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Accountants; pleading fraud, negligence and gross negligence; privity. Action against accounting firm by commercial landlord alleging fraud and other wrongs in connection with auditing of financial statements of an insurer, the commercial tenant. Plaintiff claimed to have relied on audited and certified financials in deciding whether to agree to a lease amendment that allowed the insurer to vacate the premises and terminate the lease years before its natural termination. Citing Houbigant, the court pointed out that a fraud claim against an accountant need only be set forth in sufficient detail to apprise the defendant of the nature of the claim, that the circumstances surrounding fraud may be peculiarly within the knowledge of the defendant and that, where discovery has not occurred, it suffices if the complaint contains some rational basis for inferring that the alleged misrepresentation was knowingly made. The court held that the allegations here sufficed. The court also held that the complaint adequately alleged gross negligence, asserting that the irregularities had been massive. The plaintiff alleged that the defendant firm had known that the certified statements were going to be used and relied on by plaintiff to assess the insurer's financial condition in connection with the proposed lease amendment, which sufficiently alleged privity. Motion to dismiss denied. Water Street Leasehold LLC v. Deloitte & Touche, LLP, Index No. 601091/2003, 4/19/04 (Lowe, J.).

Accounting; burden; required detail; breach of fiduciary duty; breach of partnership agreements. Action for damages arising out of defendants' alleged mismanagement as general partners of a residential apartment building. Defendants, having submitted an accounting to plaintiffs as directed by a previous order of the court, and claiming that plaintiffs had not objected to any items disclosed in the accounting, moved for an order judicially settling their account and granting them a discharge and release. Plaintiffs opposed the motion, asserting, *inter alia,* that the accounting was unverifiable as it lacked sufficient detail about deposits made, gave no explanation as to how the partners' capital accounts were calculated and generally did not comply with GAAP. The court denied defendants' motion, finding that the fact that plaintiffs had failed to object to any specific items in the accounting did not constitute a partial acceptance, but rather served as an objection to the entire accounting because the lack of detail and completeness rendered it impossible to verify its accuracy or to determine whether defendants' alleged self-dealing transactions were included. The court further stated that defendants had failed to submit evidence rebutting plaintiffs' objections. Cooper v. Tomback, Index No. 601599/2002, 3/15/04 (Ramos, J.).

Arbitration; authority of arbitrator; review. Motions to confirm and reject arbitrator's award of $8 million. Petitioners claimed that the arbitrator had failed as required to conduct an investigation. The court ruled that petitioners had failed to note that the engagement letter gave the arbitrator discretion to determine the inquiry necessary. The court stated that the petitioners had submitted relevant material to the arbitrator. Petitioners contended that the arbitrator had improperly refused to receive testimony. The court found that the arbitrator had refused a request for a continuance to allow a particular person to testify and that that was in his power. The court further found that the arbitrator presented reasonable bases for refusing the request. Finally, petitioners claimed that the arbitrator had erred in determining that he had no authority and fixing the amount of certain costs. However, the court found, the costs had not been disputed as required by the agreement between the parties. The award was confirmed. Creative Communication of America v. Green Harbour Communications, Index No. 604530/200, 4/30/04 (Cahn, J.).

Arbitration; FAA; NASD Code; NASD-DR 10201 (a) (1); vacatur; employment agreement. Trade secrets; unfair competition. The court denied petitioner's motion to vacate or modify an award of over $1 million in favor of respondent made in an NASD arbitration proceeding arising out of petitioner's misuse of trade secrets. The award designated a lump sum for compensatory damages, not indicating how the sum had been computed. Petitioner failed to show that the award had been granted in manifest disregard of the law, one of few bases for vacatur. Petitioner asserted that the award had been a windfall for respondent, his former employer, and argued unsuccessfully that it should have been based merely on respondent's lost profits, rather than on–as he asserted it was–his subsequent employer's gross revenues. The case cited to support his theory that the award sum should have been based on lost profits contained no breach of agreement allegation, though, and this one did; the arbitrators might have based the award on breach of contract rather than equitable theories. The court noted that wherever a barely colorable justification exists to support an award, the award should be confirmed. Even assuming that, as required to establish manifest disregard, the law on damages in this case was well defined, explicit, and patently applicable, petitioner failed to allege, as also required, that he had provided the law to the arbitrators. Petitioner further petitioned to reduce the award to reflect only net profits that his former employer had lost due to diverted transactions, which would have cut the award by two thirds. An arbitration award may be modified due to a mistake apparent on its face, such as a miscalculation, which petitioner argued had been made. But there had been no calculation presented on the face of the award. Petitioner adduced a calculation, his own inference, from which the award could have been derived–a possibility, not a certainty. It is generally a better practice to explain how an award was computed, but the arbitrators were not mandated to do so. The miscalculation petitioner adduced was not only missing from the face of the award, he failed to show that it underlay the award. Greenberg v. Twenty-First Securities Corp., Index No. 114900/2003, 4/21/04 (Cahn, J.).

