

**Semi-Tech Litigation, L.L.C. v Ting**

2004 NY Slip Op 30126(U)

March 22, 2004

Supreme Court, New York County

Docket Number: 0604644/2002

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ  
*Justice*

PART 03

SEMI-TECH LITIGATION, L.L.C., as assignee, pursuant to the FIRST AMENDED PLAN OF LIQUIDATION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR SEMI-TECH GROUP UNDER CHAPTER 11 OF THE BANKRUPTCY CODE DATED SEPTEMBER 18, 2000, IN THE CASE CAPTIONED IN RE GRAEME LTD. ET AL., CASE NOS. 99 B 45399 (BRL) THROUGH 99 B 45401 (BRL), U.S. BANKRUPTCY COURT, S.D.N.Y., of the DEBTORS' ASSIGNED CAUSES OF ACTION and the CREDITORS' ASSIGNED CAUSES OF ACTION of all (a) HOLDERS OF UNSECURED CLAIMS and (b) ELECTING FORMER HOLDERS,

INDEX NO. 604644/2002  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

Plaintff,

-against-

JAMES H. TING, FRANK E. HOLMES, CHUCK C.H. TAM, DOUGLAS A.C. DAVIS, ALBERT GNAT, KENNETH C. SMITH, MICHAEL LIST, CLARA LOH, ERNST & YOUNG L.L.P. (an Ontario Limited Liability Partnership), ERNST & YOUNG L.L.P. (a Delaware Limited Liability Partnership), ERNST & YOUNG (a Hong Kong Partnership), and ERNST & YOUNG INTERNATIONAL, LTD.,

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

MAR 24 2004

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

Dated: March 22, 2004

KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
SEMI-TECHLITIGATION, L.L.C., as assignee, pursuant to the FIRST AMENDED PLAN OF LIQUIDATION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR SEMI-TECH GROUP UNDER CHAPTER 11 OF THE BANKRUPTCY CODE DATED SEPTEMBER 18,2000, IN THE CASE CAPTIONED IN RE GRAEME LTD. ET AL, CASE NOS. 99 B 45399 (BRL) THROUGH 99 B 45401 (BRL), U.S. BANKRUPTCY COURT, S.D.N.Y., of the DEBTORS' ASSIGNED CAUSES OF ACTION and the CREDITORS' ASSIGNED CAUSES OF ACTION of all (a) HOLDERS OF UNSECURED CLAIMS and (b) ELECTING FORMER HOLDERS,

Index No. 60464412002

Plaintiff,

-against-

JAMES H. TING, FRANK E. HOLMES, CHUCK C.H. TAM, DOUGLAS A.C. DAVIS, ALBERT GNAT, KENNETH C. SMITH, MICHAEL LIST, CLARA LOH, ERNST & YOUNG L.L.P. (an Ontario Limited Liability Partnership), ERNST & YOUNG L.L.P. (a Delaware Limited Liability Partnership), ERNST & YOUNG (a Hong Kong Partnership), and ERNST & YOUNG INTERNATIONAL, LTD.,

Defendants.

-----X  
**KARLA MOSKOWITZ, JSC**

This action follows prior litigation that plaintiff commenced as a result of certain allegedly improper business dealings of a now bankrupt Canadian holding company called Semi-Tech Corporation (STC). The main issue on this motion is whether plaintiff Semi-Tech LLC, has standing to pursue claims that certain individual creditors assigned to it. For lack of standing, and other reasons, ten of the twelve above-named co-defendants move separately to dismiss plaintiffs first amended complaint (motion sequence numbers 003 through 011) in its entirety. The court holds that plaintiff has standing, dismisses plaintiffs seventeenth and

**FILED**

MAR 24 2004

NEW YORK  
COUNTY CLERK'S OFFICE

**DECISION and ORDER**

eighteenth causes of action against Ernst & Young Canada and otherwise denies these motions for the following reasons.

### BACKGROUND

STC was incorporated in the province of Ontario and had its principal place of business in Toronto. The transactions relevant to these dismissal motions involve an indenture agreement (the Indenture)<sup>1</sup> between STC as the borrower and, initially, Bankers Trust Company of New York (Bankers Trust) as the indenture trustee.<sup>2</sup> (*Id.*) Plaintiff alleges that a number of STC's directors and officers violated the Indenture by involving STC in a series of transactions that the directors and officers failed to report to Bankers Trust and in which STC dissipated, wasted or alienated its corporate assets, thus rendering itself unable to meet its obligations under the Indenture. (*Id.*) The corporations involved in these transactions were STC; its American subsidiary, the Singer Company N.V. (**Singer**),<sup>3</sup> and its Hong Kong affiliate, Akai Holdings Ltd. (**Akai**),<sup>4</sup> (*Id.*) Plaintiff further alleges that STC's auditor, the Canadian office of the Ernst &

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<sup>1</sup> None of the nine motions now before the court, nor the voluminous opposition papers, includes a full copy of the Indenture.

