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Arbitration, FAA; AAA Rule 8. Proceeding to stay arbitration arising out of partnership agreements. Proceeding governed by FAA. The agreements had been formed to make investments throughout the US and that brought the Act into play. The parties agreed to proceed under AAA rules, which give the arbitrator power to decide scope of the arbitration clause. Rule 8(a) provides that arbitrator has the power to rule on his/her own jurisdiction, a delegation of the arbitrability issue. Stay denied. In re RD Management Corp., Index No. 116754/2002, 7/16/03 (Cahn, J.).

Arbitration; fraud permeating contract. Where broad arbitration clause agreed to, fraud in inducement is an issue for the arbitrator unless fraud relates specifically to the clause or permeates entire contract. Plaintiffs alleged that defendants had falsely represented that they had competence to perform work contracted for, as well as costs and time to completion. Court held these allegations were insufficient to show fraud as part of a scheme that permeated the contract. Motion to compel arbitration granted; action stayed. Kaplan v. Swanson, Index No. 24587/2002, 8/6/03 (Emerson, J.).

Banking; liability of banks for misappropriations related to fiduciary accounts. Two actions arising out of misdeeds by an attorney, who misappropriated funds of investors. To state a cause of action in negligence against banks, the court stated, plaintiffs must allege that their funds had been deposited in attorney escrow or fiduciary accounts and the bank had had constructive or actual knowledge of improper payments or diversions. The court rejected defendants' contention that the amended complaints were time-barred since the court in a prior ruling had found that plaintiffs' allegations made out a negligence claim though not so denominated. The court dismissed the complaints against one bank because the activity in certain accounts did not support a claim against that bank and other accounts cited were not escrow or IOLA accounts. This bank had no duty to customers of other banks. As to other banks, the court held that the complaints imperfectly but sufficiently stated that the funds had been deposited in fiduciary accounts. The court ruled that whether the misdeeds of the lawyer constituted an intervening cause could not be determined on a pleading motion. The complaints would be dismissed insofar as plaintiffs sought to hold defendants responsible for sums deposited in another bank. Eschel v. Fleet Bank, Index No. 600809/1998; Bassman v. Blackstone Associates, Index No. 600891/1998, 7/17/03 (Ramos, J.).

Constitutionality of Municipal Assistance Corporation Refinancing Act. Action seeking declaratory judgment invalidating 2003 Municipal Assistance Corporation Refinancing Act extending MAC payments over 30 years. The Act provides for annual payments to the City of New York. Plaintiffs contended that as neither a referendum nor an annual appropriation must occur, the Act is unconstitutional. The court ruled that an appropriation is required before the payments at issue can be made, rejecting plaintiffs' argument that the legislation

had a different result. The court construed relevant provisions to further the overall policy of the statute and concluded that, even if there were an error in drafting in one section, other provisions viewed in harmony would require an appropriation. The court refused to accept that the legislative intent was to enact a statute that would be facially unconstitutional. Plaintiffs argued that the statute also violated the constitution by causing an impermissible borrowing by the City based on pledging future revenues without issuing general obligation debt. The court held that Wein v. City of New York, 36 NY2d 610, was dispositive of the question. Here, the court found, as in that case, a public benefit corporation was issuing bonds and the City's full faith and credit were not pledged. The payments to the corporation were permissible gifts. As to plaintiffs' argument that the City improperly encumbered funds constitutionally pledged to current debt, the court noted that

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plaintiffs had not set this claim out in their pleading. The court rejected the contention since there was no lien by the public benefit corporation that issued the bonds. The plaintiffs' argument would cause all of the City's income to be pledged, thereby hamstringing it. As with the MAC, the Act was not unconstitutional on this theory. The court also rejected plaintiffs' argument that payment to the City impaired the rights of plaintiff Local Government Assistance Corp. LGAC need not pay the City until there has been an appropriation and all of the LGAC debt service has been met. The court found that there was no infringement of contractual or property rights under the Act. Defendants' motion for summary judgment granted. Local Government Assistance Corp. v. Sales Tax Asset Receivable Corp., Index No. 5218/2003, 9/17/03 (Benza, J.).