Brokers; licensing agreements; exclusive right to sell; exclusive agency; primary cause. Tortious interference. Fraudulent inducement; reliance; statement of future intent. Discovery; amendment of interrogatory answers; failure to act promptly. Reference to hear and report; frivolous conduct; false statements. Action arising out of agreement regarding licensing of defendants' products. Plaintiff was to receive royalty on sales of defendants' products. Plaintiff argued that he had had an exclusive agency or right to sell, with which defendants had interfered. An exclusive right to sell requires a clear statement to that effect; a designation as "exclusive broker" is not enough. The court found that the agreement here required plaintiff to negotiate a licensing agreement in order to obtain compensation. As that had not occurred, plaintiff was not entitled to a commission. Nor did the agreement bar defendants from negotiating agreements themselves. At most, there was an exclusive agency and plaintiff would have to demonstrate that he had been the procuring cause. The court found that defendants, not plaintiff, had been the procuring cause of the agreement with the third-party. Also, defendants had not violated the agreement with plaintiff, as plaintiff claimed. The court ruled that plaintiff had offered no evidentiary support for his claim that defendants breached their duty by unduly interfering with plaintiff's work. On defendants' fraudulent inducement counterclaim, defendants could show no damages and did not show that plaintiff had made material misrepresentations knowingly or that defendants had relied. Plaintiff's alleged promise regarding securing licensing agreements for defendants was a statement of future intent. The counterclaim was thus deficient. A tortious interference counterclaim failed in that there was no contract at the time plaintiff had acted and defendants could not show damages as to interference with prospective economic advantage as they had entered into a contract after a time. Defendants also did not name parties to a contract they would have entered into but for plaintiff's conduct. Plaintiff sought to amend interrogatory answers. The court refused, noting that the allegations therein had been outstanding for three years prior to the motion to amend. Plaintiff had had ample chance to amend but had not done so. The court held that the Referee had properly exercised authority on a discovery issue. In any case, the court found, the Referee had been correct in ruling that there had been an orchestrated attempt to obstruct discovery. The court held that the Referee had correctly found that plaintiff had violated Rule 130-1.1 by failing to withdraw a motion and filing frivolous motions. The court found that plaintiff and his former counsel had made material factual statements that were false and had engaged in frivolous conduct. Costs and attorney's fees authorized; hearing allowed without need for a plenary action. Levine v. Angsten, Index No. 604063/2000, 3/9/04 (Ramos, J.).

Contracts; asset purchase; duty of seller not to impair good will. Employment; restrictive covenants; breadth. Defendants sought a preliminary injunction against plaintiffs. Defendants had purchased a business from plaintiffs pursuant to an asset purchase agreement and plaintiffs had executed employment contracts with defendants containing restrictive covenants. The court stated that the seller of a business has a legal duty to refrain from impairing the good will of the business, including to refrain from soliciting former customers, which duty is not subject to a test of reasonableness and is indefinite in duration. The agreement here had included the sale of good will and customer lists. Therefore, the court held, plaintiffs would be enjoined from soliciting former customers. As to the restrictive covenant, a test of reasonableness applies. The court found the covenant extremely broad. Also, plaintiffs alleged that defendants had breached the agreement by failing to pay wages. When a party benefitting from a covenant breached the contract, the covenant is not enforceable. Thus, issues of fact were raised sufficient to lead the court to conclude that defendants had not established a clear right to relief enjoining plaintiffs from promoting service in any manner. McNamara v. Dav-El Services, Inc., Index No. 15245/2003, 4/2/04 (Emerson, J.).

Contracts; breach of contract; breach of duty not to impair goodwill; solicitation of clients, customers and referrals. Litigation arose after plaintiffs purchased defendants' dental practices. Plaintiffs alleged, *inter alia,* that one defendant had breached his employment agreement and converted fees. That defendant moved for summary judgment. The court found that plaintiffs had not sought to treat defendant's patients. Defendant could have treated these patients without harming plaintiffs. Plaintiffs' claim regarding patient solicitation was dismissed. The court found that defendant had not breached his employment agreement by teaching and providing minimal services at Mount Sinai Hospital, and granted defendant's motion dismissing that claim. This activity had predated the sale and had been known to plaintiffs' shareholders. The court denied summary judgment on defendant's counterclaim as issues of fact remained. Plaintiffs further alleged that a group of defendants had collectively breached their fiduciary duty of loyalty by having solicited plaintiffs' patients, referral sources and employees and breached the duty not to impair goodwill. The court dismissed the patient solicitation claim, but maintained that since plaintiffs had purchased goodwill, factual disputes remained with regard to their allegations of solicitations of employees and referral sources. The court dismissed plaintiffs' claims for conversion, finding that they were predicated on the previously- dismissed solicitation claim. The court granted collective defendants' motion for partial summary judgment, finding that plaintiffs had not refuted the claim that the patient lists at issue were not the plaintiffs.' DDS Partners, LLC. v. Celenza, Index No. 604086/2002, 3/8/04 (Ramos, J.).

Contracts; construction; letter as enforceable amendment; breach. Change orders. Settlement agreement. Releases. Defendant and a third party had entered into a construction contract for a multi-unit apartment complex. Subsequently they had signed a letter that attempted "to address all outstanding disputed change order issues" and that provided that the third party would receive $443,000, including a $106,000 settlement incentive payable upon project completion and execution of a settlement agreement. The letter also required a written amendment to the parties' existing agreement. Soon afterward, due to the third party's voluntary liquidation, plaintiff had undertaken that party's obligations under the performance and payment bonds naming plaintiff as surety. Plaintiff commenced this action alleging breach of contract and other causes of action, seeking recovery of the contract balance and payments pursuant to the alleged incentive agreement. Defendant moved for partial summary judgment that the letter was not an enforceable amendment to the original contract. It argued that the letter was not binding because it was subject to a binding written amendment to the contract and execution of a settlement agreement. The court noted that the issue was not whether the letter was an independent contract, but whether it was a modification of the construction contract, and found that it was. The letter facially comported with the contract's requirements regarding amendment and modification, and, as there had been mutual assent–defendant's offer had been accepted by the third party's countersigning–it also arose to a modification under fundamental contract principles. The letter's requirement that the changes conform with the parties' existing agreement additionally manifested the signers' assent to modify the contract. Further, in exchange for defendant's payment, the third party had accepted less than it had previously demanded on the change orders. Although the letter contemplated a separate settlement agreement with mutual release of claims, obligations and liabilities, the original contract had already provided that defendant was entitled to such releases; in that instance the letter's language was merely redundant. Summary judgment denied. United States Fidelity and Guaranty Co. v. Delmar Development Partners, LLC., Index No. 6699/2002, 4/2/02 (Benza, J.).

Contracts; indemnification; notice; opportunity to participate; consent to settlement. Action arising out of development agreement involving wireless technology. The agreement provided that defendants would indemnify plaintiff from infringement suits provided that plaintiff notified defendants of the suit and that defendants were allowed to participate in the defense and/or consent to any settlement. In a later patent infringement action, a counterclaim was asserted against plaintiff. Defendants argued in this case that plaintiff had not allowed defendants to fully participate in the defense. There had been timely notice and the parties had discussed a joint defense. The court held that the record did not establish as a matter of law whether plaintiff had allowed the defendants to participate. Plaintiff contended that it had still complied since defendants had settled the case. The court ruled that the language at issue, using "and/or", was ambiguous as to whether plaintiff had to satisfy one or both conditions. Further, the counterclaim had not been settled; other claims had been. Plaintiff had had to move for summary judgment on the counterclaim. There were questions of fact as to whether plaintiff had complied with the indemnity provisions. Motion and cross-motion for summary judgment denied. Symbol Technologies, Inc. v. Intersil Corp., Index No. 18971/2003, 3/8/04 (Emerson, J.).

