge defendants were enriched by monies paid into Rainforest and that they could not retain those monies in equity and good conscience. The court also reasoned that the question of whether the Bunge defendants reasonably relied on Teledata's authority to transfer the funds could not be addressed in the context of a motion to dismiss the pleadings. With respect to the Bunge defendants' aiding and abetting fraud cause of action, the court first accepted plaintiffs' allegation that defendant Ramachandran defrauded them into entering the agreement to transfer stock to Rainforest by making representations that Teledata was a large, well-capitalized company. It also accepted plaintiffs' allegation that Teledata and the Bunge defendants cooperated in a churning scheme in which the Bunge defendants made short term loans to Teledata that were used to obtain bank guarantees on contracts. It held that defendants' actual knowledge of the fraud could be inferred from their motives in committing the fraud, namely, from the financial gains received for providing short term loans to Teledata, masking these loans as purchase and sale contracts, and participating in the churning scheme to make it appear that Teledata was complying with its obligation to fund Rainforest. Thus, the aiding and abetting cause of action survived. The court accepted plaintiffs' argument that Bunge Ltd. should be made to answer for the actions of Bunge S.A. through a judicial piercing of the corporate veil because plaintiffs sufficiently alleged that the corporate form was abused to achieve fraud, causing inequity and injury to the plaintiffs. Plaintiffs alleged sufficient facts that corporate formalities between the two entities were often disregarded. Finally, the court held that plaintiffs' cause of action for tortious interference with contract was time-barred. Goel v. Ramachandran, Index No. 50017/2010, 1/27/12 (Scheinkman, J.).**

Fraudulent inducement; fraud; tortious interference; default judgment; avoidable consequences. In an action arising from a dispute over a fragrance that was to have been promoted by a celebrity spokesman, the court adopted the recommendation of the special referee in awarding recovery to plaintiff perfume manufacturer for the amount of out-of-pocket losses it incurred in the development and marketing of the fragrance, but not for lost sales or punitive damages. The referee found that plaintiff relied on a series of representations and promises by the defendants that constituted fraudulent inducement, fraud, and tortious interference and proximately caused plaintiff to incur out-of-pocket costs. The court rejected defendants' arguments that plaintiff's reliance was not supported by the record. Defendants claimed that plaintiff should not have relied on defendant's promises because the spokesman refused to give interviews for the launch party and failed to furnish photos for the press release. The court found that a series of mixed messages from defendants over the course of several months formed a basis for plaintiff's reliance. Defendants also argued that the doctrine of avoidable consequences barred plaintiff's recovery, since plaintiff knew of defendants' allegedly tortious conduct on the day after the parties entered the subject agreements. Noting that the doctrine relieves a defendant of liability for consequences preventable by actions that reason requires a plaintiff to take, the court explained that the burden of showing that a plaintiff unreasonably failed to minimize damages rested with the defendant. If plaintiff's conduct was reasonable under the circumstances, plaintiff can recover even if another reasonable course of action existed. Here the court again found that defendants' mixed messages did not conclusively reveal an intent not to perform and therefore plaintiff's course of conduct was reasonable under the circumstances. Defendants finally argued that plaintiff could not recover out-of-pocket costs because it did not add the intended spokesman as a party to the license agreement, which would have made the intended spokesman responsible for all contract representations. The court found that defendants failed to prove that such action would have procured any performance by him under the contract. Plaintiff did not recover lost profits because the referee found its expert testimony to be speculative, as it was premised solely on documents provided by plaintiffs and sales projections based on too short a time period. The referee found no evidence to support plaintiff's argument that defendants acted maliciously, so no punitive damages were awarded. Revelations Perfume and Cosmetics, Inc. v. Prince Rogers Nelson, Index No. 603350/2008, 5/22/12 (Fried, J.).**

