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Accountants; misrepresentation; scienter; reliance; plaintiff's duty to investigate; causation; sole inducing cause; intervening cause; criminal conduct; aiding and abetting; actual knowledge; punitive damages. Action by bank against accounting firm and partner. The firm had certified the financial statements of a company to which plaintiff had lent money. The opinion was a "clean" one, but the company turned out to have been engaged in fraud and criminal charges were filed, to which various principals and employees pled guilty or of which they were found guilty. Defendants moved to dismiss. The court held that scienter had been adequately pled since the pleading alleged that the partner had been aware of concerns expressed by other auditors and had had enough time to investigate. The court held that the pleading sufficiently alleged facts supporting a claim that defendants had been on notice of fraud at the company but had failed to conduct investigations in accordance with proper auditing standards. The court stated that plaintiff did not have to allege a motive to deceive; intent may be based on allegations that defendants knew that the representations were false when made**.** Also, an auditor's failure to verify financials independently may give rise to a claim for fraud, especially where the auditor had notice of particular circumstances that raised doubts. As to reliance, defendants argued that plaintiff's reliance was not justifiable because it apparently had not investigated or verified the information. The court noted that the report had been a clean one, without restrictions. To plead reliance, the court stated, a plaintiff need not allege that it conducted an additional audit. On causation, the court stated that fraudulent misrepresentations need not be the sole inducing cause of damage. The court held that it was enough that the pleading alleged that plaintiff would not have made loans to the company had the defendant firm not given a clean opinion. The court also found that it was foreseeable that plaintiff would suffer losses once induced by defendants to transact with the company, which, it would have been evident had the audit been accurate, would not have been able to repay a loan. The court rejected the argument that criminal conduct by principals is an intervening cause as a matter of law. The court dismissed an aiding and abetting claim. Such a claim requires a high degree of scienter. The predominant view is that actual knowledge is required to establish such liability, which had not been alleged. The court declined to dismiss a demand for punitive damages. Sterling National Bank v. Ernst & Young, LLP, Index No. 121916/2003, 1/7/05 (Cahn, J.).

Arbitration; FAA; signatory to agreement; Partnership Law § 115-a; adequacy of arbitration procedures; choice-of-law clause; waiver; coverage of arbitration agreement. Plaintiff limited partners commenced a derivative action on behalf of the limited partnership, a hedge fund, alleging, *inter alia,* breach of fiduciary duty and fraud. Defendant former general partner moved to dismiss the complaint claiming that it was time barred and, in the alternative, to stay the action and compel arbitration on the ground that plaintiffs' claims arose under the arbitration clause contained in the limited partnership agreement. Further, defendants claimed that the partnership agreement's arbitration clause was governed by the Federal Arbitration Act. The defendant partnership cross-moved for the same relief. The complaint alleged in part that a defendant, movant's sister, had been facilitating the execution of certain stock transactions at a favorable price for a relative's individual account (i.e., her brother's) and that defendants had deliberately failed to disclose the misconduct to the limited partners and the partnership. The court found first that the arbitration clause was governed by the FAA, but that under New York law, a court could address certain threshold questions on a motion to stay or compel. Plaintiffs argued that the motions to compel should be denied because the limited partnership was not a party to the agreement. The court disagreed and determined that even though it was not a signatory to the agreement, the partnership must act through the general and limited partners and the limited partners were parties to the agreement. The court further found that plaintiffs' claims against defendant clearly fell under the agreement's provision that the parties submit any controversies or claims to arbitration. Plaintiffs argued that Partnership Law § 115-a required judicial determination of their claims and that the American Arbitration Association would not provide adequate procedural protections for their claims. The court found both of those arguments insufficient to deny defendants' motion. Partnership Law § 115-a, the court stated, merely provides that limited partners may bring derivative actions on behalf of limited partnerships. The court also pointed out that plaintiffs had failed to cite any authority indicating that Congress intended that derivative claims brought pursuant to state partnership law not be arbitrable. The court rejected the assertion that AAA rules fail to provide adequate procedural protections. The court further noted that the partnership agreement's choice-of-law clause provided that the agreement's terms and provisions be construed under the laws of New York. Thus, the court must determine the effect of the choice-of-law provision on whether the court or the arbitrator should decide the timeliness of plaintiffs' claims. The court cited the Court of Appeals decision in Luckie and determined that where an agreement is governed by the AAA and provides that the agreement "and its enforcement" are subject to NY law, a court may resolve a defendant's statute of limitations defense prior to sending the matter to arbitration. Here, the choice-of-law clause did not provide that the agreement and its enforcement or the arbitration was governed by New York law. Thus, federal law controlled and the issue of whether plaintiffs' claims were barred by the statute of limitations was one for the arbitrator. The court next addressed plaintiffs' contention that the moving defendant had waived his right to arbitration by requesting that the court convert his motion to one for summary judgment. The court held that defendant had not waived his right to arbitration and that his request to convert the motion had been made solely to allow the court to consider his documentary evidence in support of dismissal. Finally, the court ruled that since the other individual defendants were not covered by the arbitration agreement, the claims against them would be litigated in this action. 212 Investment Corp. v. Kaplan, Index No. 603029/2004, 2/9/05 (Cahn, J.).

Attachment; standards. Contracts; interpretation. Motion for an order of attachment. As part of a sale of businesses, an escrow agreement was entered into. Payments were due from the escrow in stages. Under the agreement, plaintiff was permitted to make a claim to any portion of the funds by serving a "notice of direction" on the bank. The sellers could dispute the direction by serving a notice within 30 days of the dispute, after which specified dispute resolution mechanisms would be employed. Here, plaintiff served a notice of direction as to some $850,000 a few days before the payment date. The sellers stated that they would investigate, but not until after the payment date. When the bank informed plaintiff that it would pay the sellers on the due date, plaintiff sued and sought an attachment. The court rejected defendants' arguments that they had consented to jurisdiction and that the funds did not belong to them as defendants retained some interest in the funds. The court also rejected defendants' reading of the escrow agreement; plaintiff had shown a probability of success on the merits. Defendants argued that plaintiff had to issue a notice of direction no later than 30 days prior to the payment date. The court stated that an agreement will not be interpreted in a manner that produces an absurd or unreasonable result. The court thus agreed with plaintiff that the 30-day dispute period should be measured from the date it served the direction. Defendants' interpretation was not required by any express terms of the agreement, although the agreement did address a tardy notice of dispute by defendants. This omission the court found telling; if the sophisticated parties had intended the outcome defendants argued for they could easily have so provided. The court ruled that the 30-day dispute period should be inviolate, with the funds preserved in escrow and an orderly dispute resolution process maintained. However, the court held that plaintiff would not actually be entitled to an attachment because there must be a showing that drastic action is required for security purposes (such a showing is required by constitutional concerns). Motion denied. Burrell Color, LLC v. Burrell, Index No. 01317/2005, 2/05 (Fisher, J.).**