Contracts; breach; oral agreements; statute of frauds. Fraud; fraudulent inducement. Vesting of profit participation rights. In action alleging breach of contract, inter alia, plaintiff sought declaratory judgment that he be treated as vested in certain deferred compensation profit participation plans that company formerly employing him had offered to key executives. According to plaintiff, company executives had wooed him from a higher paying position by touting the superior long-term financial rewards he would accrue through the executive plans. Under the plans a participant received "participation units" corresponding to shares in the employer, that in 53 year-old plaintiff's case would be worth $3.5 million when he turned 65, and in lieu of dividends, quarterly payments that in plaintiff's case would equal $30,000. The plans' documented terms included that executives terminated before age 65 forfeited awards. Plaintiff alleged that individual defendants had told him that the Board of Directors, of which they were members, could and regularly did cancel forfeitures, and that the parties had orally agreed to plaintiff's proposal that if he were terminated before 65, other than for cause, he would be treated as vested. Parties had allegedly shaken hands to confirm. Approximately eight months later plaintiff had been terminated. The court found that the statute of frauds barred the alleged promise to treat plaintiff as vested. The promise at issue was an oral modification to the deferred compensation profit participation plans, not a separate agreement as defendant argued, and the plans could not be performed within a year. For example, the participation units could not be exchanged for shares or cash until participant was 65. Under the statute, written agreements may only be changed in writing; defendants' alleged acts were not unequivocally referable to the oral modification. As to the quarterly payments, the statute would bar any obligation to pay plaintiff extending beyond the year after the promise was made, but not bar payments due within a year, in respect to which the promise was capable of being performed. However, a breach of contract claim did not lie against defendants for a claimed January payment due within the year, but after plaintiff's termination, because at termination plaintiff had forfeited his participation units, on which right to payments depended. The statute barred any contradictory oral promise. Plaintiff could not avoid the bar by recharacterizing the breach of contract claim as fraud and fraudulent inducement against defendant company and executives, the court determined. Mere refusal to perform an oral agreement within the statute does not generally constitute such fraud as to justify disregarding the statute. In dismissing fraud and fraudulent inducement claims against the individual defendants, court noted that plaintiff was a sophisticated individual, a lawyer, for whom reliance on a handshake in regard to a promise worth $3.5 million was unreasonable as a matter of law. Levine v. American International Group, Index No. 603425/2002, 7/9/03 (Ramos, J.).

Contracts; breach; "reverter" provisions. Title insurance; withholding of material facts; public record. Fiduciary obligation; duty to defend. Collateral estoppel. Equitable estoppel. Waiver. Court denied plaintiff's motion for summary judgment and granted cross-motion to dismiss complaint in action arising from alleged breach of contract. Plaintiff had purchased property from a foundation and defendants, who had provided the title certificate and insurance policy, had refused to indemnify after the Rockland County Supreme Court had declared the sale and deed null and void. In purchasing the property plaintiff had promised to obtain zoning favorable to the foundation's mission, then to sell a number of acres back to the foundation. If zoning were not obtained plaintiff would sell back the entire property. These terms had been set forth in "reverter provisions" in the contract of sale that plaintiff knew the foundation deemed non-negotiable. On the day of signing, the foundation's lawyer, who had previously represented

plaintiff in an unrelated matter, had prepared without the foundation board's approval a rider that removed the provisions. The agreement had been signed, and the foundation's lawyer had prepared a deed that recited that the sale had been approved by resolution of 2/3 of the board, a requirement of the certificate of title. Subsequently, plaintiff had never obtained the originally promised zoning, and the foundation had brought the Rockland County action. Defendants had provided plaintiff's counsel for the action and for an appeal that had failed. In ordering rescission of the sale contract the court had directed refund to plaintiff of all out-of-pocket payments; it had also held the foundation lawyer guilty of malpractice, negligence, and breach of fiduciary duty. In the instant action, plaintiffs alleged entitlement to reimbursement for "the value" of the subject property, $522,811 plus interest. The court found that there was no valid policy requiring defendants to pay. The title insurance policy was void from inception because plaintiff had withheld material facts that if revealed might have deterred defendants from issuing it. The factors that created the title defect were outside the public record, the court found, and it would not presume defendants could have made themselves aware of them. Plaintiff's argument that because the Rockland court had decided that he had not aided and abetted the foundation lawyer, defendants were collaterally estopped from raising the affirmative defense that plaintiff had caused the contract to be changed, failed. Defendants had not been party to the Rockland County action and had had a fiduciary obligation to defend plaintiff against the foundation's claim. Plaintiff's equitable estoppel argument had no merit as the policy was void due to plaintiff's material misrepresentations, and plaintiff did not demonstrate that it had relied on defendant's defense to its detriment. The doctrine of waiver was inapplicable. Defendants, in pursuing plaintiff's defense, had not waived their right to assert that the policy did not cover plaintiff; an insurer's duty to defend is much broader than its duty to indemnify. The court also stated that, as the policy was void, requiring defendant to pay plaintiff's claim because it had not provided timely notice of disclaimer would create coverage where none existed. The court found that because plaintiff had fully recovered its purchase money, he had suffered no compensable loss. Costs and disbursements were ordered to defendants. Lebovits v. American Title Insurance Co., Index No. 601498/2000, 7/10/03 (Ramos, J.).