<sup>2</sup> IBJ Whitehall Bank and Trust Company (IBJ Whitehall) took Bankers Trust's place as Indenture trustee pursuant to a contract dated May 11, 1999. (*See* Ainsworth Amended Affirmation in Opposition to **All** Motions, Exhibit A [amended complaint], ¶ 104). Both Bankers Trust and IBJ Whitehall are licensed New York corporations with their principal places of business in New York County. (*Id.*)

<sup>3</sup> Singer is organized under the laws of the Netherland Antilles, and is licensed, and has its principal place of business in, New **York**. (*See* Ainsworth Amended Affirmation in Opposition to All Motions, Exhibit W (Goodman Affidavit), ¶ 1).

<sup>4</sup> Akai, that was formerly known as Semi-Tech (Global) Company Ltd., is evidently a Hong Kong corporation, licensed to do business in that location. (*See* Memorandum of Law in Support of Motion to Dismiss (motion sequence number 008), at 1). Interestingly, plaintiff has presented a printout from the New York State Secretary of State indicating that "Serni-Tech (Global) Corporation" was incorporated and licensed to do business here on July 10, 1992. (*See*

Young global accounting partnership, agreed not to report the these transactions to Bankers Trust, thus delaying STC's creditors from foreclosing on the Indenture and allowing STC to avoid liability by declaring bankruptcy. (Id., ¶ 2). Plaintiff finally alleges that several other Ernst & Young members met twice in New York in 1997, at the behest of Ernst & Young's governing body, and conspired at those meetings to conceal the this deception from STC's creditors and from the Canadian authorities, (Id.). The plaintiff here, Serni-TechLitigation, L.L.C. (Semi-Tech), is a Delaware corporation with its principal place of business in New York County. The Bankruptcy Court created Semi-Tech to afford STC's creditors a vehicle to pursue their respective claims.<sup>5</sup> (Id., ¶¶ 5-7).

#### The Individual STC Co-defendants

Co-defendant James H. Ting (Ting), a Hong Kong citizen, was the chairman, president and CEO of STC, the chairman and CEO of Singer, as well as the chairman and CEO of Akai. (Id., ¶¶ 24-31). Ting apparently resigned as Singer's CEO in 1997, but retained his position there as chairman. Ting was also allegedly a director or officer of many of those three companies' various subsidiaries. (Id.). Co-defendant Frank E. Holmes (Holmes), a Canadian citizen, held positions as a director, executive vice president and CFO of STC and as a director and executive vice president of both Singer and Akai. (Id., ¶¶ 32-35). Co-defendant Chuck C.H. Tam (Tam), also a Canadian citizen, was a director, executive vice president and CFO of STC, the vice chairman of Singer, and a director, executive vice president and CFO of Akai. (Id., ¶¶ 36-40).

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Ainsworth Affirmation in Opposition to All Motions [motion sequence number 008], Exhibit D).

<sup>5</sup> The provision creating Semi-Tech was part of the Chapter 11 liquidation plan confirmation order that the Hon. Burton R. Lifland of the U.S Bankruptcy Court for the Southern District of New York signed on November 9, 2000 in the case of In re: Graeme Ltd., et al., Case Nos. 99B 45399 (BRL) through 99B 45401 (BRL).

Co-defendants Douglas A.C. Davis (Davis), Albert Gnat (Gnat) and Kenneth C. Smith (Smith), all Canadian citizens, were directors of STC, and Smith was also a director of Akai. (Id., ¶¶ 41-49). In the balance of this decision, the court will refer to these co-defendants by name, when appropriate, or will refer to them collectively as “the individual co-defendants.”

Plaintiff asserts that Ting, Holmes, and Tam supplied STC’s officers’ certifications to Bankers Trust (and later to IBJ Whitehall) that STC was in compliance with the terms of the Indenture. (Id., ¶¶ 110, 115). Plaintiff also states that Davis, Gnat and Smith were members of STC’s audit committee that oversaw Ernst & Young’s work. (Id., ¶¶ 42, 45, 48). As of the date of this decision, Holmes, Davis, Gnat and Smith have provided some discovery to plaintiff, while the other individual co-defendants have not. (Id., ¶¶ 44-48, Exhibits B, C, D, E),

#### The Ernst & Young Co-defendants

Co-defendant Ernst & Young L.L.P. (E&Y Canada) is an Ontario limited liability partnership. E&Y Canada, who was STC’s auditor in Canada, prepared the auditors’ certificates that STC submitted to Bankers Trust. (Id., ¶¶ 56-58). Co-defendant Ernst & Young L.L.P. (E&Y USA) is a Delaware limited liability partnership and was Singer’s accounting **firm**. (Id., ¶¶ 59-61). Co-defendant Ernst & Young (E&Y Hong Kong) is a Hong Kong partnership **and** was Akai’s accounting **firm**, (Id., ¶¶ 64-66). Co-defendant Ernst & Young International, Ltd. (E&Y International) is a limited liability corporation organized under the laws of the Cayman Islands **and** allegedly is the entity governing all of the Ernst & Young partnerships worldwide. (Id., ¶¶ 69-70). The balance of this decision will refer to the individual Ernst & Young co-defendants when appropriate or will refer to them collectively **as** “the E&Y defendants.” As of this date, plaintiff has had limited discovery from E&Y Canada **and** E&Y USA, but none from

the other E&Y defendants. (See Ainsworth Amended Affirmation in Opposition to All Motions, ¶¶ 49-51, Exhibit G).