Commercial real estate; refinancing; assignment. Release; duress; fraud. Contracts; interpretation; ambiguity; custom and usage; merger clause; covenant of good faith and fair dealings; third-party beneficiary. Unjust enrichment; contract. Prima facie tort; independent duty. Extortion. Action by owners of commercial real property against defendant loan servicer alleging that defendant had wrongfully charged an excessively high fee for the assignment of a mortgage and refused to provide one plaintiff with an assignment.

Plaintiffs had sought to refinance mortgage loans by prepaying them and receiving an assignment rather than a satisfaction of mortgage, to minimize their mortgage recording fee obligations. One plaintiff had issued a release. The court rejected plaintiff's duress argument because defendant's threat not to provide an assignment absent a release did not deprive plaintiff of its free will because plaintiff had not alleged or shown that without the assignment it would have been unable to consummate the refinancing. Further, the release had been negotiated. However, the court held that the proposed amended complaint, supplemented by evidence in the record, set forth satisfactorily a basis to avoid the release on the ground of fraud where defendant had allegedly falsely represented that it was demanding the release on behalf of the trustee of a trust. The agreements here did not contain a provision expressly governing whether borrowers on prepayment were entitled to a satisfaction or an assignment. The parties disagreed as to what the custom and usage is on this point in New York so that these were, the court held, issues of fact. Although there was a merger clause, the agreements provided for prepayment and plaintiffs thus were not seeking to introduce evidence that contradicted a contract provision. Further, the court stated, a merger clause would not bar a court from inferring a covenant of good faith and fair dealing where that would not be inconsistent with the contract. Plaintiffs claimed that defendant had deprived them of the full benefits of the prepayment provisions of the loan documents. However, the court ruled, an unjust enrichment claim failed because a valid and enforceable contract governed. A prima facie tort claim failed due to plaintiffs' failure to allege a violation of a legal duty independent of contract. An extortion claim failed since the failure to provide an assignment would not have prevented the refinancing. A proposed claim that asserted third-party beneficiary status of a servicing agreement was found deficient because the right to an assignment rather than a satisfaction was too incidental to the governing contracts to warrant such status and the document expressly negated third-party enforcement, the court found. Dismissal granted in part. 767 Third Avenue LLC v. Orix Capital Markets, LLC, Index No. 601047/2004, 1/21/05 (Fried, J.).

Commercial real estate; refinancing; suretyship status of remainderman. Tortious interference; malice. Action arising out of a series of complex real estate transactions in which plaintiff obtained a remainder interest in fee in 14 parcels located in ten states. Plaintiff alleged that as a result of a financing transaction in 1999 of which it had had no notice. Plaintiff claimed to be a surety, having special rights. Defendants contended that as plaintiff had no obligation to pay any portion of the mortgage debt, it was not a surety. After reviewing authorities and the details of the transactions, the court held that a partnership obtained a fee interest and an estate for years and expressly assumed all liability on the mortgage and was primarily liable. The plaintiff's fee interest was subject to the mortgage debt and became secondarily liable. The remainder future interest was a surety, to the extent of its value. Plaintiff therefore was entitled to assert the rights of a surety. The court held that an obligation of plaintiff to execute such documents "as may reasonably be required" did not unambiguously mean that the surety consented to the 1999 refinancing; there was a question of fact, as there was regarding whether that refinancing impaired plaintiff's suretyship status. Summary judgment denied, except as to a tortious interference claim where it was alleged that a defendant had acted in its economic interest. RM 14 FK Corp. v. Bank One Trust Co., Index No. 600472/2003, 2/8/05 (Fried, J.).

Contracts; breach; collateral estoppel; res judicata; Robinson-Patman Act. Plaintiffs, carriers for a home delivery program of the Daily News newspaper, commenced this action alleging breach of contract, conversion and unjust enrichment. They claimed that, starting prior to 1995 and continuing thereafter, defendant had changed their work rules in breach of the carrier agreements plaintiffs had previously executed with defendant. Plaintiffs alleged that the changes affected delivery schedules, methods of collection, complaint resolution procedures, contract requirements, and pricing and customer lists, causing them to sustain damages and loss of business. Plaintiffs had commenced two prior actions based on the same claims, one in Richmond County Supreme Court and the other in the Federal court in the Southern District of New York. In the Federal action, plaintiffs had asserted five federal antitrust claims in addition to a New York State breach of contract claim. The Federal court dismissed all but one of the five antitrust claims, sustaining a claim for secondary-line price discrimination under the Robinson-Patman Act. Plaintiffs moved in Richmond County for leave to voluntarily discontinue the State action without prejudice. The State court granted the discontinuance with prejudice and the order was subsequently reversed by the Appellate Division, Second Department. After plaintiffs ultimately concluded that they could not provide sufficient evidence to sustain their claim under the Robinson-Patman Act, they moved for voluntary dismissal of their claims in Federal court. A Notice of Voluntary Dismissal provided that plaintiff's Federal court action was conditionally discontinued without prejudice, and expressly provided that plaintiffs had not sought dismissal of the remaining State law claims in their complaint. On February 24, 2003, plaintiffs and defendant had entered into a stipulation of dismissal which stated, *inter alia,* that plaintiff's State law claims were dismissed without prejudice to refiling them in State court. Defendant moved in this case for an order dismissing plaintiffs' complaint based on res judicata. Defendant asserted that certain allegations in plaintiffs' breach of contract claim were reiterated in their conversion and unjust enrichment claims, and that the allegations in this action were based upon the same allegations as the previously dismissed Federal price discrimination claim. Thus, defendant contended, the Notice of Voluntary Dismissal served to bar plaintiffs' complaint under res judicata. Defendant further argued that some of plaintiffs' claims were barred by collateral estoppel. The court denied defendant's motion to dismiss the complaint on the grounds of res judicata and collateral estoppel. The court found first that, pursuant to the terms of the February 24, 2003 stipulation of dismissal, plaintiffs' refiling of their claims in the State court was appropriate. The court next determined that the conditional order of discontinuance issued by the Federal court which dismissed plaintiffs' Federal claim for secondary-line price discrimination did not dispose of plaintiffs' State law claims and pointed out that the price discrimination claim was distinct from plaintiffs' State law claims in the Federal action. The court further found that the Federal court did not make any determinations on the merits of plaintiffs' State law claims and thus such claims could not be barred by res judicata. The court found unpersuasive defendant's argument that collateral estoppel barred some of plaintiffs' claims, and concluded that the Notice of Voluntary Dismissal was not a determination of issues on the merits in the Federal action. The court ruled that plaintiffs had stated a viable cause of action for breach of contract. The court, however, granted defendant's motion to the extent of dismissing plaintiffs' conversion claim, finding, *inter alia,* that it was duplicative of the breach of contract claim, as it had not alleged a taking separate from the breach of contract, and that no factual basis for the conversion claim had been pled other than the terms of the contract. The court granted defendant's motion to dismiss plaintiffs' claim for unjust enrichment because the allegation was covered in plaintiffs' breach of contract claim. Unjust enrichment is an equitable claim and in this case, the court found, it had not been properly pled by plaintiffs, nor was its allegation supported. Finally, the court denied defendant's motion to dismiss plaintiffs' complaint with respect to a certain plaintiff because that plaintiff had not been named as an individual engaged in the business of newspaper delivery. The court found that since plaintiff had been included in the caption of the action, the subsequent irregularity had not prejudiced any substantial rights of the defendant and could be easily corrected or disregarded. The court further found that defendant had made no affirmative showing of the absence of a contract between it and this plaintiff. Cirri v. Daily News L.P., Index No. 26512/2003, 2/7/05 (Demarest, J.).**