Insurance law; statutory interpretation. A court-appointed rehabilitator submitted a rehabilitation plan to restore an insurance company to solvency for court approval. The rehabilitator proposed continued rehabilitation efforts, as opposed to liquidation, with class two priority status reserved for "Claims under Policies" as defined in the plan. Class two claims receive priority over all claims other than administrative expenses. Since the efficacy of the plan hinged on highly discounted settlements of over $100 million in surety claims, the rehabilitator interpreted the definition of "Claims under Policies" as excluding surety bonds, fidelity bonds, and similar instruments. The threshold question before the court was whether the surety claims were entitled to class two priority status in liquidation pursuant to Insurance Law § 7434(a)(1). The court first held that under the Insurance Law, buttressed by case law, a suretyship is a "kind of insurance" and a surety bond is a contract of insurance. It then turned to the rehabilitator's second argument that the specific use of "policy" in Insurance Law § 7434(a)(1)(i) without any express inclusion of "surety bonds" or "surety contracts" demonstrates a legislative intent to exclude surety claims from class two priority. The court disagreed with this interpretation, finding that other provisions of the Insurance Law refer to surety bonds as policies of insurance. It also pointed to several New York court decisions equating a surety bond with a policy of insurance. Having determined the surety claims were entitled to class two priories in liquidation, the court concluded that the proposed plan impermissibly accorded surety claimants with less favorable treatment then they would receive in liquidation. Accordingly, the court disapproved the plan and remitted the matter to the rehabilitator to propose a revised plan or, alternatively, to apply to the court for an order of liquidation. In the Matter of the Rehabilitation of Frontier Insurance Company, Index No. 97-2006, 5/23/12 (Platkin, J.).**

Letter Agreement; contract interpretation. Procedure; summary judgment. This action arose from a letter agreement between Sirius Satellite Radio Inc. and plaintiffs, the distributer of entertainment personality Howard Stern's radio show and Stern's agent. The agreement predated the merger between Sirius Satellite Radio Inc. and XM Satellite Radio Inc. that created defendant Sirius XM Radio, Inc., and each pre-existing satellite radio service had and retained its own subscribers during all times relevant to this action. In the agreement, the term "Sirius" is defined as "Sirius Satellite Radio Inc." The agreement also uses the term "Sirius subscribers," which is not separately defined. The agreement required defendant to pay plaintiffs a series of performance-based awards, provided that the number of Sirius subscribers exceeded industry analysts' estimates by a certain amount each year-end during the term of the agreement . There was no dispute that the number of Sirius subscribers sufficiently exceeded those estimates at the close of one such period, and defendant compensated plaintiffs accordingly. The dispute arose the year the merger took effect. Plaintiffs interpreted the term "Sirius subscribers" to constitute all subscribers of newly formed defendant. They commenced this action, alleging that defendant owed significant amounts related to the agreement's performance-based awards. Defendant moved for summary judgment, arguing that the agreement unambiguously provided that the term "Sirius subscribers" constituted the subscribers of Sirius Satellite Radio Inc. only, not the combined subscribers of the new entity. The court agreed and granted the motion. The court reasoned that at the time the parties entered into the agreement "it is clear that the only subscribers that the parties considered part of the 'total number of Sirius subscribers' for purposes of calculating [compensation] were those individuals who subscribed to the Sirius radio system." The court further reasoned that the language of the agreement disposed of plaintiffs' argument that "Sirius subscribers" constituted all subscribers under the Sirius XM umbrella including a provision that contemplated a potential merger between Sirius and XM. This provision, the court noted, was the only place in the agreement that "mentions or even refers to 'XM.'" The court concluded that "to the extent the parties contemplated the relevance of new subscribers acquired by merger at all, they provided for their consideration under an entirely separate section," which provided "specific compensation to plaintiffs in the case of a merger with XM, and refers to those subscribers as 'subscribers of the surviving company.'" One Twelve, Inc. v. Sirius XM Radio Inc., Index No. 650762/2011, 4/16/12 (Kapnick, J.).