#### The Indenture Agreement and the Alleged Defaults

In 1993, STC financed **part** of a purchase of **25** million shares of Singer stock from Akai by issuing a quantity of ten-year senior secured discount notes (the Notes). (Id., ¶¶ 87-88). STC issued these Notes pursuant to the Indenture between STC, as borrower, **and** Bankers Trust (later, IBJ Whitehall), **as** indenture trustee. (Id., ¶¶ 89-90; Notice of Motion to Dismiss of E&Y Canada, [motion sequence number 003], Exhibit F). The Notes had a projected value of \$654,193,000.00 at maturity. STC's pledge of its Singer stock to Bankers Trust (the Pledge) secured the Notes. (Id., ¶¶ 91-92; Exhibit M). The Pledge provided that the Indenture trustee in New York would hold all of the "Collateral" (i.e. pledged shares of Singer stock) and contained New York State choice of law **and** forum selection clauses. Id. **Although** none of the parties **has** submitted a copy of the Indenture, they describe its provisions to protect Note-holders against the possible dissipation or mismanagement of STC's corporate assets and the consequent loss of value to the Notes. (Id., ¶¶ 94-109). Specifically, STC would be in default of the Indenture if: a) it engaged in any "related entity transactions" (a transaction whose terms either were not comparable to those that STC would have negotiated with **an** "unrelated" entity, or that a board vote had not approved or not recommended after **an** independent expert review; b) permitted either Singer, or one of Singer's subsidiaries, to incur indebtedness that would drop its yearly cash flow ratio below a factor of 3:1; or c) disposed of **any** of its **Akai** shares for less than fair market value. (Id.). For the duration of the ten-year maturity term of the Notes, both STC's directors and its auditor (E&Y Canada) had to periodically certify to Bankers Trust that STC

remained in compliance with the Indenture **and** to report to Bankers Trust any event constituting one of the above defaults. (Id.).

A) The Individual Defendants' Alleged Defaults

Plaintiff alleges that STC engaged in **the** following transactions, all of which constituted defaults under the terms of the Indenture. (Id., ¶ 135).

D) The Singer Furniture Company Transaction

First, plaintiff claims that in 1995, Ting, **Tam**, Holmes, Gnat and Davis engineered STC subsidiary Singer's purchase from Akai of the "Singer Furniture Company" (**SFC**), at an inflated price, and then directed that Singer close down SFC at a net financial loss, (Id., ¶¶ 136-153).

Plaintiff alleges that this constituted a default under the Indenture because the terms of the SFC transaction were not the type that STC would have negotiated with an unrelated third party and because STC's board did not approve the transaction. (Id., ¶ 154).

ii) The Singer do Brasil Transaction

Next, plaintiff claims that, in 1997, STC permitted its subsidiary Singer to authorize its Brazilian subsidiary, Singer do Brasil, to issue a number of notes, causing Singer to incur debt that drove Singer's cash flow ratio below 3:1. (Id., ¶¶ 174-177). Plaintiff alleges that this constituted a default under the Indenture because STC had agreed not to permit Singer or any of Singer's subsidiaries to engage in such transactions and because STC failed to report the transaction to Bankers Trust. (Id., ¶ 177-179).

iii)

Plaintiff also claims that, in 1997, STC permitted Singer to purchase from **Akai** a number of shares in a German corporation called G.M. Pfaff at **an** inflated price, that Singer paid for by

incurring yet more debt and driving its cash flow ratio even further below 3:1. (Id., ¶ 184-188). Plaintiff alleges that this transaction constituted a default under the Indenture because the terms were not the same as those that STC would have negotiated with an unrelated third party and because the transaction violated STC's responsibility to ensure the stability of Singer's cash flow ratio. (Id., ¶ 188-189).