Contracts; breach. Employment; unions; airlines. Stock "put" rights. Delaware GCL § 160; creditor protection; impairment of capital. The court granted the plaintiffs partial summary judgment on claims against the defendant airline for breach of a contract that had granted the plaintiffs, in exchange for $866 million in wage and benefit concessions, "put" rights in regard to an issue of Preferred Stock in the defendant. The stock would be held for the plaintiffs until they exercised the put rights, compelling the defendants to choose among repurchase options. Or, alternatively, with the votes of two of three board members the plaintiffs had been allowed to appoint as further consideration for their concessions, the defendant could exercise certain other options, But if the defendant had not repurchased all of the stock by a certain date, the shares would begin to accrue high dividends, and the plaintiffs would be entitled to appoint more board members. Prior to the designated Put Date the defendant, as required, had announced its elected option: to repurchase the Preferred Stock using cash. In the same announcement it had added that it could not carry out the repurchase because that would "impair" its capital in violation of Delaware Law, under which it was incorporated. The defendant acknowledged the obligation to repurchase, but contended that the law required it to defer the transaction until its financial condition improved. The plaintiffs brought two suits that were consolidated by the court. As a threshold matter the court found that, contrary to the defendant's contention, a Certificate of Designations accompanying the Preferred Stock issue that omitted the provisions in the agreement requiring majority votes by the plaintiff-appointed board members did not govern the parties' contractual relationship. The agreement governed. Regarding the Delaware Law, the point at which to measure capital impairment was the Put Date and not, as the plaintiffs argued, ten years before when the agreement had been executed. But even if the defendant had properly invoked the Delaware Law, it had misinterpreted a key provision of the Put Right as giving it three choices: repurchase with cash; repurchase with common stock; or exercise an alternative option that gave the plaintiffs certain options. On its face, however–and as the structure of the subdivisions made clear–the provision had given only two choices: to repurchase or take the alternative option. Once the defendant had announced its choice to repurchase, if it could not repurchase with cash it had to repurchase with common stock, which would not have been prohibited under the Delaware Law. After the defendant's announced election of the cash option, its board had passed a resolution that it could not conclude that repurchasing the stock would be lawful. This constituted a breach because the majority of the board members the plaintiffs had appointed had voted against the resolution, and pursuant to the agreement the defendant could choose not to repurchase any of the Preferred Stock on the Put Date only if it had the consent of a majority of those members. Partial summary judgment for plaintiffs on liability. International Association of Machinists and Aereospace Workers v. Northwest Airlines Corp., Index No. 602476/2003, 3/22/05 (Freedman, J.).

Contracts; breach; pleading. Tortious interference. Breach of fiduciary duty; existence of duty. Fraud; reliance; statement of future intentions. Unjust enrichment; unclean hands. Litigation arose out of multiple business agreements among the parties. Plaintiff alleged, inter alia, that it had provided goods and services to a corporate defendant, a Nigerian oil exploration company owned by an individual defendant. Plaintiff alleged in part that it had paid over $1 million in exchange for the individual defendant's representation that plaintiff would expand in Nigeria and in the United States. Plaintiff further alleged that the individual defendant and his co-defendant son created another entity in secret as a competing organization, in order to gain control of plaintiff's employees, contracts and business. In its complaint, plaintiff asserted claims for breach of contract, breach of fiduciary duty, unjust enrichment, accounting and fraud. Three defendants moved to dismiss. Plaintiff cross-moved for an order allowing it to amend the complaint to assert a cause of action against defendant CSS Petroleum; for an order finding that all defendants had defaulted in answering; and for an order consolidating defendants' motions. The court dismissed the breach of contract claim because the complaint had not sufficiently pled the terms of the alleged contract, the consideration owed by the individual defendant or a breach of the contract. Having found no breach of contract, the court next found no cause of action for tortious interference of the Nigeria Agreement by the allegedly competing entity, explaining that another defendant, Pan Ocean, was not a third party that could have been induced to breach. The court denied plaintiff's application to assert a cause of action against the competing entity as plaintiff had failed to allege wrongful means by this defendant in its pursuit of plaintiff's business opportunities. Plaintiff's claims for breach of fiduciary duty and an accounting were dismissed for lack of factual support that defendants had owed it a fiduciary duty; the complaint indicated that the relationship among plaintiff, the individual defendant and Pan Ocean was one of arms length, which would not give rise to a fiduciary duty. The court determined that plaintiff could not recover for unjust enrichment because it lacked "clean hands" due to its admitted willing participation in the selling and redeeming of its treasury stock in fraud upon the INS. The court dismissed plaintiff's claims for fraud, finding that there had been no allegation by plaintiff of misrepresentation by defendants of present facts, as opposed to future intentions, promises, or expectations. The alleged statements here fell in the latter category. Defendants' motions to dismiss were thus granted and plaintiff's cross-motion was denied. International Oil Field Services Corp. v. Fadeyi, Index No. 5991/2004, 4/25/05 (Austin, J.).**