Motion to dismiss; CPLR§§ 3211 a(1), (7) 3016(b); fraud in the inducement; fraudulent concealment; scienter; duty to disclose; special facts doctrine; unjust enrichment; loss causation. In this action for fraudulent inducement, fraudulent concealment, and unjust enrichment, plaintiff alleged that defendant fraudulently induced it to provide financial guarantee insurance for a collateralized debt obligation ("CDO"), consisting of a portfolio of investment securities largely selected by a nonparty hedge fund client. The nonparty client chose the securities with the intention that they would fail, with the result that the client would reap huge profits and defendant huge fees. The gist of the complaint is that plaintiff would not have provided the insurance if it had known that the client was not an equity investor but intended to take a short position in the CDO. Defendant moved to dismiss the complaint in its entirety for the failure to state a claim. As to the claim for fraudulent inducement, the court concluded that plaintiff adequately pled material misrepresentation in that it alleged that defendant affirmatively misrepresented that plaintiff and the non-party "shared a common interest" when defendant knew that they were in direct conflict. As to reliance, the court found that the plaintiff adequately pled that if it had knowledge of the non-party's true economic interest, it would have materially affected its decision to participate in the transaction. The court rejected defendant's argument that the disclaimers in the offering prohibited reliance. The disclaimers were characterized as "boiler plate" and lacking specificity but, the court held, even if they had been specific, they would not preclude a purchaser from claiming reliance where the facts were particularly within defendant's knowledge. As to scienter, the court found that the complaint furnished a rational basis to infer that defendant intentionally misled plaintiff by its silence in the face of plaintiff's manifest reliance on the mistaken belief that the non-party it was insuring was on the same economic side of the transaction. As to the claim for fraudulent concealment, the court determined that the complaint alleged that defendant had superior knowledge of the non-party's role in the transaction and knew the plaintiff was acting on a mistaken belief. Further, having affirmatively made representations as to the non-party's role in the transaction, defendant had a duty to be complete and accurate. As for the last element of the fraud claims – loss causation - the court found that it was foreseeable that plaintiff would suffer losses as a result of its reliance on defendant's alleged misrepresentation and the concealment of the nonparty's economic interest in the portfolio. However, the court dismissed the unjust enrichment claim finding the pleading contained only a conclusory allegation without a factual basis to support the conclusion that defendant was enriched at plaintiff's expense. ACA Financial Guaranty Corp v .Goldman, Sachs & Co., Index No.650027/2011, 4/23/12, (Kapnick,J).

Motion to dismiss; motion to compel; class action; labor laws; discovery requests. The named plaintiffs were employed by defendants to provide services to homebound, elderly, and disabled clients. According to the complaint, plaintiffs' duties included: performing personal care services; heavy and light cleaning; shopping; running errands; and escorting clients. Plaintiffs worked several 24 hour shifts during their employment, and as many as four such shifts back to back. While working 24 hour shifts, plaintiffs were required to remain at the clients' residences to provide assistance throughout the night; however, plaintiffs did not live at the clients' homes. Named plaintiffs brought an action, pursuant to CPLR Article 9, alleging three causes of action on behalf of a proposed class of all current and former home health care workers employed by defendants in New York during the period from 2005 up to the date that defendants ceased, or were enjoined from, the alleged unlawful practices. Plaintiffs asserted that members of the class had the same duties and were paid an hourly daytime rate and a flat rate for the nighttime hours. Allegedly, defendants failed to maintain and preserve payroll records, failed to post a notice in a conspicuous place summarizing minimum wage provisions, and failed to pay plaintiffs and members of the class the "spread of hours" premium. Plaintiffs alleged three violations of New York Labor Law, including: failure to pay the statutory minimum wage; failure to pay one and a half times the basic minimum hourly rate for all hours worked in excess of forty per work week; and failure to pay the "spread of hours" premium. In an effort to avoid providing the class discovery demanded by plaintiffs, defendants moved to dismiss plaintiffs' class-wide claims, arguing that no violations occurred and that, because the conditions of employment were unique to each prospective member of the class, class certification was precluded. Plaintiffs cross-moved for an order compelling defendants to answer discovery demands, including those addressed to the class members. The court denied defendants' motion to dismiss the class action and granted plaintiffs' motion to compel. Defendants argued that plaintiffs' class-wide claims should be dismissed because the class did not meet the requirements set forth in CPLR §§ 901 and 902, in that the class was fatally overbroad, and the litigated issues too individualized for class treatment. The court held that in order to determine whether the requirements of CPLR § 901 were met, and to assess the considerations listed in CPLR § 902, limited discovery must be conducted so plaintiffs could assemble evidence to meet their burden of showing that they had met the statutory prerequisites for certification of a class. Dismissal of plaintiffs' class-wide claims on the ground that the criteria for certification had not been established was inappropriate at the time. The court did not decide the issue of whether the proposed class was overbroad, holding that, given the legal requirement to maintain records of employee compensation for at least three years, it was not overly burdensome to supply the information requested. Pending completion of limited class discovery, the court held that it was premature to determine whether the class was over-inclusive. Defendants also argued that the claims by the individual plaintiffs were too individualized to allow class treatment under the "commonality" requirement of CPLR §901(a)(2). The court held, however, that when the only difference between members of the class were the hours worked, wage scale, and work locations, the "commonality" requirement was not defeated. The court also noted that defendants did not claim that plaintiffs had not adequately pled facts to support their claims. Whether such factual contentions were sufficiently applicable to the other members of the class would be determined upon the motion to certify the class. Kodirov v. Community Home Care Referral Services, Inc., Index No. 3871/2011, 5/8/12 (Demarest, J.).**