iv) The Russian Transactions

Plaintiff next claims that, in 1995, Akai entered into an option agreement to purchase a number of shares in a Russian entity called "Kelleman Limited" (Kelleman). Another Russian entity called "the Kurochina Foundation" held those shares in trust, and that entity's trustee, "Ibbett Limited," was to sell the shares. However, plaintiff alleges **that Akai** was, in fact, the **only** shareholder of Ibbett Limited, and that Ting, Holmes, Tam **and** non-moving defendant Clara Loh were Ibbett Limited's directors. (Id., ¶ 266-269). Plaintiff further claims that in 1997, Singer also entered into **an** agreement with Kellerman to purchase a number of shares in a Russian entity called "A/O Concern Podolsk" (Podolsk) formerly called "Singer Podolsk." These shares represented Kellerman's remaining corporate assets. (Id., ¶ 270-272). Plaintiff alleges that Akai's payment to Kellerman actually went to the **STC** directors who operated Ibbett Limited and that part of **Singer's** payment to Kellerman was actually paid to Akai, under the guise of a refund, and also eventually went to the STC directors who operated Ibbett Limited. (Id., ¶ 273-274). Plaintiff finally claims that, in 1999, Singer, Akai and Kellerman entered into a second set of nearly identical transactions in which Singer contracted directly to purchase certain outstanding shares of Podolsk, Akai separately contracted with Kelleman to purchase the remaining **shares** of Podolsk, Kellerman refunded **part** of Singer's purchase price, Singer

refunded **an** equal amount to Akai and Akai ended **up** with all of the shares of Podolsk. (Id., ¶ 346-347). Plaintiff alleges that all of these transactions constituted defaults under the Indenture because their terms were not the same **as** those STC would have negotiated with **an** unrelated third **party** and because the transactions violated STC's responsibility to ensure the stability of Singer's cash flow ratio. (Id., ¶ 275-276; 357-358).

v) The Akai Transaction

Plaintiff finally claims that between July and September of 1999 Ting caused STC to sell off its entire forty-percent interest in Akai's stock piecemeal, in blatant violation of the terms of the Indenture. (Id., ¶ 336-343).

B) Plaintiffs Claims against The R&Y Defendants

Plaintiffs allegations against the E&Y defendants sound in fraud, conspiracy **and** breach of professional responsibilities. Specifically, plaintiff asserts that E&Y Canada falsely reported to Bankers Trust in both the 1996 and 1997 auditors' certificates that STC had not defaulted on the terms of the Indenture. (Id., ¶ 466-494). Plaintiff claims that this constitutes common-law fraud, negligent misrepresentation **and** accounting malpractice, (Id.). Plaintiff also asserts that in 1998, E&Y Canada sent a letter to the Ontario Securities Commission in which it intentionally misrepresented the reasons why it resigned **as** STC's independent public auditor, (Id., ¶ 440-465). Plaintiff claims that this too constitutes common-law fraud, negligent misrepresentation and accounting malpractice. (Id.). Finally, plaintiff asserts that all of the E&Y defendants met twice in New York in August of 1997, where they were made **privy** to the details of STC's illicit business dealings, as well **as** of E&Y Canada's fraudulent concealment of the occurrence of these dealings in the auditors' certificates that it had submitted to Bankers Trust and that the E&Y

defendants jointly resolved that E&Y Canada should seek to withdraw **as** STC's auditor rather than disclose its own improper behavior. (Id., ¶ 495-517; 565-576; 621-626; 633-646). Plaintiff claims that this constitutes common-law fraud, aiding and abetting fraud and breach of fiduciary duty and also affords a basis for holding all of the E&Y defendants vicariously liable for E&Y Canada's actions. (Id.). Although plaintiff has had little discovery **from** certain of the E&Y defendants at this juncture, documents produced at Holmes', Davis', Gnat's **and** Smith's depositions confirm that all of the E&Y defendants did attend the two 1997 meetings in New York and that E&Y Canada partner Robert Long subsequently contacted Gnat and Davis, who were members of STC's audit committee, about E&Y Canada and E&Y USA withdrawing **as** STC's and Singers' auditors, respectively. (Id., Exhibit E, Gnat deposition transcript, attachments 29, 30, 32).

#### Prior Proceedings and STC's Bankruptcy

In 1998, the Ontario Securities Commission granted STC's request to replace E&Y Canada **as** its auditor with the accounting **firm** of Deloitte & Touche. (Id., ¶ 246). Plaintiff alleges that STC made this request solely because of the E&Y defendants' covert demands to replace it that Robert Long had communicated to STC. (Id., ¶ 248). Plaintiff further alleges that, at the 1997 meetings, E&Y Canada had apprised the other E&Y defendants that it had submitted misleading or incomplete auditors' certificates to Bankers Trust on STC's **behalf** and that all of the E&Y defendants thereafter resolved that it would be most advantageous for them if E&Y Canada stopped representing STC and E&Y USA stopped representing Singer, although E&Y Hong Kong should continue working for Akai. (Id., ¶¶ 255-265). Plaintiff finally alleges that the E&Y defendants also resolved to demand that STC provide the Ontario Securities Commission

with an innocuous, but false, reason for wanting to replace E&Y Canada as its auditor although the real reason was because the E&Y defendants no longer trusted the financial information that STC, Singer and Akai had been providing them. (*Id.*, ¶¶ 201-225; Exhibit E [and attachments]). Both the order of the Ontario Securities Commission and a subsequent STC press release state that STC was replacing E&Y Canada with Deloitte & Touche as STC's auditor because STC wished to use the same firm, i.e. Deloitte & Touche, to audit both itself and its subsidiaries. (*Id.*, ¶¶ 245-248, Exhibit DD. Deloitte & Touche had begun working as Singer's auditor in 1997. [*Id.*, ¶¶ 246]). The court also notes that these documents show that in 1997, E&Y Canada sought and received permission from STC to access and utilize E&Y Hong Kong's audits of Akai's corporate dealings, specifically as regards the SFC transaction, when it prepared its STC auditors certificates for Bankers Trust. (*Id.*, Exhibit B, Attachments 30, 31, 50).