Contracts; interpretation; ambiguity. Indemnification; time limitation. Action for breach of contract arising out of stock exchange agreement. Plaintiff had agreed to indemnify defendant for a certain time for related liabilities. Defendant had served a notice of claim regarding a contingent Argentine tax liability and other claims. Plaintiff contended that the claims were barred because they had not been determined on time. The court found that the language of the agreement was unambiguous and that there was no reason to hold that the service of a notice of claim for indemnity would trigger a six-month statute of limitations. Summary judgment for plaintiff denied and granted to defendant on timing issue only. AMI Tesa Holdings, L.P. v. Telefonica S.A., Index No. 602615/2002, 8/5/03 (Ramos, J.).*

Contracts; interpretation; date of determination; value of stock. Defendants acquired the assets of plaintiffs in a complex transaction. Plaintiffs were entitled to contingent phantom stock. The parties disagreed as to the date for the determination of the value thereof. The court found that the individual plaintiff had resigned early, which constituted a "termination in breach" and a "resignation" under relevant agreements. This led to a determination date, which was six months prior to the notice of exercise. There was no inconsistency in this reading, the court found. Thus, summary judgment to defendants on two claims. Questions of fact as to possible waiver of a deadline for payment barred summary judgment on another claim. The same result obtained with regard to what was a "reasonable time" for payment, and certain other claims. RLP, L.P. v. Oppenheimer Acquisition Corp., Index No. 14255/2001, 9/03 (Stander, J.).

Contracts; interpretation; merger agreement. Action arising out of aborted merger. The parties disagreed as to whether the intended general partner of a surviving partnership came into being. The court ruled that the merger agreement was not ambiguous. The court found that defendants' reading relied upon subsequent documents and transactions involving non-parties. The court stated that it must instead determine meaning from the language used by the parties. The court determined that the "general partner" referred to a particular entity that, as required, had completed an IPO and raised $100 million. Mandatory conditions had been met. However, the court further found that a plaintiff had not executed and delivered certificates of merger and, as a result, the merger agreement had terminated by a set deadline. As there had been no breach by defendants, specific performance and damage claims by plaintiffs failed. Aquavella v. Home Properties of New York, L.P., Index No. 1554/2000, 7/03 (Stander, J.).

Contracts; statute of frauds; estoppel; condition precedent; futility of notice; ambiguity; course of conduct; implied covenant of good faith; conversion; defamation. Procedure; summary judgment; hearsay as opposition. Action by Cayman Island hedge fund against prime broker relating to forced liquidation. At issue in the challenged events were repo financing, forward contracts, a margin account and "bonds in a box", the 1998 devaluation of the Russian ruble and a Russian debt moratorium. The court stated that the proper approach to