Order to show cause; *Yellowstone* injunction; notice to cure; landlord and tenant; breach of lease. Plaintiff leased property from defendants for use as a grocery store, then installed rooftop HVAC equipment, other rooftop equipment, and communications equipment. When defendants did not respond, plaintiff treated the delay as an approval and went ahead with the installations. Defendants served a 30-day notice to cure, seeking removal of the equipment. Plaintiff then moved by order to show cause for a *Yellowstone* injunction. A *Yellowstone* injunction maintains the status quo and tolls the cure period so that upon an adverse determination, plaintiff may cure the default and avoid forfeiture. The court noted that it could issue a *Yellowstone* injunction only if plaintiff demonstrated that: 1) it held a commercial lease; 2) it received a notice of default, notice to cure, or a threat of termination of the lease; 3) it requested injunctive relief prior to the termination of the lease; 4) and it was prepared and able to cure the alleged default by any means short of vacating the premises. The court found that plaintiff satisfied the first three elements and that, during oral argument, it demonstrated that it was ready, willing, and able to cure the alleged default. The court also held that the termination of the lease and closure of the grocery store would result in irreparable harm to plaintiff and its employees. It conditioned the injunction on an undertaking in the sum of $25,000. Fairway Douglaston LLC v. AAC Douglaston Plaza, Index No. 652592/2011, 4/13/12 (Ramos, J.).

Preliminary injunction; Legalzoom; voting rights; undertaking. In a successful two-member company organized under an operating agreement questions arose as to whether the two had equal votes or votes based on profit share, as both scenarios were stated in different sections of the agreement. The defendant minority member took several unilateral actions to which the plaintiff majority member objected, and the plaintiff sought to enjoin defendant from, inter alia, transferring the entity's assets or interests therein, disbursing the entity's funds, applying for credit or loans, entering agreements on the entity's behalf, and accessing the entity's post office box. The court granted the injunction because, under either view of the voting provisions, the defendant did not have the authority to act unilaterally. Each provision could be read to defer to the other. Turning to applicable New York law, Limited Liability Company Law § 402(a) defers to an operating agreement or, alternatively, members shall vote in proportion to their share of current profits. Although the operating agreement detailed a 70/30 split, the two had amended their relationship more recently, splitting profits 50/50, though it was disputed as to whether those actions were a change in the profit sharing relationship or merely fair at the time. Limited LLCL § 408 provides for, unless overridden by the operating agreement, management by a vote of a majority, meaning equal votes. The court concluded that irreparable harm would occur absent an injunction, though balancing the equities was a much closer question. The injunction required the parties to manage the company by mutual agreement and to obtain mutual consent before binding the company into any agreement, even within the ordinary course of business, and allowed each party full access on an ongoing basis to all documents and reports in the other's possession or control. In every injunction, the plaintiff is required to furnish an undertaking based on defendant's potential damages. Since the court found defendant's damages to be very slight, it set an undertaking of $25,000. Ryan v. Walters, Index No. 54978/2012, 4/11/12 (Scheinkman, J.).**

Reinsurance; Connecticut Unfair Trade Practices Act; fiduciary duty; breach; aiding and abetting breach; gross negligence; negligence; recklessness. Plaintiff insurance company sued Appalachian Management Co., a wholly-owned subsidiary of Lehman Brothers Holdings, Inc. (LBHI) for negligence, gross negligence, recklessness, and violation of the Connecticut Unfair Trade Practices Act (CUPTA) arising from the investment of certain trust assets. It later amended its complaint to add a breach of fiduciary duty claim against defendant and claims for aiding and abetting that breach against four individual defendants. Under a reinsurance agreement, Lehman Re, another wholly-owned subsidiary of LBHI, agreed to reimburse plaintiff for all claims paid out under a certain class of policies in exchange for a premium of $155,667,717 consisting of investments placed into a trust account to serve as collateral for Lehman Re's obligations and the source of payment for the reimbursement obligations. Under the trust agreement, Lehman Re had the authority to invest the assets in eligible securities regulated by Connecticut Insurance Code § 38a-102 or to substitute eligible securities for trust assets. Lehman Re delegated advisory and management authority to Appalachian to invest in its sole discretion, within the law. Nine years later, one of the individual defendants, an assistant vice president at LBHI, instructed the trustee to replace $48,650,000 of trust assets with $44,500,000 face value of Ballantyne Re floating rate debt securities. One week later, LBHI filed for bankruptcy, and plaintiff determined that the Ballantyne Re securities were not eligible securities under Connecticut law and sold them for $4,800,000, a loss of nearly $40,000,000. Plaintiff alleged the substitution of Ballantine Re securities violated