On January 22, 1999, Bankers Trust and certain Note-holder creditors commenced an action in an Ontario court pursuant to the Canadian Companies Creditors Arrangement Act and the Business Corporation Act (the Ontario action). The plaintiffs in the Ontario action sought to accelerate STC's obligation to pay the Notes because STC had defaulted on the terms of the Indenture. Plaintiff here alleges that Ting, Tam, Holmes, Davis and Smith falsely testified in the Ontario action about STC's finances and assets and about the true reason why STC had changed auditors. (*Id.*, ¶¶ 288-321). The Canadian court ultimately dismissed the Ontario action. (*Id.*, ¶ 322).

On July 2, 1999, STC commenced an action in this court against Bankers Trust's successor in interest IBJ Whitehall for a declaratory judgment that STC had not defaulted on the terms of the Indenture (the New York action), (*Id.*, ¶ 323-324). STC also sought a preliminary

injunction preventing any Note-holders from seeking to accelerate STC's repayment obligation, on the ground that this would force STC into bankruptcy. (Id., ¶ 325). Some of STC's Note-holders intervened in the New York action and cross-moved for an injunction forbidding STC from disposing of any more of its own or Singer's assets. (Id., ¶ 328-329). On August 2, 1999, this court rendered a decision granting STC's motion for a preliminary injunction and denying the Note-holders' cross motion. (Id., ¶ 334).

**STC** filed a Chapter 11 Bankruptcy petition in the U.S. Bankruptcy Court for the Southern District of New York on September 7, 1999 (the Bankruptcy action). (Id., ¶ 16, 335). This stayed all proceedings in the New York action and rendered the Notes valueless. (Id., ¶¶ 335; 360). The First Amended Plan of Liquidation of Unsecured Creditors of Semi-Tech Group Under Chapter 11 of the Bankruptcy Code, dated September 18, 2000 (the Plan) provided for assignment to plaintiff of the Noteholders' claims. Those who were beneficial owners of the relevant notes as of September 15, 2000 (the date the Plan set for determining which creditors were entitled to vote to accept or reject the Plan) had the option to accept or decline the assignment of their claims by indicating their choice on a form. (See Ainsworth Affirmation in Opposition to all Motions, **Ex. J** at § 7.5.2) Section 7.5.2 of the Plan provided that these Noteholders "shall be deemed to have accepted the Creditor Claim Assignment Offer unless such holders elect to reject on the Ballot. . . ." (Id.) Those who no longer owned their notes could assign their claims to plaintiff "by executing **and** delivering the Former Holder Assignment Forms to the Claims Agent" (Id. § 7.5.4).

The judge in the Bankruptcy action then entered **an** order on November 9, 2000 that confirmed the Plan and thereby created Semi-Tech as a vehicle for both **STC's** creditors and its

estate in bankruptcy to pursue their surviving claims in state court (the Bankruptcy Order). The Bankruptcy Order specifically permitted Semi-Tech to pursue: a) certain creditors' causes of action that they had assigned to Semi-Tech; b) the claims of certain holders of unsecured claims and c) the claims of certain electing former holders. Semi-Tech thereafter commenced this action on November 13, 2001.

### The Motions

None of the co-defendants named in this case has filed **an** answer. Instead, ten of them now move to dismiss on grounds that include: 1) lack of jurisdiction; 2) forum non conveniens, 3) lack of standing; 4) insufficient pleadings; or 5) failure to state a claim.

## DISCUSSION

### I. Dismissal for Lack of Standing

E&Y USA moves to dismiss on the ground that plaintiff Semi-Tech lacks legal standing to assert claims on behalf of both STC and STC's creditors and Note-holders (motion sequence number 007).<sup>6</sup> The other E&Y defendants join in this motion (motion sequence numbers 003, 006, 008), **as** do the individual co-defendants (motion sequence numbers 004, 005, 010 and 011).