Contracts; interpretation; intention that agreement be executed. Misrepresentation; reliance; relation to contract. Promissory estoppel. Negligent misrepresentation. Action arising out of a sale of a company by plaintiffs to defendants. Defendants moved to dismiss plaintiffs' claims of breach of contract, promissory estoppel and fraud. At issue was whether the parties were bound by an unexecuted stock purchase agreement which had been delayed due to an unresolved ancillary dispute between an outside party and plaintiff. Plaintiffs also alleged that defendants had made misrepresentations to plaintiffs regarding the financing of the transaction. The court granted defendants' motion, finding that plaintiffs had failed to fully perform and that the parties had not intended to be bound absent a fully executed and delivered agreement. When parties do not intend an agreement to be binding until it is reduced to writing and signed, they are not bound until such time. The court ruled that the stock purchase agreement provided that it had to be executed to be enforceable. A contrary interpretation would have created inconsistency with related writings. Plaintiffs contended that the contract had been changed by performance. But, the court held, there had been only part performance and it had not been unequivocally referable to the oral modification. Further, expressions of intent to be bound only by a writing had been made clearly and repeatedly. Contract claims thus failed. The court concluded that there had been no implied-in-fact contract as the parties had intended to be bound by a written agreement. The court determined that there had been no fraud, finding that plaintiffs had failed to allege misrepresentations independent of breach of contract claims. Further, plaintiffs could not have justifiably relied on the face of contradictory contract terms. The alleged statements were also too vague. The court dismissed the promissory estoppel claim as it had been offered merely as an alternative to the breach of contract claim. Finally, the court dismissed plaintiffs' allegation of negligent misrepresentation because there had been no special relationship of trust or confidence between the parties. Complaint dismissed. Naturopathic Laboratories v. SSL Americas Inc., Index No. 600909/2003, 3/8/04 (Ramos, J.).

Contracts; interpretation; recitals. Arbitration; jurisdiction clause. Actions arising out of license agreements for designer clothing. The licensing entity claimed that two agreements had expired based upon a reading of the term "above-referenced agreements" in a cross-default and extension agreement. It was agreed that these included not only four Lauren Agreements, which were the subjects of the operative part of the agreement, but also four Ralph Agreements, which appeared in the recitals. The other entity claimed that the cross-default and extension agreement was intended only to extend the Lauren Agreements and to provide that, if there were a default in Canadian Lauren agreements, the US Lauren agreements would expire as well. The court held that the agreement was not ambiguous. Recitals of a contract indicate only the background and ordinarily do not form part of the real contract. The actual promises are the important part of the contract. Further, the court stated, it could consider the entire circumstances under which a contract was executed. The court found that it would strain credulity that the entity which had taken the license would risk continuation of its very profitable Lauren line on the success of an untried new line. Motions resolved accordingly. The court also ruled that disputes regarding the employment of a former COO of the licensee would have to be arbitrated. An arbitration clause was not negated by an additional clause vesting the state courts with jurisdiction in all actions and proceedings, the latter referring to applications to compel arbitration or confirm or reject awards. Arbitration directed. Jones Apparel Group, Inc. v. Polo Ralph Lauren Corp., Index No. 601736/2003, Polo Ralph Lauren Corp. v. Jones Apparel Group, Index No.110155/2003, 3/15/04 (Lowe, J.).

Corporations; subsidiary; "property", definition of for purposes of termination event under a purchase contract. Plaintiffs owned senior notes issued by defendant Texas corporation. Unless a "Termination Event"– bankruptcy of the company or "its property", among other things–occurred, the holders of the notes were obliged to purchase common stock on set dates. Plaintiffs alleged that the bankruptcy in the UK of a wholly-owned subsidiary of defendant was a Termination Event because the subsidiary was the company's "property." Plaintiffs sought a declaration that a Termination Event had occurred under the purchase agreement and an Event of Default under the indenture governing the issue, and an order compelling defendant to issue the required notice. A no-action clause in the indenture barred plaintiffs from maintaining the action as to the indenture. Such clauses must be strictly construed, but the plaintiffs' real goal was injunctive–the issuance of an order. A subsidiary corporation is not its parent corporation's property, but a separate legal entity. Absent a clear indication of dominion and control the two are not held liable for each other's contractual obligations or acts and cannot aggregate individual claims or debts for set-off purposes, and their parent-subsidiary relationship does not allow agency to be inferred. Here, none of the operative documents indicated any intent to permit a subsidiary's bankruptcy to constitute a Termination Event. The prospectus pertaining to the senior notes referred to a Termination Event resulting from defendant's bankruptcy. It also informed investors that defendant could be adversely affected by operations of its subsidiaries without stating that a bankruptcy of the subsidiary would discharge the holders of their purchase obligations. The court further cited the Commentaries on Model Debenture Indenture Provisions, which did not include "subsidiary" as a meaning of property, and which suggested that a default clause could be made to apply to a major subsidiary, in which case the subsidiary should be defined. Here none of the documents' default clauses referred to a subsidiary. The court's construction did not render the term "property" meaningless, because although property cannot become bankrupt, the company's physical assets could become subject to receivership or liquidation. Plaintiffs argued that "property" should be extended to include "beneficial ownership." But in construing contracts courts are to give the words and phrases used their ordinary meaning. Plaintiffs unsuccessfully argued that the CPLR deems ownership of the shares of a corporation to be ownership of property, but the provisions state only that stock is treated as property. The court found various other arguments similarly unavailing. Aspen Partners v. TXU Corp., Index No. 603184/2003, 3/15/04 (Cahn, J.).