CUPTA, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Defendants moved to dismiss the amended complaint for failure to state a cause of action. As to the statutory claim, defendants argued that CUPTA did not apply to claims arising from the purchase or sale of securities and that, in any event, plaintiffs failed to allege all the elements of a CUPTA cause of action. The court found the parties had not demonstrated whether the substitution of securities arose from a purchase or sale and therefore declined to dismiss on this ground. The court also found that a valid CUPTA cause of action need not satisfy all three of the statutory unfair practices criteria, but may be found unfair because of the degree to which it meets just one of the criteria. On the breach of fiduciary duty claim, the court found that plaintiff had adequately alleged the existence of a fiduciary relationship between itself and Appalachian. Although the court noted that discovery might reveal that a Lehman Re employee actually directed the substitution of securities, the fact that Appalachian admitted to administering some of the assets was sufficient to preserve this cause of action. The court declined to dismiss the aiding and abetting cause of action based on the survival of the breach of fiduciary duty claim. As to the negligence claim, the court found that plaintiff had pled the existence of a duty of care on the part of Appalachian but not on the part of any of the individual defendants. Therefore, it sustained this cause of action as against Appalachian but dismissed it as against the individual defendants. It sustained the recklessness claim as against all defendants. Aetna Life Ins. Co. v. Appalachian Asset Mgmt. Corp., Index No. 103913/2010, 4/13/12 (Ramos, J.).

Shareholder derivative action; breach of fiduciary duty; board demand; documentary evidence. Plaintiff shareholder made a formal demand that the board of directors sue current and former directors, officers, and employees for alleged breaches of fiduciary duty related to the corporation's asset-related exposures. The board formed a demand committee consisting of one outside director to investigate the allegations. The committee hired outside counsel and conducted an investigation. The committee reported its findings to the board, which refused the demand to sue. Plaintiff then brought this derivative action against the current and former outside directors, the current and former inside directors, officers, and employees, and the corporation as nominal defendant. Plaintiff's amended complaint asserted claims against management defendants and members of the board's Audit and Risk Management Committee for breach of fiduciary duty, aiding and abetting such breach, and waste of corporate assets. The amended complaint also included a new cause of action against the committee member, alleging breach of fiduciary duty, aiding and abetting such breach, and waste of corporate assets by causing the corporation to engage in an allegedly sham investigation. Defendants moved to dismiss based on documentary evidence, lack of standing, and failure to state a claim. Plaintiff challenged defendants' submission of the board's refusal letter, contending that it was not documentary evidence and its submission required converting the dismissal motions into summary judgment motions. The court allowed the refusal letter to be considered, noting that courts routinely reference the substance of demand refusal letters to establish causes of action based on refused demands, which requires a heightened pleading standard. The court held that plaintiff failed to plead any particularized facts to raise a reasonable doubt that the board acted in an informed manner, independently, and in good faith. As such, the business judgment rule shielded the board, and plaintiff lacked standing to pursue the derivative claims arising out of the demand. The court noted that the fact that the committee had only one member was insufficient to raise a reasonable doubt, particularly considering that the committee hired outside counsel and a financial expert to assist in the investigation. The fact that the committee member was close to retirement also failed to raise reasonable doubt. The complaint alleged that the committee member was appointed despite his personal culpability, but the court found that this was a conclusory allegation and unsupported by fact that could rise to the level of a substantial likelihood of director liability. Further, the court held that the fact that the committee member may have been part of a previous, unrelated settlement of a shareholder derivative action did not support the assertion that he was biased. Finally, the court held that the fact that outside counsel had previously represented a corporate subsidiary on a completely unrelated matter did not create a conflict. Regarding the causes of action alleged against the committee member, the court found that these claims were not made in the demand letter and arose from a different set of circumstances as set forth in the demand. Plaintiff argued that a demand with regard to these new claims would have been futile, however the court held that plaintiff failed to expressly plead this alleged futility in the amended complaint. As such, the court granted the defendants' motions to dismiss in its entirety. Lerner v. Prince, Index No. 650417/2009, 5/15/12 (Fried, J.).