E&Y USA first argues that the U.S. Bankruptcy Code does not authorize plaintiff Semi-Tech to assert claims on behalf of both the bankruptcy debtor **and** its creditors and that the Bankruptcy Court judge, therefore, exceeded his authority when he signed the order permitting Semi-Tech to do so, (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 007] at 6-10). E&Y USA specifically argues that STC's Chapter 11 liquidation

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<sup>6</sup> Because E&Y USA is the **primary** proponent of this argument, this portion of the court's decision cites only to pages from E&Y USA's memorandum of law.

plan created Semi-Tech pursuant to Bankruptcy Code § 1123(b)(3)(B) and that that statute authorizes Semi-Tech to represent the estate of the “debtor,” i.e. STC, only. (Id.) E&Y USA cites Lippe v. Bainco Corn., 218 BR 294 (SDNY 1998) that involved a creditors trust under a bankruptcy plan. The Lippe court refused to allow the creditors trust to sue third party professionals who had joined with the debtor in defrauding creditors. The Lippe court reasoned that the plaintiff was “standing in the shoes of the debtor corporation” and therefore could not sue because the claim belonged to “the creditors **qua** creditors.” (Lippe, 218 B.R. at 301[citations omitted]).

E&Y USA’s argument, while somewhat convincing, is not applicable to this case. First, Judge Raplan of the United States District Court for the Southern District of New York has already ruled on this issue in Semi-Tech Litigation, LLC v. Bankers Trust Co., 272 F. Supp.2d 319, 323 . Judge Kaplan held that Semi-Tech had standing as assignee of the Noteholders’ claims and that just because Semi-Tech was a “creature of a bankruptcy” was no reason to strip the assignments of their legal effect. Judge Kaplan’s reasoning is persuasive.

It is clear that, given the Noteholders’ assignment, the claim against the E&Y defendants belongs to Semi-Tech as a creditor and in that sense Semi-Tech is not “standing in the shoes of the debtor.” In Lippe, an “Official Committee of Unsecured Creditors” transferred whatever right that Committee had to prosecute the action. (Lime, 218 BR at 298). The court considered the Committee as suing in the place of the debtor. Here, however, the Noteholders assigned their claims individually. In addition, the assignment of STC’s claims to Semi-Tech clearly benefits both STC’s estate in bankruptcy, that may use **any** recovery from this action to repay its Noteholders, and the unsecured Note-holders themselves, who have no other means of securing

recompense for their investment.

E&Y USA attacks the Noteholders' assignments citing Barnes v. Schatzkin, 215 AD 10, aff d, 242 NY 555. In Barnes, the court refused to allow a trustee in bankruptcy to take an assignment of a claim from a creditor and sue as trustee on that claim against a third person. (Barnes, 215 AD at 11). However, the majority in Barnes based its reasoning on the Bankruptcy Law then in effect that had no provision permitting a trustee from receiving property for the benefit of the estate:

No serious assertion is made here that these claims, indicated by the complaint, were property of the bankrupt. They were not assets which passed to the trustee because they belonged to the bankrupt. The causes of action which the trustee has by reason of the Bankruptcy Act, other than such **as** were property of the bankrupt, are causes of action to recover or follow assets,

(Barnes, 215 AD 10, 13). Section 541 (a)(7) in the current Bankruptcy Code clearly includes **as** property of the estate: "[a]ny interest in property the estate acquires after the commencement of the case."

Here, **as** stated earlier, the assignment from the Noteholders was not only to Semi-Tech standing in the shoes of the debtor, but also to Semi-Tech acting **as** creditor. Barnes is distinguishable for that reason as well. However, even if the assignment was to Semi-Tech acting on behalf of the debtor, given the current reading of the Bankruptcy Code, it is questionable whether Barnes remains good law. (See Ben Franklin Retail Stores v. Kendig, 225 BR 626, 650-651 [N.D. Ill. 1998]; affd, 2000 WL 28266 [N.D. Ill. Jan. 12, 2000]). Finally, the court notes that plaintiff could have a conflict between its duties to the debtor and its duties to the creditors. However, the parties did not brief this issue and in any event this issue is for the Noteholders to raise.

Moreover, E&Y USA's Bankruptcy Code argument constitutes an attack on the Bankruptcy Judge's liquidation plan to which this court must give full faith and credit. (See e.g., All Terrain Properties, Inc. v Hoy, 265 AD2d 87, 92 ["It is beyond dispute that the final decree of [a] Bankruptcy Court approving [a] \* \* \* reorganization plan is entitled to full faith and credit".]). Accordingly, the court rejects the first lack of standing argument.

E&Y USA next argues that New York State law, specifically General Obligations Law (GOL) § 13-107, precludes plaintiff from bringing claims based on a note against other parties, without a written assignment from each prior holder of that note. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 007], at 12). Again, E&Y USA is mistaken.

Section 13-107 states in pertinent part:

Unless expressly reserved in writing, a transfer of any bond shall vest in the transferee all claims or demands of the transferrer, whether or not such claims or demands are known to exist, (a) for damages or rescission against the obligor on such bond, (b) for damages against the trustee or depository **under** any indenture under which such bond was issued or outstanding, **and** (c) for damages against any guarantor of the obligation of such obligor, trustee or depository.