Discovery; subpoena to non-party; relevance; deliberative process privilege. Motion by non-party to quash subpoena. Movant was an entity that advises a government agency, the Superintendent of Insurance, but is not itself a government agency, the court ruled. The movant had prepared an insurance rate manual at issue in the case, which was claimed to be vague and ambiguous. The court ruled that the material sought was relevant. The movant claimed that the information sought is covered by the deliberative process privilege under FOIL, but the court ruled that as the movant is not a government agency, the privilege did not apply. Motion denied. In re Coordinated Title Insurance Cases, Index No. 009600/2003, 4/15/04 (Warshawsky, J.).

Donnelly Act; GBL 349; remoteness of injury; complex and speculative damages. In an alleged class action, plaintiffs claimed that, as consumers at various retail stores, they were obliged to pay excessive prices due to increased charges on merchandise imposed by the retailers in order to recoup additional costs charged to the retailers by defendants in transactions with defendants' debit cards, which the retailers were allegedly required to accept as a condition of being able to accept defendants' credit cards. Plaintiffs alleged a violation of the Donnelly Act. Plaintiffs agreed to abandon class action claims, but defendants argued that they lacked standing because their injuries were too remote. Although the Act had been amended in 1999 to extend standing, the court held that plaintiffs lacked standing since their alleged injuries were too remote. Plaintiffs did not claim to have had any dealings with defendants; rather, their alleged injury derived from the increase of prices on all products in stores where plaintiffs shopped. The alleged injuries were more indirect than in tobacco cases cited by plaintiffs. The court also found that plaintiffs' intention had not been to increase prices on all consumer goods. The court held that plaintiffs' damage claims were speculative and overwhelmingly complex. Any recovery would be duplicative since the retailers had already brought suit and received a large settlement in Federal court. This was not a case where wrongdoers would go unpunished. The Donnelly Act claim was therefore dismissed. In a GBL 349 claim, plaintiffs alleged that defendants had engaged in an extensive ad campaign regarding the debit cards. Plaintiffs sought to waive treble damages and pursue theirs as a class claim. The court held that the claim failed since it was based on ads, but plaintiffs had not alleged anything specific that was misleading. Plaintiffs argued that the claim would survive as it was based on antitrust violations. At present, the issue of a remoteness bar under 349 is pending before the Court of Appeals. Until that court rules, the court here determined that an analysis similar to that used in regard to the Donnelly Act would be proper. The claims here were too remote. Further, the complexity and speculative nature of damages would be problematic for a class action. Motion to dismiss granted. Ho v. Visa U.S.A, Inc., Index No. 112316/2000, 4/21/04 (Fried, J.).

Employment; restrictive covenants. Procedure; preliminary injunction; hearing. Motion by plaintiff for preliminary injunction against former official of plaintiff, her company and another. The court found that either plaintiff had submitted a forged copy of a confidentiality and restrictive covenant agreement, or defendant had submitted a false affidavit about defendant's execution of the agreement. The court held an evidentiary hearing on the application. The court found that defendant had signed the agreement presented by Plaintiff. Based on this finding, the court ruled that a preliminary injunction should issue. The court held that the covenant was enforceable, including a one-year ban on solicitation of plaintiff's clients. Health World Corp. v. Gottlieb, Index No. 600641/2004, 4/13/04 (Fried, J.).

GBL § 349; causation; damages; actual harm. Misrepresentation; damages; loss of benefit of bargain. Proposed class action of minivan purchasers alleging common law fraud and deceit and violation of GBL 349 based upon advertisements touting safety and a safety device the vehicles did not have. Plaintiffs sought an injunction requiring installation of the device and damages for loss, including the cost of installing the device. The court ruled as to GBL 349 that plaintiffs failed properly to allege causation since they did not claim they had seen or heard any of the ads. Also, plaintiffs failed to explain how certain cited ads from a prior year related to the later models at issue in the case. Further, the court held that plaintiffs had not alleged personal injury or costs incurred to install the device, thus failing to allege "actual harm." Plaintiffs claimed they were injured because they purchased the minivans without the device and now would have to pay for its installation. Plaintiffs relied on the alleged deception as both act and injury. The court rejected plaintiffs' fraud claim because it sought recovery for the loss of the benefit of the bargain, not recoverable in such an action. Complaint dismissed. Bradley v. Daimler Chrysler Corp., Index No. 602193/2001, 3/08/04 (Lowe, J.).

GBL § 349, § 350; causation; statute of limitations. In an action alleging violations of GBL 349 and 350, plaintiff alleged that defendant had engaged in deceptive practices, misrepresentation and false advertising with regard to its rules for "Checking Plus" accounts, and moved for class action certification. Defendant moved for summary judgment dismissing the complaint. The account was a revolving credit account that provided customers with overdraft protection. Plaintiff, who had both checking and "Checking Plus" accounts at defendant bank, claimed that defendant had never explained its policy for repayment of overdrafts and had subsequently overcharged him for interest on his overdraft repayment. Defendant maintained that it had notified customers of its procedures for repayment of overdrafts. The court granted defendant's motion to dismiss, finding that plaintiff's testimony had been insufficient to establish that information in defendant's advertising brochure had caused his damages. Plaintiff did not assert that he had ever read a particular brochure and conceded that none of defendant's employees had ever told him that procedures were what he understood them to be. Moreover, the customer agreement presented by plaintiff as evidence of defendant's deceptive omissions, actually refuted plaintiff's allegations, as it had, in fact, established the relevant customer information and policies for "Checking Plus" accounts. The court also concluded that plaintiff had failed to satisfy the elements of either a GBL 349 or 350 claim and stated that, in any event, those claims were time-barred, as plaintiff could not establish that he was injured as a result of defendant's deceptive acts during the three-year limitation period. Plaintiff's motion for class action certification was denied as moot. Sherry v. Citibank, N.A., Index No. 601527/2002, 4/22/04 (Cahn, J.).