Shareholder derivative action; choice of law; breach of fiduciary duty; breach of loyalty; accounting; oppression; disqualification of counsel. Shareholders in a private real estate investment fund incorporated in Mauritius brought an action against the organizer of the fund and several of the companies he controlled for mismanagement and self-dealing at the shareholders' expense. Defendant organized the fund. At its inception, he reserved all voting shares in the fund for the fund's sponsor, which he controlled. He also separately controlled the fund's manager, which received a fee of $500,000 per year. Plaintiffs brought a shareholder derivative suit, and defendants moved for dismissal based on documentary evidence and lack of capacity to sue. Plaintiffs' suit relied upon New York law under the shareholder agreement's choice-of-law provision. The court found that, although New York typically enforces choice-of-law contractual provisions, the laws of Mauritius controlled because the laws of shareholder standing and corporate governance were governed by the law of the state of incorporation. It was undisputed that §170 of the Mauritius Companies Act 2001 (the "Companies Act") required that shareholders seeking to bring a derivative suit must apply for and obtain leave of the Commercial Court in Mauritius. The court found plaintiffs' expert affidavit of a Mauritian barrister to be unpersuasive in that it reached no clear conclusion that New York law should be applied, and the cause of action was dismissed without prejudice. Plaintiffs' motion for an accounting was denied as premature. Shareholders had a right under the Companies Act to inspect certain records of the company, but plaintiffs had not arranged for any inspection with the company. Plaintiffs claimed that defendant breached a duty of loyalty and fiduciary duty but, since this cause of action was limited to a company's director or secretary for duties specified in §§94, 148, and 156 of the Companies Act and plaintiffs failed to allege a breach of these named duties, the derivative claims were dismissed. Finally, plaintiffs brought a cause of action for oppression under §178 of the Companies Act, which provided relief for unfairly prejudicial conduct. However, the statute did not apply to companies holding a Category 1 Global Business License, and the cause of action was therefore dismissed. Additionally, plaintiffs moved to disqualify defendant's counsel by asserting that there was a conflict of interest based on its past representation of the fund and current representation of defendant. Since the fund was represented by new counsel and was not a defendant to this case, the court held that there was no conflict. OM Investments v. E.S.P. Das, Index No. 650936/2011, 5/16/12 (Ramos, J.).