Contract; breach; stock purchase agreement; breach of fiduciary duty; conversion; fraud; 42 USC § 1983; rescission; adequacy of remedy at law. Action arising out of a stock purchase agreement with defendants for a dry cleaning and laundry service. Plaintiffs claimed that although they had satisfied their obligations under the stock purchase agreement, defendants had breached by failing to deliver the company stock. Plaintiffs alleged causes of action for, *inter alia,* fraud, conversion and violation of 42 USC § 1983 against both defendants. Plaintiffs also alleged claims for breach of contract and rescission against defendant Cho and breach of fiduciary duty against defendant Oh. Defendant Oh cross-claimed against Cho seeking monetary damages. Defendants moved to dismiss. The court found that plaintiffs' breach of contract claim and defendant's cross-claim should survive as the documentary evidence was not dispositive of either claim. The court dismissed plaintiffs' claim for fraud as against defendant Cho only, finding the allegations insufficient since plaintiffs had not alleged that Cho had made any statements on which plaintiffs had relied separate from the agreement itself, but the court dismissed the portion of the fraud claim that sought punitive damages. The rescission claim was dismissed as plaintiffs had failed to demonstrate that a complete and adequate remedy was unavailable at law. The court dismissed the conversion claims in both the complaint as well as in defendant Oh's cross-claim as duplicative of the breach of contract claims. The court did not dismiss plaintiffs' claim for violation of 42 USC § 1983, finding that claims alleging state involvement mandated factual inquiry. The court also allowed to survive plaintiffs' claims against Oh for breach of an implied covenant of good faith and fair dealing and breach of fiduciary duty. Jang v. Cho, Index No. 601484/2004, 3/10/05 (Freedman, J.).

Contracts; credit and interest rate protection ("collar") agreements; breach; anticipatory repudiation; breach versus repudiation. Adequate assurances. Election of remedies. Restitution damages. Construction. September 11th disaster. In the spring of 2001, the parties had entered into an $83 million credit agreement to fund the plaintiff's development, in Battery Park City, of the first environmentally "green" residential building in the US. They had also, as required by the credit agreement, executed a collar agreement covering interest rate risks. When September 11th came, halting construction, the plaintiff had spent $17 million of the $32 million of its own funds it was required to spend before drawing on the loan. In January 2002, the plaintiff had prepared to resume building, but the defendants had announced that projected rents on the building had dropped substantially and proposed reducing the loan to $70 million. Battery Park had offered concessions in aid of the project, and in mid-February the plaintiff had asked the defendants to be informed by "all the lenders" that it would receive the full loan of $83 million. Instead, in late February the defendants had told the plaintiff by letter that the September attacks might have caused a Material Adverse Change, a default event as defined in the credit agreement, that the defendants were "prepared to discuss" a loan of $70 million, and that the letter was "not a commitment to lend." The plaintiff had tried to persuade the defendants that the loan remained viable at $83 million. Following extensive further discussions, the defendants had proposed a loan of $75 million, with Battery Park agreeing to make up the difference conditioned upon the plaintiff getting alternative financing through the Liberty Bond Program of the State's downtown revitalization effort. A volley of correspondence had ensued between the parties. In May the plaintiff had asked the defendants to guarantee the Liberty Bonds and said that if the bond proceeds were not available by September it planned to draw on the credit agreement funds. In June the defendants had replied that they were reviewing the bond guarantee request and that if the plaintiff had not executed the amended loan documents by July 1 they would terminate the agreements and require the collar agreement to be cash settled; the plaintiff in its rejoinder had welcomed the defendants' response on the bond guarantee but said that it would not be possible to close by July 1 because the defendants had not yet provided a term sheet for restructuring the loan as a credit enhancement. In July the plaintiff had ceased payment under the collar agreement and in August, having received the term sheet, it had written to the defendants requesting that they rescind the credit and collar agreements and refund all fees and related payments. Concurrently, the plaintiffs had written to the defendants that because of the quick cleanup of the WTC site they were now offering the original $83 million; they added that the plaintiff owed them a $50,000 administrative fee and other sums. The plaintiff had then brought a suit to rescind the agreements and the defendants a suit of their own to foreclose on the plaintiff's leasehold interest. The defendants' earlier motion to dismiss the plaintiff's action had been denied, and the court consolidated two opposing summary judgment motions in this decision. It denied the defendants' motion to foreclose on the collar agreement because it found that the parties had intended it and the credit agreement to be integrated contracts. They had been executed on the same day, related to the same funding, and, most important, they contained cross-default provisions. The defendants pointed out that the agreements did not contain cross-defaults with respect to them, but neither addressed the defendants' default at all. Regarding the plaintiff's contention that the defendants had repudiated the credit agreement, entitling the plaintiff to rescind both agreements and collect restitution, the court declined summary judgment, finding that numerous questions of fact remained. The plaintiff had not demonstrated that the defendants had made a definite and final communication that they were not going to perform, as required before they could invoke the doctrine of anticipatory repudiation. The court distinguished a case where anticipatory repudiation had unmistakably come into play: there, a purchaser had demanded a discount on certain condominiums and the seller had "vehemently rejected" that demand. Here, it was an issue of fact whether the plaintiff had "vehemently rejected" the smaller loan. And it was not clear whether the defendants had done anything in violation of the agreement. Whether the defendants' late February letter was intended to repudiate or, as they claimed, modify the agreement, was an issue of fact. Whether their possibly unreasonable time frame for declaring a Material Adverse Change had occurred, or their pressure on the plaintiff to accept a smaller loan, amounted to repudiation, also presented issues of fact. The plaintiff contended that the defendants' failure to give it adequate assurances that they would fund the full loan constituted repudiation. The court, noting that in Norcon, 92 NY2d 458, the Court of Appeals had extended the adequate assurances doctrine beyond the UCC, acknowledged a measure of reason in the plaintiff's argument that being required to spend $32 million of its own before drawing on the loan made them entitled to adequate assurances. But Norcon did not extend the doctrine of adequate assurances to every contract. It focused on a 25-year contract that did not anticipate or provide for the impact of price declines, whereas this case involved a few months and the credit agreement provided for an event like the September 11 attacks in providing for a Material Adverse Change. In Norcon the Court, in addition, had noted the parallels between the sale of goods and sale of electricity; this case involved a loan agreement. The court found that the plaintiff had not been entitled to adequate assurances. Further, although it was moot, the plaintiff had not, as case law requires, put the defendants on notice that it was requesting adequate assurances. The defendants argued that, if the agreements were read together, the plaintiff had elected to continue the credit agreement by continuing monthly payments as required under the collar agreement and by not terminating the credit agreement after receiving the defendants' late February letter but instead negotiating. The court stated that the continued payments could have been in the interest of reaching a new agreement in recognition of the first being repudiated; or that the plaintiff's continuing to negotiate might, on the other hand, have represented rejection of the repudiation and an attempt to urge full performance. The plaintiff asserted that its suspending construction in 2002 due to lack of financing, not due to September 11, and recourse to financing by Liberty Bonds showed that it had ceased to treat the credit agreement as effective. The defendants pointed to the plaintiff's May letter asserting that they might draw on the credit agreement funds if the bonds were not available as showing that the plaintiff had elected to treat the agreement as valid, but the court disagreed; rather, the letter evidenced the plaintiff's alternative funding arrangement. The court did agree that the plaintiff had been required to elect remedies because under New York law an anticipatory breach gives the non-breaching party two mutually exclusive options. But as the time-frame for election varies, issues of fact remained here, particularly salient because the plaintiff's spending had not reached the $32 million mark that ushered in defendants' time for performance, and interest rates had so fallen that the plaintiff's payments under the collar agreement had become unnecessary. The defendants argued that even if the plaintiffs prevailed on the issue of anticipatory repudiation they were not entitled to restitution damages because if the defendants had breached at all, it was not a complete failure to perform. Further, it was undisputed that the plaintiff would save money under the Liberty Bond terms. The plaintiff pointed out, though, that it had paid millions in fees and other expenses incurred in reliance on the defendants' loan commitment, and argued that the defendants' alleged repudiation had brought about a complete failure of consideration. The court declined to rule as a matter of law that the defendants' conduct had not constituted a complete repudiation and said that to disallow restitution at this point could permit the defendants to retain fees for which they may have done nothing. River Terrace Associates, LLC v. Bank of New York, Index No. 603745/2002, 4/05 (Moskowitz, J.).