Insurance; brokers; duty to pay commission; breach of contract; fraud; promissory estoppel; unjust enrichment; *quantum meriut*; GOL 5-701(a)(2). Defendant insurer moved to dismiss claims of breach of contract, unjust enrichment and *quantum meriut.* Plaintiff, a casualty insurance broker, claimed that he had a contractual agreement with defendant whereby a finder's fee and commission were to be paid by defendant if plaintiff obtained his client's workers' compensation policy from it. Relying on this promise, plaintiff provided defendant with the name of his client. Defendant, however, placed the policy with co-defendant, listed itself as broker of record and subsequently collected the commissions paid on the policy procured for plaintiff's client. Defendant urged that the claim for breach of contract be dismissed as the cause of action was one that sought to hold it liable for the actions of the co-defendant, and was thus barred under GOL 5-701(2) as it was not in writing. The court concurred that the breach of contract claim was barred by the statute of frauds. However, it pointed out that plaintiff appeared to have valid claims against defendant for promissory estoppel and fraud and thus granted plaintiff leave to amend its pleadings to include those causes of action. The court further found that plaintiff had sufficiently alleged claims for unjust enrichment and *quantum meriut.* Napolitano v.Oriska Insurance Co., Index No. 13472/2002, 3/22/04 (Austin, J.).

Insurance; liability insurance; D&O coverage; rescission; duty to defend. Declaratory judgment action seeking declaration that defendants were not entitled to liability insurance coverage to defend and indemnify them in pending civil and criminal proceedings arising out of the Tyco International matter. Defendant former CEO moved for partial summary judgment seeking a declaration that plaintiff provide for his defense costs in three underlying lawsuits pursuant to the fiduciary liability and executive liability sections of its insurance policies. Plaintiff argued it had validly rescinded the policies and returned defendants' premiums based upon misrepresentation, thus nullifying any duties to defendant, and, further, that a personal profit exclusion in the policies barred his claim for coverage. The court stated that the issue of whether plaintiff's unilateral rescission of the policies for misrepresentation could excuse its present duty to provide defense costs for defendant prior to final adjudication of the issue was not much addressed in the New York courts. The court, however, cited with approval to cases in other jurisdictions and found that until plaintiff's rescission claims were litigated in its favor, the policies would remain in effect and bind the parties. If plaintiff were ultimately to prevail and the policies were declared void ab initio, plaintiff might be able to recover its defense costs. The court then concluded that plaintiff had an obligation to defendant to cover defense costs for him in an ERISA action, finding that those allegations fell within the policies' definition of wrongful acts and that the personal profit exclusion did not excuse plaintiff from providing coverage as the ERISA plaintiffs had not alleged that defendant had personally profited from any fiduciary breach. The court further stated that plaintiff had to cover defense costs in the underlying securities action pursuant to the policies' executive liability section, and that the personal profit exclusion also did not apply as plaintiffs' claims in that action were based on defendant's alleged mistakes and omissions. Finally, the court determined that plaintiff must pay the defense costs in the underlying criminal action, again finding that defendant's alleged acts constituted wrongful acts as defined in the executive liability section of the policies. Although the defendant was charged with personally profiting from a criminal enterprise, certain charges did not involve allegations of direct profiting. These charges did not fall within the exclusion for personal profit and a defense of them, which would extend to the entire action, was required. Federal Ins. Co. v. Tyco Intl. Ltd., Index No. 600507/2003, 3/5/04 (Freedman, J.).

Insurance; notice of claim; timeliness; disclaimer; waiver; reservation of rights; definition of "claim." Action arose from a dispute between defendant and Twentieth Century Fox Film Corporation regarding the rights to the Marvel comic book characters "X-Men." Plaintiff moved for summary judgment declaring that it had no duty to defend or indemnify defendant in the underlying federal lawsuit, which alleged Lanham Act violations and common law claims for unfair competition over defendant's marketing, to another company, of a new television series. Plaintiff further moved to confirm the report of the Special Referee. Defendant moved for summary judgment declaring that plaintiff was obligated to defend and indemnify it, and also moved to vacate the Special Referee's report. At issue was whether a letter sent by Fox to defendant on March 19, 2001 which asserted violation of the Lanham Act and breach of their contracting agreement constituted a claim for relief which should have triggered an immediate notice of claim to plaintiff. Plaintiff alleged, *inter alia*, that defendant had failed to apprise plaintiff of information necessary to assess coverage, and that defendant's notice of claim tendered on April 17, 2001 was untimely and should have been sent upon receipt of the March 19 letter from Fox. Defendants asserted that plaintiff had waived its late notice defense by having failed to assert it among its grounds for denial of coverage in an April 18, 2001 letter of disclaimer to defendants. The court distinguished a Second Circuit case, Amro Realty Corp., and determined that plaintiff had not waived its late notice defense since it had reserved its rights broadly and unequivocally. However, the court nonetheless denied plaintiff's motion to confirm the Special Referee's report. The court found that the policy required notice of any "potentially covered claim" and, unlike many policies, defined "claim" to include a demand for "injunctive relief." As that is a judicial remedy, the court stated, a letter, even strongly worded, could not be considered as such. The court denied plaintiff's motion for summary judgment, and granted defendant's motion to reject the report of the Special Referee and its motion for summary judgment declaring that plaintiff was obligated to defend it in the federal court action. General Insurance Company of America Inc., v. Marvel Enterprises, Inc., Index No. 604690/2001, 3/9/04 (Cahn, J.).