whether a repo is a sale or a secured loan is to defer to the intent of the parties. Plaintiffs asserted that defendant had promised to continue to finance their positions. The court found that plaintiffs had failed to show that the alleged oral agreement to finance was a term repo since the facts showed that the parties only entered into day-to-day repos and there was no confirm evidencing a term repo, as the Master Repurchase Agreement required. Plaintiffs argued that defendant was estopped from relying on GBL 15-301 because defendant's oral promise had induced plaintiffs to depend on defendant and forego transactions with others. But the Agreement required written modifications and plaintiffs could not justifiably rely on an alleged oral promise. The alleged promise was not a separate agreement, and the transaction would have been governed by the Agreement. Thus, a breach of contract claim failed. Plaintiffs claimed that defendant had breached the Repurchase Agreement when it had refused to pay excess margin to plaintiffs. The court ruled that plaintiffs had failed to transmit proper written notice required under the Agreement. A letter cited by plaintiffs, the court found, did not confirm a demand for payment and thus was not requisite notice. Plaintiffs argued that performance of a condition precedent would be excused as futile where it is clear that the other party will not live up to the contract. However, the court determined that plaintiffs' margin obligations exceeded any amount allegedly owed by defendant and that plaintiffs had failed to satisfy margin. Defendant was therefore entitled to retain the excess. Plaintiffs also claimed that defendant had orally agreed to accept bonds in a box as collateral and that defendant's later insistence on cash or treasuries breached the agreement. The court ruled that the contract was unambiguous and that it provided for defendant's unqualified discretion as to margin obligations. A purported oral agreement to accept collateral of plaintiffs' choice would have constituted an oral modification of the margin agreement. Plaintiffs argued that defendant should be estopped because plaintiffs had relied on defendant's oral promise to their detriment. But, the court ruled, plaintiffs had made an investment choice to assume investment risk. Plaintiffs asserted that the parties' course of conduct assisted plaintiffs' argument, but the court disagreed since plaintiffs' argument amounted to an attempt at oral modification. Although defendant was bound to adhere to an implied covenant of good faith and fair dealing, no obligation could be implied thereby inconsistent with other terms of the contractual relationship. Defendant had the right to demand posting of specific collateral and market conditions had increased the risk. Thus, this claim failed. A "constructive liquidation" theory failed for lack of authority, and allegations of economic duress could not be relied on by plaintiffs (they may represent a defense). The court held that defendant had not engaged in conversion since it had a superior right of possession to the securities on repo. Also, the court stated, defendant had a security interest. The court held that a defamation claim failed since plaintiffs had consented to the statements by authorizing the recipient to communicate with a defendant where plaintiffs had had a reason to anticipate that the response might be defamatory. As to a second statement, it was hearsay. Although, the court noted, hearsay may be admissible to defeat summary judgment where the declarant is presumably available to testify in accordance with the statement, plaintiffs had failed to show how the witness would testify. Mere speculation would not suffice. Motion for summary judgment granted. MKP Master Fund, L.D.C. v. Salomon Smith Barney, Inc., Index No. 601396/1999, 7/7/03 (Ramos, J.).

Insurance; broker; liability, proximate causation. Suit against insurance broker alleging failure to obtain business interruption coverage. Access to plaintiff's theatre had been blocked when public authorities closed an area due to falling debris. A prior broker had obtained the coverage, which had not complied with plaintiff's request. Defendant and plaintiff had signed an agreement. Defendant then said that plaintiff should not hold it responsible till both sides could sit down to review the coverages. That had not been done when the interruption occurred. The court found that the proof made it arguable whether defendant had undertaken to review plaintiff's policies and assume an advisory role. The court ruled, however, that the letter and plaintiff's actions or inactions in scheduling a meeting meant that plaintiff could not establish proximate causation. Summary judgment for defendant. Roundabout Theatre Co. v. Continental Casualty Co., Index No. 114703/1999, 8/5/03 (Freedman, J.).

Insurance; coverage for monies returned that were improperly obtained; disgorgement to SEC and NASD; consent decree without admission of liability. Declaratory judgment action regarding whether insurers should reimburse defendant for $70 million representing amounts paid as disgorgement to settle SEC and NASD claims that defendant had coerced clients to pay a portion of profits made on "flipping" IPO stock. Defendant had allegedly allotted IPO shares to customers who paid over some profits to defendant. Defendant had entered into a consent decree requiring it to pay the money to the SEC and NASD. The court noted that a party may not insure against the risk of being ordered to return money improperly obtained as that would allow a wrongdoer to retain the proceeds of illegal acts and shift the loss to the insurer. The rule is consistent with the purposes of disgorgement, the court stated. The court rejected defendant's argument that the rule did not apply because the final judgment had been entered on consent without admission of any wrongdoing. The judgment had identified the money as disgorgements and linked it to the allegations in the complaint so that this was not a simple case of a party settling without admitting liability. To find for defendant, the court stated, would defeat the purpose of the final judgment and the policy behind disgorgement. The fact that the money was not returned to defendant's customers because of their participation did not change the result. Summary judgment to defendant for defense costs only. Vigilant Ins. Co. v. Credit Suisse First

Boston Corp., Index No. 600854/2002, 7/8/03 (Moskowitz, J.).