Contracts; interpretation; ambiguity; oral agreement; incompleteness; course of dealings; merger clause;

parol evidence; vagueness; statute of frauds. Plaintiff brought this action to enforce written and oral agreements with developer defendants, Larry A. Silverstein and Silverstein Properties Inc. Defendants moved to dismiss plaintiff's cause of action which sought to enforce a letter of agreement related to a beneficial interest in a certain property held by Properties and to dismiss plaintiff's claim which sought to enforce an oral agreement between plaintiff and defendants related to the development of the World Trade Center. The court first denied, with leave to renew, defendants' motion to dismiss plaintiff's claim seeking to enforce the letter of agreement. The court determined that ambiguity existed insofar as the parties each had a different understanding of the meaning of "develop" as used in the agreement. Plaintiff argued that it included the concept of redevelopment. Here nothing in the record indicated that one interpretation should predominate over the other. The court next addressed plaintiff's claim of breach of an oral agreement. Defendants owned 1/3 of a holding company for the World Trade Center, the Silverstein WTC Group. Defendants' remaining interest had been sold to other investors, of whom plaintiff was one. Defendants had two different mechanisms for investors to obtain returns on their investments. Prior to having made his investment plaintiff allegedly had had a conversation with defendant Silverstein that plaintiff understood to be an agreement that his investment would be of a certain type. Plaintiff thereafter signed the Silverstein LLC Agreement in connection with his investment. Defendants argued that the oral agreement was not enforceable because there was a subsequent integrated writing, that the agreement was too indefinite and that it was in contravention of the statute of frauds. The LCC Agreement contained a merger clause, which the court found applicable. It also contained a clause barring a waiver absent a written notice. The court ruled that plaintiff had not shown that the Agreement was incomplete, nor had plaintiff sufficiently shown a course of dealings that would render it so. The complaint made no allegation of fraud. Thus, the merger clause barred parol evidence. The court rejected plaintiff's argument that the oral agreement had been made with the individual defendant and thus was enforceable. The alleged oral agreement covered the same subject matter as the Agreement. There is a presumption against enforcing oral agreements where there are complete written agreements on the same subject matter. Further, the court held, the alleged oral agreement did not establish essential terms and the alleged terms were indefinite. Subsequent efforts by plaintiff attempting to commit the agreement to writing evidenced at best an agreement to agree. The statute of frauds (GOL 5-701) also undermined plaintiff's position. Motion granted. Ritorto v. Silverstein, Index No. 602088/2004, 1/20/05 (Freedman, J.).

Guaranty; Bankruptcy Code and Rules; unscheduled debt; "no asset, no bar date" case. Plaintiff sued on a guaranty. The defendant guarantor claimed that the debt had been discharged in a Chapter 7 Bankruptcy proceeding. Plaintiff argued that the debt had not been scheduled. The court FRBP 2002(e) and Federal authority that that rule abrogates the strict scheduling requirements on "no asset" filings (where there are no intentional tort debts). An omitted creditor would not be harmed in such a case. NY Court of Appeals authority, the court noted, had been decided when neither the rule nor the current code was in effect, and thus the authority would no longer be viable as to this issue. The court found that this case was a "no asset, no bar date case" not involving intentional tort debts and thus the scheduling requirements were indefinitely suspended. Case dismissed. Upper Manhattan Empowerment Zone Development Corp. v. Van Brackle Enterprises, Inc., Index No. 120708/2003, 2/25/05 (Moskowitz, J.).