Jurisdiction; personal; long-arm statute, CPLR 302 (a) (1) and (2). Forum non conveniens. Collateral estoppel; Texas Court of Appeals. Full faith and credit. Conspiracy. Stock "flip." The Argentine affiliate of plaintiff, a Texas corporation, had held a 100% working interest in exploration and production of hydrocarbons in a region of Argentina designated by a government-awarded Exploration Permit. Plaintiff's affiliate and an Argentine partner had split the interest 55/45 under a JVA. When a vast natural gas reserve had been discovered within the Permit's area the partners had solicited "farm-in" bids to help develop the site. The Argentine defendant's bid for $200 million had been received by plaintiff's affiliate's partner, acting as agent. The partner had concealed the bid from plaintiff. Following negotiations, plaintiff had sold its stock in its affiliate to the partner's Panamanian subsidiary for $8 million, the transaction closing jointly in Argentina and New York. Simultaneous with preparations for that sale, the partner had entered into a confidentiality agreement with defendant for the possible purchase of the same stock. Approximately 10 days after the stock's first sale, defendant and the Panamanian subsidiary had closed on the second sale at a price of $186 million. Plaintiff had thereafter instituted arbitration against its former partner, claiming fraudulent inducement to sell its stock. Texas Federal district court had awarded damages, but the partner had entered bankruptcy in Argentina. Plaintiff had then brought suit against defendant in Texas District Court, alleging that defendant had participated in the former partner's fraud. The Texas District Court had found personal jurisdiction, but the Court of Appeals reversed on the ground that there had been no conspiracy, and dismissed the action for lack of personal jurisdiction. Plaintiff next brought the instant action, essentially the same lawsuit as in Texas, claiming that its former partner and its investment bankers and the New York law firm on behalf of defendant had acted in conspiracy to orchestrate the two steps of the "flip." Defendant asserted that plaintiff was collaterally estopped from raising the conspiracy allegations and moved to dismiss the case for lack of personal jurisdiction. The court found that Texas law bars re-litigation of a claim if a court has fully considered and decided it in an earlier action and that findings of a Texas Appellate court wield the same preclusive effect as trial court judgments. It concluded that the Appellate decision satisfied the requirements of a case having been litigated and was entitled to full faith and credit. Absent a conspiracy, plaintiff's only allegation to support personal jurisdiction involved defendant's employment of a

New York law firm. But the firm's actions did not substantially relate to plaintiff's injury, which had stemmed from fraudulent concealment by plaintiff's former partner and subsidiary. Nothing in the record indicated that the New York firm had been involved in the first sale. Further, the misrepresentations giving rise to the fraud had not been made in New York, so no tort could have been committed in this jurisdiction. The court agreed with defendant that its use of a New York firm to provide due diligence regarding one Argentinian company's sale to another was insufficient to support personal jurisdiction. Case dismissed. Reef Exploration, Inc. v. Shell Compania Argentina de Petroleo, S.A., Index No. 602861/2002, 4/22/04 (Gammerman, J.).*

Leave to reargue; employment; breach of fiduciary duty; unfair competition; misappropriation of trade secrets. Collateral estoppel. Plaintiffs were involved in the development, production and sale of AriZona beverages. The instant action alleged defendants' misappropriation of plaintiffs' confidential and proprietary information gained during the individual defendant's employment at plaintiff's marketing company to develop his own competitor beverage company. Plaintiffs moved for leave to reargue the court's previous order and leave to serve an amended complaint asserting claims for breach of fiduciary duty and unfair competition. The court determined that defendant's five-month employment with one plaintiff had created an employer- employee relationship between them sufficient to sustain the plaintiff's claim for breach of fiduciary duty and that plaintiffs had alleged the provision of confidential, proprietary information to defendant and that defendant had used that information to compete. The court thus granted plaintiff's motion to reargue on that issue. The court, however, denied plaintiffs' motion to reargue the common law unfair competition claim, pointing to the fact that the requisite element of likelihood of confusion had previously been litigated in the United States District Court and determined by that tribunal not to be present when it granted summary judgment dismissing plaintiff's Lanham Act claims. The Second Circuit had affirmed. The court thus concluded that plaintiffs were collaterally estopped from asserting a likelihood of confusion in the instant action. Beverage Marketing USA, Inc. v. South Beach Beverage Co., Index No. 265/2002, 4/5/04 (Austin, J.).

Misrepresentation; availability of relevant information. Breach of fiduciary duty; relationship. Defendant moved for summary judgment in an action arising out of an estate plan agreement. Plaintiff brought the instant action, alleging breach of fiduciary duty and fraudulent misrepresentation. Plaintiff argued that her percentage of the estate should have been based on the worth of the family companies had defendant properly invested during a profitable stock market period in the late 1990's. Plaintiff further alleged that defendant had taken a large portion of the companies' profits for himself, as directors' fees, without authority or consent. Defendant maintained that he had satisfied the agreement and alleged that it was plaintiff who was in breach as she had failed to execute a receipt, release and refunding agreement in accordance with the agreement. The court granted defendant's motion on the ground that plaintiff had failed to show any knowing misrepresentation of fact made by defendant. Much information had been available to plaintiff, but it was never requested. A letter cited by plaintiff had told her that defendant had received director's fees, but plaintiff had not inquired further. Nor were there facts sufficient to support the existence of a fiduciary relationship between plaintiff and defendant. Moreover, the fact that plaintiff and defendant were brother and sister did not by itself establish such a confidential relationship. The court further granted defendant's motion for summary judgment on the first counterclaim to the extent of directing plaintiff to execute a release and refunding agreement as required under the agreement of understanding. Chasanoff v. Perlberg, Index No. 10125/2000, 3/22/04 (Austin, J.).

Motion to dismiss; statutory damages; 47 USC § 227. Defendants moved to dismiss in an action that alleged violations of the federal Telephone Consumer Protection Act. Plaintiffs had received numerous phone calls from a defendant, an alleged commercial telemarketer. Defendant, which had been soliciting enrollment fees for a not-for-profit company, argued that its pre-recorded phone messages fell under the statute's exemption for nonprofit entities as set out by the FCC. The court clarified that the statute distinguishes between for-profit telemarketers soliciting "by or on behalf of" tax-exempt nonprofit organizations, and for-profit companies that deliver their own message as part of their telemarketing approach, using the guise of offering donations or referrals to tax-exempt nonprofit organizations as a vehicle for placing themselves under the statute's rubric. The court pointed out that the latter type of telemarketing scheme was clearly not covered by the statute's exemption, and, in fact, the exclusion of such commercial calls was precisely what had been intended by the drafters. The court held that the claim was sufficient to withstand a motion to dismiss for failure to state a cause of action as plaintiffs alleged that there was a thinly veiled, but improper identity of interest and relationship among the for-profit marketer and the various non-profit organizations for which it performed services. Motion denied. Leyse v. Flagship Capital Services Corp., Index No. 104902/2003, 3/18/04 (Ramos, J.).