Insurance; coverage; marine inland policy; costs for moving goods during repair. Commercial inland marine insurance policy. Plaintiff sought to recover costs incurred in moving and manipulating goods at a warehouse damaged by fire so the goods would not be damaged during renovations. The policy provided insurance for "covered property" that sustained a loss through a "covered cause." As there was no physical damage to the goods in question, there was no covered loss. The policy required the insured to take reasonable steps to protect the property from damage and to keep a record of expenses for consideration in settlement of a claim. This imposed a duty to mitigate damage. However, the policy precluded coverage for subsequent loss resulting from a cause that is not a "covered cause." The requirement to maintain a record of expenses was intended to provide proof as to the true extent of the loss from a covered cause and to exclude damages caused by the insured's negligence. Motion to dismiss granted. Klein's Moving & Storage, Inc. v. Westport Ins. Corp., Index No. 53317/2002, 7/9/03 (Demarest, J.).

Lease; termination; good faith; best effort; condition precedent. Parties had entered into a lease providing each with the right to terminate upon 30 days written notice if plaintiff had not delivered possession of premises to defendant by set date. Possession had not been delivered and plaintiff had sent defendant a termination notice which defendant rejected, asserting the lease to be in full force and effect. Plaintiff commenced action and on summary judgment court declared the lease terminated. By agreement of parties, defendant then served an answer alleging three counterclaims that plaintiff moved to dismiss. The court found that the counterclaims advanced essentially the same arguments that the court had rejected to grant summary judgment. All were premised on the contention that plaintiff had not acted in good faith in completing tenant work as provided by the lease, or on a provision for extensions of time if the work encountered "unavoidable delays." A lease is a contract and hence contains an implied covenant of good faith and fair dealing, the court stated, but that covenant will not be applied inconsistent with the other terms of the contract. The right to terminate was absolute; as the court had previously determined, the lease contained no condition precedent to its exercise, and a tenant has no enforceable expectation that a landlord will act in good faith or utilize its best efforts in exercising an absolute right to terminate. The court rejected defendant's argument that discovery was necessary; issues of fact did not come into play because defendant had not set forth claims upon which relief could be granted. Counterclaims dismissed. Gotham Plaza Associates, LLC v. KFC of America, Inc., Index No. 16643/2001, 8/26/03 (Austin, J.).

Lien Law; class actions; elements. Purported Lien Law class action. The court pointed out that, though there is no mechanical test in regard to numerosity, the plaintiff had failed to identify even a single member of the proposed class. The plaintiff also failed to satisfy the superiority requirement since it had brought an action to foreclose a mechanic's lien for the same amount of damages at issue in this case. This indicated that the class action device would not be necessary and superior. Class certification motion denied. Abra Construction Corp. v. 112 Duane Associates, Index No. 603260/2002, 7/21/03 (Ramos, J.).*

Misrepresentation; falsity; scienter; reliance; fiduciary relationship. Plaintiff entered into agreement with a defendant to assist plaintiff in selecting a new computer system. Defendant had recommended a certain system and urged plaintiff to enter into an implementation agreement with a co-defendant, a related entity. Plaintiff alleged that defendant had misrepresented the qualifications of co-defendant and its personnel. The court found on summary judgment that there was no evidence that statement regarding past experience of employees was false or known to be so when made. Further, defendant had disclosed that the employees did not have experience with the recommended system and plaintiff could have retained another entity had it so chosen. Thus, there was no justifiable reliance. Plaintiff claimed to have relied upon long-standing relationship with defendant, but there was no fiduciary relationship. Thus, fraudulent inducement claim failed. Questions of fact barred the motion of the co-defendant. Atkins Nutritionals, Inc. v. Ernst & Young L.L.P., Index No. 8956/2001, 8/25/03 (Emerson, J.).

Misrepresentation; taking advantage of ignorance; CPLR 3016(b); conspiracy; aiding and abetting. Procedure; requesting leave to amend. Action for damages arising out of losses incurred in investments made in OTC stocks on advice of a defendant. Plaintiff alleged that this defendant had been silent about his lack of connections to the brokerage firm defendant and other things and that the other defendants had been complicit in this silence. The court stated that New York has recently joined other jurisdictions in limiting the privilege to take advantage of ignorance. The complaint provided adequate notice of the actions challenged. However, the court ruled, the complaint failed to allege specific facts regarding dates of stock sales and losses and thus failed to comply with CPLR 3016(b); the fraud claim had to be dismissed. A claim of conspiracy to commit fraud failed since there is no independent conspiracy cause of action. A concerted action fraud claim similarly had to be dismissed. The dismissal of the fraud claim required dismissal of aiding and abetting claims. The court declined to grant plaintiff leave to amend

because it had requested leave only in its memorandum of law and thus could not properly assert the necessary factual basis for the claims. Bonsai Finance & Consulting Ltd. v. UBS Painewebber Inc., Index No. 601582/2002, 7/8/03 (Moskowitz, J.).