Insurance; advertising injury; copyright and trademark infringement; product counterfeit; umbrella policy. Duty to defend. Lanham Act (15 USC § 1125 [a]); false designation of origin. Disgorgement; compensatory damages. Fashion industry. The plaintiff succeeded on its motion for partial summary judgment for a declaration that the defendant insurers had a duty to defend it in a Federal copyright infringement action. The Federal plaintiff claimed that the plaintiff here had advertised and sold prom dresses identical to its own copyrighted dress, and sought monetary and other damages, including all profits gained by the alleged infringement. The plaintiff had bought two policies from the defendant insurers, the first covering copyright infringement arising in the plaintiff's "advertisement," the second an umbrella policy. The defendants argued that in the underlying complaint the Federal plaintiff had not made claims that would fall within the ambit of "advertising injury" as the first policy defined it–or at least had not made the claims in earnest. But this assertion, the court found, ignored the complaint's manifest content for what the defendants said was its "gist," which they depicted as merely an allegation that the plaintiff had wilfully copied the dress. The court was not persuaded. A case the defendant relied on did not control, since there the underlying complaint alleged unlawful manufacture, importing and sale, but not advertising. The court instead looked to Cosser, 789 NYS2d 586; the decision in that case had held that an underlying Federal complaint potentially triggered coverage for advertising injury despite defendants' stance that none had been alleged. The court determined that since the first policy obligated the insurer to defend the plaintiffs in the Federal action, coverage also existed under the second policy, which in Part A had provided standard excess coverage following "form" with the first policy, and in Part B, extended coverage triggered by any copyright infringement, not only one occurring in the insured's advertisement. The defendants argued that the policies' "knowledge of the falsity" exclusions applied because the underlying complaint alleged that the plaintiff here had intentionally "knocked off" the Federal plaintiff's dress design. However, the plaintiff could be found liable in the Federal action without a showing of deliberate conduct, hence at least some of the underlying claims arguably arose from covered events. The defendants were required to defend the entire action; the duty to defend is broader than the obligation to indemnify. Defendants' cross-motion for a declaration that they were not obligated to provide any coverage unsuccessfully relied on cases involving product counterfeiting, with goods "palmed off" as manufactured by another maker, whereas here the product at issue bore plaintiff's own label. The defendants also argued that the Federal plaintiff's claim for profits arising from the alleged infringement was, in effect, not for compensatory damages but for disgorgement of ill-gotten gains, a risk against which New York public policy precludes insuring. But this case was different from one where, for example, the First Department had denied judgment to a bank seeking to be covered for disgorgement of funds acquired by repeated violations of securities regulations. Here the claims fell into categories that courts have found to comprise "damages" as defined in policies that cover advertising injuries stemming from trademark infringement; these damages include recovery of an infringer's profits. The same reasoning applied to copyright infringement, which both policies here explicitly covered. T Juniors, Inc. v. Utica Mutual Insurance Co., Index No. 601965/2004, 3/31/05 (Fried, J.).

Insurance; loss of business income; September 11th disaster; co-insurance; civil authority. Contracts; interpretation. Action by a business school against its insurer seeking recovery for loss of business income due to damage to its premises and a suspension of operations caused by the 9/11 disaster. At issue were co-insurance and civil authority clauses. The court found no authority on the relationship between the two. Plaintiff argued that application of the former clause to a civil authority loss would result in a double penalty and a reading to that effect would be both incorrect and inequitable. The court held that the policy language was unambiguous in that the declarations page stated that business income was subject to co-insurance 100% and that the policy elsewhere stated that the insurer would not pay the full amount of "any loss," which would include civil authority losses. The drafters knew how to exclude coinsurance from some provisions, but did not do so with regard to civil authority loss. Summary judgment granted in part. New York Career Institute v. Hanover Ins. Co., Index No. 114921/2003, 1/4/05 (Fried, J.).**

Procedure; forum non conveniens; delay in moving; contacts with New York. Action arising out of contract to purchase 74 cell phone towers for installation in various states. The complaint alleged that the towers failed to meet design specs regarding structural integrity. Moving defendants, engineers, were sued for having negligently certified the designs. Defendants moved to dismiss or stay a portion of the action under CPLR 327 (a) because the action would require the court to apply the laws of the other states involved to determine defendants' liability. The court held that movants had delayed too long in making the motion. The action had been pending since 2002 and had twice been scheduled for trial. Extensive discovery had been completed. In any case, the court held, defendants had not met the burden on the motion. Defendants were residents of New York and that was where the contracts had been drafted, the towers designed and manufactured, where defendants had done most of their work and most witnesses resided. The court stated that the building codes of the various states would have little relevance; the key question was whether defendants had properly certified the plans in light of required antenna loads and a particular standard. Another defendant had not joined the motion so that the case would proceed in New York in any event. Choice of law problems are not determinative. Motion denied. SBS Network Services v. Fred A. Nudd Corp., Index No. 51706, 1/15/05, 1/25/05 (Fisher, J.).**

Reinsurance; settlement; environmental pollution claims; single occurrence; "follow the settlements"; retentions. Plaintiff reinsurers moved for summary judgment that they had no obligation to reimburse defendant, their reinsured, for any portion of a settlement paid by defendant to its insured, Witco, in connection with pollution claims. Defendant allocated the settlement amount to excess policies and the reinsurance certificates on the basis that the claims had constituted a "single occurrence." The court held that plaintiffs had established that the claims constituted multiple occurrences. Defendant's "common cause" or "common origin" theory must fail, the court stated. The court held that the damages at 140 sites in the US arose out of particular conditions at the sites, not from "general conditions" that were "substantially the same" at all of the sites. This interpretation of the excess policies was consistent with NY law, the court stated. The court also rejected defendant's argument in support of a single occurrence theory based upon a single site as the purported sole cause. The court further held without merit defendant's argument based upon the "follow-the-settlements" doctrine because the reinsurers were not contesting defendant's settlement decisions based on the underlying policies and such a clause does not obligate a reinsurer to indemnify a reinsured for payments in excess of the reinsurer's agreed-upon exposure. The court held, however, that plaintiffs had failed to show that an allocation on a multiple-occurrence basis would result in defendant's being unable to satisfy its per-occurrence, per year retentions so as to be entitled to reimbursement. Summary judgment denied. Argonaut Ins. Co. v. Travelers Ins. Co., Index No. 124063/2000, 1/5/05 (Freedman, J.).