Preliminary injunction; specific performance. In an action for breach of agreement regarding an investment and financing transaction, plaintiffs moved for an order enjoining defendants from issuing equity or debt securities, and merging with, or entering into financing agreements with, parties other than plaintiffs. Defendants argued that plaintiffs' claims were baseless and requested that the court impose sanctions. The court denied plaintiffs' request for a preliminary injunction, finding that plaintiffs had failed to provide convincing evidence to support their allegations of irreparable injury, and further dismissed as conclusory plaintiffs' claim that the equities favored them. The court found that there was a question whether specific performance, which the complaint demanded, would be available since courts are reluctant to compel specific performance forcing the organization of corporations. Moreover, critical questions remained as to whether specific performance applied in the instant case, as plaintiffs had not demonstrated that monetary damages would be inadequate. Finally, the court denied defendants' request for sanctions, costs and attorneys' fees, finding that plaintiffs' motion for preliminary injunction was neither meritless, nor undertaken to cause delay. Berkowitz v. Teleplus Enterprises, Inc., Index No. 117263/2003, 3/4/04 (Ramos, J.).

Procedure; extension of time for service, (CPLR 306-b); service abroad; Hague Convention. Third-party plaintiff moved for an order extending the time to serve third-party defendant, a foreign company organized under the laws of Switzerland with its principal place of business in Lugano. The attorney's Request for Service Abroad of Judicial or Extrajudicial Documents had been rejected by the Tribunale d'appello, which claimed that under Article 3 of the Hague Convention, attorneys could not make a request to serve international process absent authorization from a court. The court granted the extension of time to serve, finding that efforts to serve the third-party summons and complaint in Switzerland were reasonably diligent and that any delay had not been caused by the third-party plaintiff, but by factors inherent in the service of process in Switzerland. The court further found that under Article 3 of the Hague Convention, the attorneys were competent authorities to issue the Request for Service Abroad to the Tribunale d'appello in Lugano. Chase Manhattan Bank v. Akin, Gump, Index No. 605246/2000, 3/23/04 (Ramos, J.).

Procedure; motion to restore. Suretyship. Contracts; third-party beneficiary. In a complex action arising from a defaulted loan on a commercial property, the court restored the case after it had been inactive for approximately two and a half years. Defendant surety moved for summary judgment dismissing plaintiff's complaint. The court granted defendant's motion, finding that the sale of the subject property and the Chapter 11 restructuring of a prior loan to the former owner acted as a novation or material change, thus discharging defendant as surety. The court further rejected plaintiff's contention that it was entitled to recover its loss of approximately $1.1 million from an unsecured claim allowed by the Bankruptcy Court, concluding that none of the defendants could be held responsible for plaintiff's liabilities on a new loan to a new debtor. The court dismissed the amended complaint alleging that co-defendants had misrepresented the extent of electrical work completed under the subcontract, finding that plaintiff had suffered no damage in connection with the property and that plaintiff was not a third-party beneficiary. The court dismissed defendant's cross-claim seeking indemnification, or, in the alternative, contribution against other defendants in light of the fact that plaintiff's claims against defendant had been rejected**.** The court further determined that the surety had not met its burden to overcome summary judgment on its cross-claim against other defendants. Village of Hempstead v. Colonia Ins. Co., Index No. 25576/1998, 4/02/04 (Austin, J.).

Procedure; necessary joinder; credit card rewards program; impleader. Arbitration. Plaintiff brought a class action against defendant, alleging, *inter alia,* breach of contact and deceptive business practices (GBL 349) in its administration of a rebate program for defendant's credit card holders. Defendant moved to join Chase Manhattan Bank as a party defendant, arguing that plaintiff was avoiding the arbitration clause set out in the underlying card member agreement by not including the bank, and that under the parties' cobranded agreement, Chase was actually responsible for the creation of the rewards program and its policies. The court denied defendant's motion, and determined that Chase was not a necessary party. The court explained that plaintiff's complaint had not been addressed to Chase's operation of the reward and rebate program, but to defendant's management and application of it, and that defendant had failed to show how it would have been prejudiced by the failure to include the bank. The court further found that the arbitration clause in the card member agreement between plaintiff and Chase would by its terms have been negated if Chase was joined as a party defendant since the remedy under the clause was limited to monetary damages and plaintiff was seeking declaratory and injunctive relief, as well as monetary damages. The court found no agreement to arbitrate here between plaintiff and defendant. The court concluded that defendant's claim for indemnification under the cobranded agreement between it and Chase could be heard as part of the instant litigation by an impleader action. Spector v. Toys "R" Us, Inc., Index No. 16479/2003, 3/22/04 (Austin, J.).