Partnerships; corporate form; fiduciary duty; profit and loss sharing. Code of Professional Responsibility DR 3-102. Conversion; tangible assets. Trade libel. Interference with contract. Unfair competition. New York Judiciary Law § 495. Motion to dismiss in action arising out of alleged oral agreement entered into as the basis for a purported partnership. Plaintiff corporation, of which plaintiff was sole shareholder, provided immigration-related services. Defendant corporation, of which defendant was sole managing member, provided legal representation to plaintiff's clients. The court found that claims of breach of fiduciary duty and contract and for an accounting relied on existence of a partnership but that no partnership existed. Parties had been operating entirely through their respective corporations and New York does not permit a partnership to operate through the corporate form. Plaintiff corporation had been formed prior to the oral agreement and defendant corporation to carry out its legal objectives, so it was chronologically inconsistent to say they were formed to carry out the partnership's objectives. Even if they had been, business had been transacted through the corporate structure and not according to partnership law. The indispensable element of profit and loss sharing was absent. Defendant, moreover, who was licensed to practice law in New York, was prohibited under the Code of Professional Responsibility from sharing legal fees with plaintiff, who was not licensed. Loss sharing, in turn, was precluded by the personal liability protection that the corporate form confers. A claim of conversion of partnership assets failed, there being no partnership. A further assertion that defendant had used plaintiff corporation's services without compensation failed to identify tangible assets converted. Allegation of trade libel failed for failure to allege the particular words used (CPLR 3016(a)). Allegation of intentional interference with contract was insufficiently specific to stand. Unfair competition claim failed because plaintiff could not practice law, nor, under New York Judiciary Law § 495, can any corporation; hence neither could compete with defendant for clients. Motion to dismiss granted. International Legal and Trade Consultants, Inc. v. Emandi, Index No. 604122/2002, 7/9/03 (Ramos, J.).

Partnerships; doctors and dentists; partners' right to records. Action arising out of dispute among former partners in a dental practice. The court ruled that patient records are the property of the treating physician. A former partner is only entitled to records of patients with whom he/she had a patient-doctor relationship. The court held that HIPAA and its regulations did not require differently. Lewis v. Clement, Index No. 13178/2002, 7/03 (Stander, J.).

Procedure; forum non conveniens. Action arising out of failed relationship between plaintiff investment advisors and defendants, banking and investment fund services entities and individuals. After termination of relationship, defendants allegedly defamed plaintiffs and some of their clients to Greek authorities as "money launderers." Government authorities investigated plaintiffs, but cleared them. On a forum non conveniens motion, the court found that the fact that defendants had sought arbitration in New York was one factor to be weighed with others. The court noted that plaintiffs were not New York residents and that the majority of events had occurred in Greece. The letter in question had not been published in New York and no facts presented indicated that it had been sent from New York. Further, the court found that the ends of justice and convenience of the witnesses would be served by a Greek forum. Greek law would probably apply. The court also ruled that Greece provided an adequate alternative forum. Any discriminatory animus would affect defendants as well. Motion granted. Mionis v. Bank Julius Baer & Co., Index No. 604471/2001, 7/1/03 (Lowe, J.).

Procedure; motion for default; dismissal/leave to serve late answer. Motion for default; cross-motion to dismiss or for leave to serve late answer in action arising out of trailer rental and leasing services agreement. Service established. Verified complaint set forth claims for breach of contract and conversion, but not sufficient facts as to damages. Services attested to by counsel only insufficient. Ownership and right to possession of trailers established re conversion, but damages unclear. Demand for return unclear. Individual defendant had reasonable excuse for delay (settlement talks in progress) and policy favors settlements. Also, possible law office failure. Meritorious defense: obligations were corporate, not guaranteed by individual defendant. Contract claim must be dismissed, but not conversion claim, as to which defendant could be liable personally. Default judgment as to corporate defendant. Transervice Trailer Rental & Leasing v. JKB Leasing/Truck America, Index No. 6304/2003, 9/8/03 (Austin, J.).