Statute of Limitations; reasonable diligence; two year extension; CPLR 203(g). Fraud. Contract; successive breaches. Limited liability companies; alter egos. Unjust enrichment; attempt to plead around contract. Plaintiff had invested close to $1,000,000 in shopping centers in Atlanta and Detroit, becoming a 10% member pursuant to two operating agreements. Plaintiff sued the centers' owners and a third LLC with which they were affiliated, and various other defendants, individuals and entities, alleging numerous misdeeds including fraudulent inducement, and that $4,300,000 was missing from one center's acquisition, or, the other investors did not really invest $11,500,000. Defendants moved to dismiss based on statute of limitations and failure to state a cause of action. Delaware law governed the case's substantive issues, New York law the procedural. Plaintiff argued that his claims were not time-barred because he had no reason to suspect impropriety until his demand for access to company books was refused, and, furthermore, only after being granted limited discovery did he learn that defendants had misappropriated more than $18,000,000, and he had sued within the two-year extension period provided for under CPLR 203 (g). The court explained that the fraudulent inducement claim was time-barred because that claim accrues upon contract execution and plaintiff sued more than six years after entering into the agreements. Moreover, plaintiff could reasonably have known about the fraud well before demanding access to the books, when certain payments allegedly promised to him ceased. Similarly, a claim for breach of fiduciary duty seeking money damages only, governed by a three-year limitation, accrued more than three years prior to filing the complaint and so also was dismissed. Plaintiff's breach of contract claim, on the other hand, contained numerous continuing performance claims that involved discrete acts well within the six-year limitations period. Although plaintiff could not recover for acts outside the six-year limitations period, or for acts that could not have been discovered with reasonable diligence within six years, within the two-year extension period, the breach of contract claim could not be dismissed in its entirety. The unjust enrichment and declaratory judgment claims survived the statute of limitations defense to the same extent. The court also declined to dismiss the breach of contract claim for lack of particularity. Yes, most of plaintiff's allegations were of actions within the broad discretion accorded defendants under the agreements and Delaware law, but plaintiff did allege facts sufficient to allege breaches. Plaintiff's claim for declaratory judgment that all the named individual and institutional defendants were alter egos was dismissed since plaintiff failed to demonstrate either the necessary corporate domination by some defendants over the corporation or that through their dominance defendants abused the privilege of doing business in the corporate form. Plaintiff's claim for breach of the implied covenant of good faith was based on assertions concerning accounting and other obligations expressly covered by the agreements, which therefore could not serve as basis for a separate claim. Unlike the breach of contract claim, the fraud claim was dismissed for lack of particularity, the court noting that plaintiff failed to allege misleading statements defendants made or that defendants were obligated to disclose certain transactions; the court also pointed out that under the agreements conduct of the company's financial affairs, including size of reserve funds, was within management's discretionary authority. Claims for unjust enrichment and constructive trust were dismissed because the parties' relationship was governed by contract. Nor could plaintiff use an unjust enrichment claim to hold defendants not parties to the contract liable to it. Finally, plaintiff did not dispute defendants' claim that the Delaware Court of Chancery is the exclusive forum for statutory books and records claims; instead, he argued that books and records are subject to discovery in courts of law in civil cases. Because the previously assigned Justice already had declared that plaintiff should have access, the claims for that access were dismissed. Whether particular books and records plaintiff sought must be produced would be determined in the course of discovery. Antebi v. Thor Gallery at Warren Conner, LLC, Index No. 600371/2010, 4/4/12, (Sherwood, J.).

Summary judgment: CPLR § 3213. Interest rate swap agreement; instrument for payment of money only; instrument that does not cite a sum certain on its face. Plaintiff's motion for summary judgment in lieu of complaint under CPLR § 3213 raised, at core, an issue not previously considered by New York courts, namely, whether an interest rate swap agreement may qualify as an instrument for payment of money only. In an interest rate swap agreement, parties agree to trade cash flows on a notional amount. Here, defendant agreed to pay a fixed interest rate and plaintiff a floating rate set to a market indicator. The $10,000,000 notional amount was not exchanged, but was the reference point for payments. In months the floating rate rose above the fixed rate, plaintiff paid defendant the difference, and in months the fixed rate was above the floating, defendant paid plaintiff. Subsequently, the floating rate dropped below the fixed interest rate, defendant ceased payments, it acknowledged, and plaintiff elected early termination under the agreement. The court stated that an agreement is not an instrument for payment of money only if it requires proof outside the agreement to resolve the claim beyond simple proof of nonpayment or a minimal deviation from the document's face. Arguing against summary judgment, defendant contended that the agreement here was analogous to one that the Second Department disqualified from CPLR 3213 treatment, because, the court had said, the agreement provided for more than a simple unconditional promise by defendants to pay a sum of money at a certain time. The court distinguished that case, however; the sums there were keyed to plaintiff's distributions pursuant to various limited partnership agreements and the abundance of agreements made the amount due difficult to calculate. More important, that agreement could reasonably be expected to involve issues of fact concerning who paid what, when. An instrument is not ineligible for CPLR § 3213 merely because it does not cite a sum certain on its face, the court said. In the swap agreement here, the interest rates were publicly available and easy to ascertain. Therefore, the external proof required here was no greater than that needed to calculate the debt on a guaranty on a loan subject to a variable interest rate, which already has been determined eligible for CPLR § 3213 treatment. The court further noted that the parties knew at the time of signing that a debt would be due under specified conditions, no partial performance was required to trigger it, and defendant acknowledged its debt. Therefore, the agreement in this case– the same did not invariably apply to all interest rate swap agreements, the court cautioned–was an instrument for payment of money only. Plaintiff's motion for summary judgment was granted and calculation of damages referred to a special referee. Allied Irish Banks, PLC v. Young Men's Christian Association of Greenwich, Index No. 652967/2011, 4/12/12 (Fried, J.).