Res judicata and collateral estoppel; prior Art. 78 proceeding; asset purchase agreement. Plaintiff ophthalmologists brought this instant action against The Trustees of Columbia University after the University assessed a 10% "Dean's Tax" as a condition of the renewal of their part-time faculty appointments. Plaintiffs' suit alleged breach of contract, unjust enrichment and tortious interference with prospective business relations. Defendants moved to dismiss plaintiff's claims for breach of contract and tortious interference arguing that the claims were barred by res judicata as the same claims had arisen in a prior Article 78 proceeding brought by plaintiffs to determine the legality of the "Dean's Tax." The court denied defendants' motion. The court found that res judicata would not bar plaintiffs' claims here because those claims could not have been asserted in the prior proceeding and the economic damage claims asserted by plaintiffs were not incidental to the primary relief sought in the Article 78 proceeding. The court explained that the judicial determination made in the Article 78 proceeding did not automatically entitle plaintiffs to the damages they sought on the breach of contract and tortious interference claims, nor did it resolve the question of the defendants' liability for breach of a non-interference provision of an asset purchase agreement. The claims here did not seek restoration of economic benefits derivable directly from the plaintiffs' status as part-time faculty members. The asset purchase agreement at issue here was not an employment agreement and the plaintiffs were not parties in their individual capacity. Plaintiffs cross-moved for an order converting defendants' motion into one for partial summary judgement. The court granted the cross- motion and determined that notice to defendants of the conversion was unnecessary as the issues presented by the motion were purely legal in nature and the parties had fully addressed those issues in their papers. The court denied partial summary judgment to plaintiffs on the issue of collateral estoppel and the decision in the Article 78 proceeding, finding that plaintiffs had failed to show that the issue of whether the University's conduct was a breach of the non-interference provision was identical to an issue that had been raised and decided in the Article 78 proceeding. The court further denied plaintiffs' request for partial summary judgment with respect to tortious interference, finding that the determination sought on that issue would neither resolve the issue as to wrongful means, nor would it serve to advance the litigation. Odrich v. Trustees of Columbia University, Index No. 601189/2004, 2/14/05 (Cahn, J.).

Shareholders derivative action; standing to pursue; distinguished from class action. Corporations; financing; initial public offering; short form merger. Contracts; specific performance; intent to be bound. New York versus Delaware law; demand on board; business judgment rule. Misrepresentation. Tortious interference; "but for" element. Sanctions. Purported shareholders derivative action. The plaintiffs also brought the suit as a class action seeking to enforce an underwriting agreement, purportedly for $67 million, between a corporate defendant of which they had been shareholders and a bank defendant, as well as a shareholders agreement. The defendants moved to dismiss the complaint. In related federal actions arising from the corporate defendant's failed IPO the plaintiffs had alleged that the bank defendant had refused to price the IPO because the SEC planned to focus on it in an upcoming inquiry. They had also alleged that the corporate defendant had failed to properly notify common shareholders prior to a "sham merger" in which other shareholders had transferred 90% of the defendant's shares to a Delaware corporation, then with various maneuvers, including a new stock issue, had protected all shareholders except the plaintiffs from a plunge in their shares' values. The core federal claims had been dismissed; the plaintiffs lacked standing to pursue 10b - 5 claims, the claims failed to plead reliance and there were other defects, and even if the defendants had made false and misleading statements to the plaintiffs, it was held, it did not matter because the defendants had had enough votes to effect the merger anyway. The outcome here under State law was consistent. First, the court found that the complaint combined derivative claims with class action allegations and for such reason alone would have to be dismissed. Further, the plaintiffs lacked standing to assert a derivative action whether New York or Delaware law governed the dispositive issue of making a proper demand on the board. The court noted that, "remarkably," the plaintiffs, arguing that New York law governed, had cited a case in which the court had held that notwithstanding a New York jurisdiction provision in a shareholders agreement, because issues of the company's governance were involved, Delaware law controlled. An issue of corporate governance is governed by the law of the state where the corporation is incorporated; here, too, Delaware law governed. In any case, the plaintiffs had not shown that there was a difference in the two states' laws regarding proper demand and they had failed to create doubt that the board was entitled to the presumption of the business judgment rule. Although the plaintiffs asserted that a demand had been made to no avail, they did not supply necessary details, such as who had made the demand, when or to which board members, and their allegations that the board had refused the demand were largely conclusory. Further, plaintiffs lacked standing because they had not been shareholders when they had brought this action. The merger had eliminated their share ownership and under Delaware law terminated their standing to pursue derivative claims. As for the claim that the defendants had breached the underwriting agreement, the agreement had never been executed, although an S-1 registration statement had been executed and filed with the SEC, and the court found that the parties had not intended to be bound by the agreement in the interim. A malpractice claim against a law firm defendant for failure to inform the relevant parties of a right to seek specific performance failed, too. Allegations that a law firm employee should have known that his sending out the buyout term sheet in unmarked envelopes, and other acts on his part, had interfered with certain class member rights under the shareholders agreement lacked the "but for" element required for a viable claim of tortious interference. The complaint was dismissed with prejudice. In a motion previously decided by the court, the plaintiffs had sought a preliminary injunction against two defendant banks based on alleged violations of the shareholders agreement, to which the banks were not parties. Plaintiffs' counsel had declared at oral argument that the motion's merit had been clear in the complaint. It had not. The court granted the defendants' cross-motion for sanctions against counsel to the extent of awarding defense counsel costs, including attorneys' fees, in defending against the motion. Adams v. Bank of America Securities LLC, Index No. 602297/2004, 3/31/05 (Fried, J.).

Suretyship; right to indemnification; bad faith; unreasonableness of payment; collateral security. Action arising out of an agreement entered into by defendant with New York State for the operation of concessions at Watkins Glen State Park. Defendant was to provide capital improvements. Defendant provided a performance bond, which included an indemnification provision, on which plaintiff sued. Plaintiff had paid the State when defendant failed to make the improvements. The court found that plaintiff had established that it had acted in good faith and that the amount paid was reasonable. The court held that defendant had failed to raise an issue of fact. Defendant asserted that plaintiff had acted in bad faith in failing to challenge the State's claim but in settling same, or in failing to contact alleged witnesses. The court found that defendant had submitted no proof of bad faith. Defendant had offered plaintiff only conclusory denials of liability and a vague witness list. Also, defendant had failed to provide collateral security, as required under the agreement. The court rejected defendant's argument that plaintiff had paid on a claim the bond did not cover since the language of the bond covered all of defendant's obligations. Plaintiff's motion for summary judgment granted. RLI Ins. Co. vs. Waters, Index No. 781/2994, 2/25/05 (Fisher, J.).**