Procedure; motion to set aside verdict. Trustee; negligence; proximate causation. Motion to set aside $54 million jury verdict. Defendant had been a collateral trustee in a bankruptcy and had moved for adequate protection but not to lift the automatic stay. Plaintiff sued defendant for breach of duty and negligence in its failure to protect plaintiff's secured interest in the collateral. Defendant argued that the law had been unsettled as to whether a lift stay motion was a prerequisite to a motion for adequate protection. The First Department held that there was a question of

fact as to whether corporate trustees should have moved more quickly to protect collateral. On this motion, the court held that there was no reasonable basis for the jury to have found for plaintiff. Insufficient evidence had been presented to show that the challenged conduct had been the proximate cause of plaintiff's damages. It was only speculation whether the addition of a lift stay motion would have persuaded the Bankruptcy Judge to rule differently. There was a lack of proof regarding the actual effect of the delay on the debtor/creditor relationship. The court distinguished Curiale, 214 AD2d 16. Bluebird Partners, L.P. v. First Fidelity Bank, Index No. 601365/1997, 7/10/03 (Gammerman, J.).

Procedure; personal jurisdiction; doing business (CPLR 301); CPLR 3211(d). Action by plaintiff, New York corporation, against New Jersey corporation for breach of contract regarding shipment of goods from abroad. Defendant had no offices, employees or property in New York. The court held that a foreign corporation that maintains a marine terminal and provides stevedoring operations in another state is not amenable to suit under CPLR 301 because some of its customers are in New York. There was no proof that defendant was qualified to do business in New York or had activities here. Plaintiff did not argue that defendant solicited customers from New York on a continuous basis. The existence of an internet website accessible to New York residents does not suffice. Conducting business with New York customs brokers employed by New York-based importers, the court found, does not alone constitute engagement in a systematic and regular course of business in New York. Plaintiff failed to show that essential jurisdictional facts may exist to discover under CPLR 3211(d). Complaint dismissed against moving defendant. United B International Corp. v. UTI United States, Inc., Index No. 34561/2002, 7/28/03 (Belen, J.).

Procedure; personal jurisdiction; faxes, phone calls and one visit to New York. Action arising out of real estate development project in Massachusetts. Individual defendant who had allegedly misrepresented facts to plaintiff sent faxes and made phone calls to plaintiff in New York from Massachusetts and made one trip to New York. The court ruled that these connections to New York were too attenuated to constitute transacting business in New York (CPLR 302(a)(1)), as they had been directed toward setting up the project in Massachusetts and the New York links had only been due to the fact that plaintiff had been physically present here. The court rejected the assertion that another defendant had been the agent for defendant here as no factual support had been offered for the notion that defendant had controlled this other defendant; the allegations appeared to be that the defendant had acted as agent for the other defendant. As plaintiff had not alleged that defendant had made misrepresentations while in New York, jurisdiction was also lacking under 302(a)(2). Motion of defendant for dismissal granted. Coleman v. Kaufman, Index No. 600444/2003, 8/11/03 (Freedman, J.).

Procedure; personal jurisdiction; forum non conveniens. Motion to dismiss (CPLR 3211(a)(8) and 327) action by which plaintiff seeks recovery of an advisory fee due on a certain purchase of membership interests. Plaintiff relied upon asserted long arm jurisdiction. The court found that defendant had executed the contract outside New York and had no physical presence in New York. However, the contract designated New York law. Defendant had sought out plaintiff, a New York corporation, thereby taking advantage of New York's unique resources in the financial and business industries. Also, principals of defendant had traveled to New York three times to discuss their relationship and had exchanged over 500 phone calls and 500 e-mails. The court held that it had jurisdiction (CPLR 302(a)(1)). The court held that defendant had failed to meet its burden under CPLR 327. As most of defendant's witnesses were located in New Jersey, any hardship would be minimal. Bangert, Dawes, Reade, Davis & Thom, Inc. v. Americas Systems, LLC, Index No. 604549/2002, 7/10/03 (Ramos, J.).

Procedure; preliminary injunction; differing interpretations of contract; likelihood of success; uniqueness and compensatory damages; balance of equities; imminent transaction. Motion for preliminary injunction prohibiting defendants from selling interests in a business. A provision restricted defendants in relation to "any transaction to sell." Defendants interpreted it to permit sale to a third party after an exclusivity period ended. Plaintiff argued that the provision was only intended to afford defendants a chance to have a back-up deal in the works in case plaintiff were to withdraw. The court found that both sides had arguments, but that plaintiff had not shown it would likely succeed on the merits. Although a film library was involved and it would be unique, plaintiff could be compensated by monetary damages. The balance of equities favored defendants as they had a contract with a third party which had been funding the company's operation and a closing was imminent. Motion denied. Wall Street Financial Associates v. Hartley, Index No. 601468/2003, 7/28/03 (Ramos, J.).