Thus, the statute provides that, when ownership of a bond is transferred, all of the claims or demands that accrued to the prior owner will automatically devolve upon the new owner, by operation of law, as part of the transfer. Before the Legislature enacted this wording, **an** express agreement was necessary to transfer existing claims for damages against a trustee with the transfer of a bond. (See Bluebird Partners, L.P. v, First Fidelity Bank, N.A., 97 NY2d 456,461 [discussing prior law **and** holding that transferees can assert claims that the transferor could have asserted, whether or not the transferees suffered any actual injuries]). The statute does not

address the situation where there has been **an assignment** (as opposed to a transfer) of a claim. Nor does the statute address the type of claim that plaintiff asserts here against accountants who allegedly committed fraud. Given that the Legislature enacted the predecessor to GOL 13-107 to expand on the rights of plaintiffs, E&Y USA's interpretation of the statute to narrow plaintiff's rights is misplaced.

In addition, even if the statute did prohibit plaintiff from suing E&Y without a direct assignment, the complaint should not be dismissed because, as E&Y USA concedes, plaintiff has identified at least **14** claimants who held notes while Singer retained E&Y USA and throughout the confirmation of the Plan. (See Memorandum of Law in Further Support of Motion to Dismiss [motion sequence number 007], at 9). Therefore, that part of E&Y USA's argument seeking dismissal for failure to comply with the requirements of GOL 13-107 is denied.

E&Y USA also argues, for the first time on reply, that § 507 of the Indenture Agreement, a standard "no action" clause, restricts the rights of the Noteholders to bring claims relating to the Indenture Agreement unless they meet certain conditions. (Memorandum of law in Support of Motion to Dismiss [motion sequence no. 7] at 10). However, E&Y USA fails to explain how § 507 prohibits the Noteholders' claim against the E&Y defendants here—claims involving accounting fraud, not for breach of the Indenture. Accordingly, the court also rejects the co-defendants' dismissal argument based on the terms of the Indenture.

E&Y USA finally argues that Semi-Tech's claims are champertous. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 007], at 13-15). Section **489** of the Judiciary Law of New **York** states in pertinent part that:

No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims. . . shall solicit, buy or take **an** assignment of,

or be in any manner interested in buying or taking **an** assignment of a bond, promissory note, bill of exchange, book, debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon. . .”

Thus, there is a violation of the statute where **an** entity has received the assignment of a claim, and the “primary purpose” behind that assignment is to sue on that claim. (See Bluebird Partners, L.P. v. First Fidelity Bank, 94 NY2d 726,736).

Plaintiff counters, claiming that “the purpose of the assignment is still the legitimate collection of a debt rather than the trafficking in litigation” and that “[t]he LLC was formed to facilitate implementing the Plan of Liquidation, to efficiently resolve creditors’ claims, and to aid the administration of the Debtors’ estates. The assignment of the creditors’ claims to the Litigation LLC was incidental to the overall transaction.” (Pl. Opp Mem. at 16).

As Judge Kaplan recognized in the July 17, 2003 decision, 272 F.Supp. 2d at 331, the New York Court of Appeals is “hesitant to find that an action is champertous **as** a matter of law.” (Bluebird Partners, L.P. v. First Fidelity Bank, 94 NY2d at 734). Here, plaintiff has advanced enough of a basis to justify a trier of fact finding that the sole or primary purpose in the assignment of the claims to plaintiff was not the commencement of a lawsuit, but rather that the Note holders were trying to protect their interests. (See Richbell Information Services, Inc. v. Jupiter Partners L.P., 280 AD2d 208,216) Accordingly, the court rejects the co-defendants’ champerty argument **as** well and denies those portions of the co-defendants’ respective motions that seek to dismiss this action for plaintiffs lack of standing.

## II. Dismissal for Lack of Jurisdiction

### A. The Individual Defendants

Gnat, Davis **and** Smith, Holmes and Tam **and** Ting each argue that there is no personal jurisdiction over them pursuant to either CPLR 301 or 302. (See Memoranda of Law in Support of Motions to Dismiss, (motion sequence number 004), at 5-16; (motion sequence number 005), at 7-13; (motion sequence number 010), at **8-24**; and (motion sequence number 011), at 6-16, respectively).<sup>7</sup> Although Semi-Tech's opposition memoranda contain no argument regarding CPLR 301, it asserts that the court may exercise jurisdiction pursuant to CPLR **302** (a)(1), (a)(2) or (a)(3). (See e.g., Memorandum of Law in Opposition to Motion to Dismiss [motion sequence number 005], at 14-24).<sup>8</sup> For the following reasons, the court agrees with Semi-Tech.

CPLR 302 (a) (1) authorizes the exercise of personal jurisdiction over a nondomiciliary where the cause of action at issue arose out of the "transaction of business within the state." The Court of Appeals holds that CPLR 302 (a) (1) is "a 'single act statute' and [that] proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never entered New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (Kreutter v McFadden Oil Corn., 71 NY2d 460,467). The courts of this state also recognize that "the place of contracting is not an exclusive criterion for determining the requisite transaction of business

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<sup>7</sup> For the sake of brevity, the balance of the court's decision will only cite to the specific pages in the memorandum of law that the particular co-defendant submitted who was primarily responsible for asserting a given argument.