Unfair competition; trademark infringement; conversion; breach of contract; prima facie tort; business reputation; GBL §§ 360-k and 360-1; motion to dismiss; consolidation; motion to replead. Scalamandre Silks, Inc. ("Scalamandre") was a world-renowned manufacturer and importer of textiles, decorative textile trims, wall covering, and carpeting. Plaintiff agreed to engage in a foreclosure of a loan made to Scalamandre and secured by Scalamandre's assets. As a result of the foreclosure, plaintiff became the owner of Scalamandre's assets, intellectual property, and associated goodwill. This action and its companion action, Bitter v Renzo (Index No. 652003/2011), arose out of the asset foreclosure. The amended complaint alleged the following causes of action against all defendants: common-law unfair competition; common-law trademark infringement; trademark infringement and damage to business reputation pursuant to GBL §§ 360-k and 360-1; use of name or address with intent to deceive pursuant to GBL § 133; and prima facie tort. It also alleged conversion against individual defendant Robert Bitter and breach of contract against individual defendant

Mark Bitter. Defendants Adriana Bitter, Mark Bitter, and Robert Bitter moved for an order dismissing the amended complaint based upon documentary evidence and for failure to state a cause of action. Defendants Franco Scalamandre and Siddhartha Holdings, LLC ("Siddhartha") moved to dismiss the amended complaint for lack of personal jurisdiction and failure to state a cause of action. Defendant Fret Fabrics LLC ("Fret"), moved to dismiss the amended complaint for failure to state a cause of action. Plaintiff cross-moved for an order consolidating this action with the companion action or directing that the two actions be jointly tried. The court held that long-arm jurisdiction did not exist over Scalamandre and Siddhartha, because, in context of a commercial tort where the damage is solely economic, the situs of the injury is where the original events associated with the action or dispute took place, not where the resulting damage occurred. Long-arm jurisdiction was improper because plaintiff alleged that these defendants filed the alleged trademark applications outside the United States. The court denied the motions to dismiss the causes of action for common-law and statutory trademark infringement. Plaintiff adequately alleged that it had recently trademarked Scalamandre with the State of New York and that defendant Robert Bitter was working as an agent of Fret selling and marketing Scalamandre goods to customers. Defendant Mark Bitter also assisted Scalamandre and Siddhartha in securing Scalamandre trademark applications outside the United States. While the Bitters and Fret asserted that plaintiff could not establish a likelihood of confusion, the court held that a determination as to the likelihood of confusion was a fact-specific inquiry inappropriate at this stage of the action. The court also denied the motions to dismiss the causes of action for permanent injunctive relief under the GBL. The amended complaint sufficiently alleged a use of the Scalamandre marks, and whether defendants intended to deceive the public could not be resolved on a motion to dismiss. Plaintiff alleged that Scalamandre had been selling textiles for a long period of time, had a showroom for decades in Manhattan, and had been commissioned by multiple presidential administrations. This was sufficient to allege that the Scalamandre trade name had acquired a secondary meaning. The court also held that the Bitters and Fret were not entitled to dismissal of the unfair competition claim because plaintiff had sufficiently alleged trademark infringement and dilution. Further, plaintiff had sufficiently alleged that defendants misappropriated and exploited proprietary information and trade secrets. The court held the Bitters were not entitled to dismissal of the conversion cause of action because the complaint alleged in detail that Robert Bitter removed property belonging to plaintiff from plaintiff's archives. The Bitters's motion to dismiss the cause of action for breach of contract was also denied. Mark Bitter entered into a non-competition agreement which could be enforced to the extent of plaintiff's legitimate interest in the enjoyment of the asset bought. The court dismissed the prima facie tort because the amended complaint failed to allege that defendants acted with disinterested malevolence, and plaintiff failed to allege any special damages. The court denied plaintiff's request to replead because it did not provide any basis to support the cause of action for prima facie tort. The court granted plaintiff's motion to consolidate this action with the companion action because they involved common questions of law and fact. <u>Ronkonkoma Operations LLC v. Bitter</u>, Index No. 652006/2011, 4/12/12 (Schweitzer, J.).

The complete texts of decisions discussed in the *Law Report* are available by hyperlink on the website of the Commercial Division at www.nycourts.gov/comdiv (under the "Law Report" section), and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org (and following links). Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the *Report* by e-mail automatically. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports by the State Reporter.

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