Procedure; preliminary injunction; elements. Action arising out of dispute concerning a "fund of funds" and its management. Plaintiff and a defendant were directors of the fund, a limited partnership. Plaintiff asserted breach of fiduciary duty and other claims. On a motion for a preliminary injunction, the court stated, it had authority to dismiss claims despite lack of a 3211 cross-motion. The court ruled that fiduciary duty and conversion claims merely

redundant of a breach of contract claim must be dismissed and so found the claims here. An unjust enrichment claim failed in view of existence of valid and enforceable written contract, and that failure doomed a constructive trust request. The court found that there were sharp issues of fact as to what plaintiff's role had been as general partner and what the defendant could have done without plaintiff's knowledge. The court found that plaintiff could be compensated with money damages for financial losses due to defendant's refusal to allow plaintiff to control investment decisions and that if plaintiff established reputational damage, plaintiff could also be compensated for that. However, defendants would suffer greater harm than plaintiff if a preliminary injunction were issued enjoining an adviser defendant from so acting. But defendants were to be barred from destroying records and plaintiff as shareholder and director would be allowed to inspect books and records. Preliminary injunction granted in part. Ehrlich v. Hambrecht, Index No. 600708/2003, 7/9/03 (Ramos, J.).*

Procedure; summary judgment; proof in opposition; speculation. Action arising out of sale of commodities to Russia. Plaintiff shipping financier sued insurance brokers on the ground that ineffective coverage had been procured. Defendant submitted proof that it had not procured the endorsements, but that another firm had done so. Plaintiff responded with conjecture that further discovery might reveal facts tending to support its assertions. However, the court ruled, clear and uncontradicted evidence showed that defendant had had no role in the transactions at issue and plaintiff's pure speculation did not suffice. Summary judgment for defendant. Bowman Import & Export v. B & P Intl., Index No. 601762/02, 7/22/03 (Freedman, J.).

Restrictive covenants; preliminary injunction. Motion for preliminary injunction against former employee. Enforcement of restrictive covenants is disfavored; the movant must make a showing of a strong probability of success. The court held that plaintiff had failed to do so as the identity of its customers was a matter of public record. Nor had plaintiff shown that the former employee had used plaintiff's "secrets" in furtherance of the business of defendant competitor. Plaintiff had not shown the probable existence of trade secrets nor that the employee's services were unique. There were too many disputed issues of fact. Money damages would be adequate. The balance of equities favored defendants as an injunction would deprive the employee of his livelihood and bar the corporate defendant from pursuing business with a hospital with which it had a 30-year relationship and an outstanding contract. Plaintiff had other customers. Motion denied. East Coast Orthotic & Prosthetic Corp. v. Allen, Index No. 601293/2003, 7/18/03 (Ramos, J.).

Shareholders derivative action; demand on board; futility; interest of directors due to possible liability. Shareholders derivative action against members of board of directors of nominal defendant J.P. Morgan Chase & Co. in connection with that defendant's role in the Enron debacle. Defendants moved to dismiss for failure to make a demand on the board or to allege that doing so would be futile. Plaintiffs contended that, under Delaware law, a demand would have been futile and that, though the mere naming of the board is not sufficient to excuse a demand, it may be excused where the directors are disabled by a substantial likelihood of liability. Defendants relied upon a provision in the certificate of incorporation limiting personal liability of the directors. Such limitation would not apply under Delaware law if the board had acted intentionally. Plaintiffs argued that the board had acted recklessly and intentionally in failing to oversee Chase, in that there was a lack of effective internal controls and reporting and approval of the transactions. The court, considering the size of transactions Chase had engaged in, their repetition, the purpose behind them and the board's disregard of its monitoring and oversight functions, rejected defendants' argument that Chase is so large that the intent of the transactions and the concerns they raised were insignificant. The court also rejected the argument that the transactions had been day-to-day transactions not within the board's province. Had there been an adequate monitoring and control system, the dealings could not have gone unnoticed. Flagrant lack of awareness would not insulate the board. Because of a substantial likelihood of liability, the board was not disinterested and a demand would have been futile. Simon v. Becherer, Index No. 600480/2002, 8/5/03 (Lowe, J.).

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