Procedure; standing; assignment; GOL 13-107; "no action" clause in indenture; champerty; personal jurisdiction; transacting business; torts; forum non conveniens; CPLR 3016(b); reliance; scienter; privity regarding accountants; partnership by estoppel. Action arising out of bankruptcy of Canadian holding company. Plaintiff sued on claims assigned to it by individual creditors pursuant to Chapter 11 liquidation plans. Ten defendants moved to dismiss on standing grounds. Plaintiff alleged that the company had engaged in transactions that wasted assets and were in violation of the indenture without notice to the indenture trustee (e.g., the purchase by a subsidiary at an inflated price of a company that was then closed down, without board approval, which transaction was not of a type the company would have negotiated with an unrelated third party.) The court held that plaintiff had standing, agreeing with an earlier Federal decision. The noteholders had assigned their individual claims. The assignment of the company's claims would benefit the company's estate and the unsecured noteholders, who would otherwise lack any mechanism for recompense. The court could not fail to give full faith and credit to the liquidation plan of the Bankruptcy Court, which had authorized the assignment. Defendants argued that GOL 13-107 barred plaintiff from bringing claims against other parties based on a note without a written assignment from each prior holder. The court rejected defendants' argument, which took a narrow view of plaintiff's rights when the legislature had sought to expand rights. Defendants argued that a "no action" clause in the indenture prohibited noteholders' claims here, but the court ruled otherwise since the claims at issue were against accountants for fraud, not breach of the indenture. The court rejected a champerty argument because plaintiff had advanced enough of a basis for a trier of fact to find that the primary or sole purpose behind the assignment was that the noteholders had been trying to protect their interests, rather than commencement of a lawsuit. Thus, the motions based on lack of standing were denied. The court ruled as to certain defendants that personal jurisdiction existed. The indenture trustee and its successor were headquartered in New York and the company's key directors had had to certify to them that there had been compliance with the indenture. Each of these acts, part of ongoing activities, was a "purposeful act," part of an ongoing transaction of business. Some other defendants had allegedly participated in submitting false audit statements to the trustee. The court found that there was a "substantial relationship" between the business transacted and the claims sued on. Personal jurisdiction over an auditor existed because, though not a signatory to the indenture, it had allegedly falsified information when providing services to the company to perform the indenture. Another defendant auditor had attended two meetings in New York where it allegedly had participated in fraud, conspiracy, etc. The court declined to shelter such activities because defendant had no permanent presence in New York. Notions of fair play and substantial justices were not offended. On a forum non conveniens motion, the court noted that plaintiff and most of the note holders were New York residents. So were the trustees. A pledge of stock supporting performance under the indenture contained New York choice of law and forum selection clauses. There was a nexus to New York and it was not clear that only Canadian law would apply. Some of the moving defendants had been involved in a New York state action and a Bankruptcy case in Federal court here. Thus, the motion was denied. Defendants sought dismissal per CLR 3016(b), but the court held that plaintiff, which had had only limited discovery, had set forth allegations sufficient to inform the defendants of the acts complained of. The circumstances of the fraud alleged against the accounting defendants was one peculiarly in the knowledge of these defendants so the claims were sufficiently pled. The court held that the complaint alleged a fraudulent act by one accounting defendant and fraudulent agreement by other accounting defendants so that plaintiff had adequately alleged reliance. As to scienter, on a 3211 motion a plaintiff need only made a particularized factual assertion supporting the inference of scienter, which the court found. On a privity argument as to claims for negligent misrepresentation and accounting malpractice, the court held that plaintiff had failed to allege conduct by the accountants linked to plaintiff acting on behalf of the noteholders. The claims were dismissed. The court also rejected a motion by an accounting defendant seeking to dismiss a partnership by estoppel theory on the ground that plaintiff's allegations were sufficient. Semi-Tech Litigation, LLC v. Ting, Index No. 604644/2002, 3/22/04 (Moskowitz, J.).

Real property; condominium; qualified member restriction; Rule against Perpetuities; EPTL 9-1.1; alienability. Martin Act. It was undisputed that a medical office building situated on land adjacent to defendant hospital and developed by the hospital and its co-defendant had as its purpose to attract to the hospital affiliate physicians. Hospital deed and condominium documents restricted ownership/occupation to "qualified persons," doctors or dentists able to provide at least 25 patient contacts with the hospital per year. Plaintiffs, a surgeon who owned a unit in the building, and an entity that had leased its unit to physicians, alleged that the restrictions represented an unreasonable restraint on alienation of an interest in real property and violated the rule against perpetuities, and sought a judgment declaring the restrictions unreasonable and unenforceable. Defendants moved to dismiss the complaint or, alternatively, for summary judgment, contending, among other things, that plaintiffs failed to state a cause of action because they had no privity with defendants; the hospital did not own the building. The court determined, however, that because the hospital as grantor had placed the restrictions in the stream of title and the condominium documents merely reflected them, plaintiffs' action was viable. Inasmuch as the rule against perpetuities expresses public policy, it cannot be waived by consent of the parties, the court noted. But, in addition, the rule against perpetuities was not implicated, as the hospital did not attempt to have power over the creation of future interests. Analyzing the dispute under the common law principles on restraint on alienation, the court agreed that the qualified member restriction was unreasonable. The hospital had at least once changed member qualifications: the surgeon plaintiff had relied on the hospital's representation that it would support his speciality but the hospital had terminated that facility. The restriction with respect to him was not only an unreasonable restraint on alienation, it bordered on the confiscatory. The hospital also could have accomplished its purpose by the less restrictive means of including preemptive rights. Finally, the court noted the building's 45% vacancy rate and found that public policy favoring productive use and development of property overrode the hospital's purpose. The restrictions in the deeds and condominium documents were void and unenforceable, the court declared. Summary judgment awarded to plaintiffs. WFR Associates v. Memorial Hospital, Index No. 6248/2003, 4/18/04 (Benza, J.).

Securities; NASD "when-issued" market; adjustment in trades; modification of reorganization plan; custom and usage; NASD Practice Code Rule 11130; UCC 8-201(e). Action involving trading in NASD "when-issued" market (a market relating to shares to be issued after approval of bankruptcy reorganization plan). At issue was whether trades in the "when-issued" market should be settled on an adjusted or non-adjusted basis. This question arose after the company moved in Bankruptcy Court to amend the reorganization plan to reduce the shares to be issued from 200 to 50 million. In the "when-issued" market, the contracts had been similar and had no contingency for a reduction in stock. Plaintiff argued that the event was the functional equivalent of a reverse stock split and that the trades should be settled in the same manner as a reverse stock split. The court found that subjective intent was not relevant. The NASD had ruled that it would not cancel or adjust the trades. Defendants argued that the NASD had sole jurisdiction over the trades. The court rejected this assertion, finding that the advisory had not been a final determination of the status of the trades as the NASD did not have authority to adjust the trades. The court declined to accept plaintiff's argument referring to custom and usage because, the court found, the circumstances were unusual and not appropriate for invocation thereof. The court found that under UCC 8-201(e), a reduction in the number of shares would be a material change in the plan, whereas the NASD Practice Code Rule 11130 only allowed for cancellation if there was a material change in the security. Due process was not fulfilled here, the court ruled. Modification of the plan had been approved, the court determined, without adherence to Chapter 11 because at the time no party had considered the modification material. The court ruled that the trades should be adjusted as requested by plaintiff based upon CPLR provisions providing for liberal construction to assure a just result. Maxcor Financial Inc. v. P.Schoenfeeld Asset Management LLC, Index No. 600410/2002, 3/15/04 (Ramos, J.).

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