Trade secrets; customer list; access; use in business; value; breach of duty of good faith and loyalty; conspiracy; conversion; punitive damages; sanctions; slander; tortious interference; unfair competition. Dispute arose when defendants, three former employees of plaintiff hair salon, left its employ and opened their own salon. Plaintiff alleged, *inter alia,* breach of duty of good faith and loyalty, conspiracy, conversion, slander, tortious interference and misappropriation of trade secrets. The substance of plaintiff's claim was that defendants had misappropriated and used plaintiff's customer list, which it claimed contained confidential information and was a trade secret. Plaintiff maintained that it had lost revenue as a result of defendants' misuse of the list to solicit business. Defendants moved for summary judgment and also sought sanctions on the grounds that plaintiffs had brought a frivolous lawsuit. The court granted defendants' motion in part. The names, addresses and phone numbers of persons on plaintiff's list were not known outside plaintiff's business. However, little was done to restrict access to the list, and several employees had had access to all or part of it. Each hairstylist had had access to information on his/her customers, and each kept a personal list apart from plaintiff's. No evidence was presented as to how plaintiff used the list or what its value was. There was no proof that plaintiff used the list to solicit business or advertize or otherwise attain a competitive advantage. Simply compiling a list of information on customers who had patronized plaintiff did not render it confidential or a trade secret. Thus, the court held, plaintiff had failed to establish that the list was a trade secret, dooming the first claim. The court held that since the list was not a trade secret, plaintiff's related claim for breach of good faith and loyalty must also fail. The court found that plaintiff had failed to make out a prima facie case for conversion of the customer list since plaintiff had had possession of the list at all times. The court dismissed the slander claim because plaintiff had failed to provide evidence that defendants had made the statements alleged and, further, plaintiff had failed to indicate when, where or to whom the alleged statements had been made. Plaintiff's claim for tortious interference was dismissed for failure to provide evidence that the defendants or their agents had prevented plaintiff's customers from patronizing its business through the use of fraud, physical violence or misrepresentation. The court dismissed plaintiff's claims for conspiracy and punitive damages since New York does not recognize either claim as an independent cause of action. The court dismissed plaintiff's claim for damages, finding that plaintiff could not establish lost profits; plaintiff's sales and profits had improved after the employees left. The court declined to enjoin defendants from using a phone number on an unfair competition theory (confusing similarity) since defendants had had that number for four years so that any confusion now must be minor. Finally, the court denied sanctions to defendants, stating that although plaintiff's claims might have been overstated, its case clearly had had merit at the time it was commenced. Hairsay, Ltd. v. Salon Opus, Inc., Index No. 5106/2001, 3/17/05 (Austin, J.).**

UCC Art. 8; transfer of securities; replacement; registration; "protected purchaser" (UCC 8-405). Litigation arose after plaintiff unsuccessfully attempted to transfer to herself securities which she alleged had been an inter vivos gift from her deceased grandmother, but which had never been indorsed to plaintiff prior to her grandmother's death. Defendants Pacific Telesis Group and SBC claimed that the certificates had been reported as lost by plaintiff's grandmother prior to her death and had subsequently been replaced and reissued to her. Defendants asserted that plaintiff had never presented the original certificates for transfer of registration either before or after the replacement. Defendants further contended that the certificates had not been indorsed nor had plaintiff given any value in return for the original certificates so as to qualify as a "protected purchaser" pursuant to UCC § 8-405(b). Plaintiff argued that the securities had been an irrevocable gift made to her by her mother and that her mother's signature attesting that the certificates had been lost was ineffective due to her frail and confused condition at the time. Both sides moved for summary judgment. The court found that defendants had been justified in replacing the lost stock certificates to plaintiff's mother in her name as the only rightful owner known to them upon receipt of her duly-executed instruction. The court concurred with defendants and found that although plaintiff, as donee of a gift, qualified by definition as a purchaser under UCC 1-201(33), plaintiff's donee status did not qualify her as a "protected purchaser" pursuant to UCC § 8-405(b) since plaintiff had never given value for the securities. The court further found that since the certificates had never been indorsed to the plaintiff by her mother or indorsed in blank, the plaintiff had never had control of the certificates and was thus not in a position to transfer or sell the securities (UCC 8-106). There is no right to registration of transfer to an ordinary unprotected purchaser after a replacement security has been issued. Defendants' motion for summary judgment was granted and plaintiff's cross-motion for summary judgment was denied. Smouha v. MTA, Index No. 7544/2001, 4/25/05 (Demarest, J.).**

UCC; fraudulent and missing endorsements on checks; notice to the drawee bank; bank's terms and conditions; UCC 4-406; bank's duty to use ordinary care (UCC 4-103); estoppel; alleged participation in fraud; fictitious payee rule (UCC 3-405); damages. Procedure; summary judgment; speculation. Action by firm, drawer of various checks on defendant, drawee bank. The checks had been paid, but the payees had not received the funds. It turned out that some endorsements were missing or had been forged. Plaintiff sued to recover the funds paid from its account. On summary judgment motions, defendant bank argued that plaintiff had notified it in an untimely way, in violation of defendant's terms and conditions. Plaintiff contended that UCC 4-406(4) controlled and under it, plaintiff's notice had been timely. The court held that notification requirements in bank agreements can be considered valid conditions precedent to commencement of an action. The court found that the notice to defendant had been untimely under defendant's terms and conditions. However, the court further ruled, defendant was not relieved of its duty to exercise ordinary care (UCC 4-103(1)). The court held that the proof showed as a matter of law that defendant had failed to use ordinary care in regard to its handling of checks on which a certain bank had been the collecting bank because defendant had not examined the endorsements on any of those checks. Plaintiff was thus not barred from suit as to these checks. As to some others, a factual issue was presented. The court rejected plaintiff's estoppel argument premised upon the alleged involvement of a partner of plaintiff in the fraud. The court found that defendant was relying solely on speculation and conjecture and thus estoppel was not a valid defense. Defendant cited the fictitious payee rule, but again relied upon conjecture to support it. The court ruled that defendant could not rely upon UCC 3-405 (1) (c). Defendant claimed that plaintiff had suffered no damages, the payees not having sued plaintiff. However, the court held, the unauthorized debiting of plaintiff's account constituted damage. A trial was required. Cohen & Leavitt v. J.P. Morgan Chase Bank & Co., Index No.114579/2002, 2/8/05 (Lowe, J.).

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