<sup>8</sup> The court's decision will not cite to all of plaintiff Semi-Tech's memoranda of law in opposition, unless necessary, because **many** of its arguments are repeated verbatim against different, yet similarly situated, co-defendants.

under CPLR 302(a)(1),” and that “other purposeful acts, ‘albeit preliminary or subsequent to [contract] execution,’ can satisfy the statutory test.” (See Fisher v McClain, 216 AD2d 210, quoting Longines-Wittnauer Watch Co. v Barnes & Reinecke, 15 NY2d 443,457).

Here, both Indenture trustees, i.e. Bankers Trust, and its successor in interest, IBJ Whitehall, were licensed New York corporations with their principal places of business in New York County. (See Ainsworth Amended Affirmation in Opposition to All Motions, Exhibit A [amended complaint], ¶ 104). Kidder Peabody & Co., Inc., the entity that underwrote the Notes also has its principal office in New York. In addition, the law firm of Skadden, Arps, Slate, Meagher & Flom, LLP, that counseled STC with respect to the issuance of the Notes is located in New York. (Id., ¶ 8). For the duration of the ten-year maturity period of the Notes, STC’s principal directors, Ting, Holmes and Tam, periodically had to certify to these New York Indenture trustees that STC remained in compliance with the terms of the Indenture and had not committed any of the acts the Indenture defined as defaults. (Id., ¶¶ 94-109). Plaintiff alleges that Ting, Holmes and Tam did, in fact, submit certifications on November 7, 1995, June 26, 1996, November 1, 1996, May 23, 1997, August 14, 1997, November 12, 1997, June 3, 1998, August 7, 1998, November 26, 1998 and March 5, 1999. (Id., ¶ 110). Plaintiff further alleges that Davis, Gnat and Smith, who were members of STC’s audit committee, had input into the auditors’ certifications that E&Y Canada submitted in 1996 and 1997. (Id., ¶ 134). It is thus clear that the Indenture was not a discrete, one time, business transaction, such as a purchase of goods, but, rather, an ongoing transaction in the nature of a loan or mortgage, wherein STC, as the borrower, had continuing obligations to the Indenture trustee. Thus, each instance when an STC director submitted a compliance certificate to the Indenture trustee in New York constituted

a “purposeful act” that, although subsequent to the execution of the Indenture, was nonetheless **part** of that ongoing business transaction. (See Fisher v McClain, 216 AD2d 210, supra).

Accordingly, the court concludes that there is sufficient evidence that Ting, Holmes and Tam, who prepared and submitted all of STC’s officers’ certificates, engaged in purposeful activity in New York.

The remaining individual co-defendants, i.e. Davis, Gnat and Smith, allege that they never transacted any business in New York, because they never personally prepared or submitted any officer certificates on behalf of STC. However, all three of these co-defendants were directors of STC and sat on its audit committee. (Id., ¶¶ 42, 45, 48). As members of the audit committee they allegedly participated in submitting false audit statements to the indenture trustee in New **York**. (Id. ¶¶ 134). In addition, Gnat and Davis allegedly participated in concealing the real reason for E&Y’s withdrawal as auditor. (Id. ¶¶ 309-322). Further, under New York law, a plaintiff need not show that these defendants (i.e. directors) personally transacted business, but, rather, need only demonstrate that the corporation, as their agent, engaged in purposeful activities here that related to the subject transaction, that those actions were undertaken for the benefit of, and with the knowledge **and** consent of, these defendants and that these defendants exercised some control over the corporation in the matter. (See Kreutter v McFadden Oil Corp., 71 NY2d 460,467 (internal citations omitted); see also Lazard Freres & Co. LLC, v WestGroup Properties LLC., \_\_\_ Ad2d \_\_\_, 2004 WL 5 1946). Those factors are all present here as to Davis, Gnat and Smith. Accordingly, the court concludes that there is sufficient evidence that these individual co-defendants also engaged in “purposeful activity” in New **York** through STC.

The second, i.e. “substantial relationship,” prong of the jurisdictional test for CPLR 302

(a)(1) requires a finding “of some articulable nexus between the business transacted and the cause of action sued upon.” (McGowan v Smith, 52 NY2d 268,272; see also Holness v Maritime Overseas Corp., 251 AD2d 220,222). Here, the causes of action that name the individual co-defendants include allegations of breach of fiduciary duty, negligence, fraud, conspiracy to commit fraud **and** negligent misrepresentation, all in connection with STC’s claimed violations of the terms of the Indenture. Because plaintiff could hardly articulate a clearer “nexus” between the activity and the transaction, the court finds that plaintiff has satisfied the “substantial relationship” prong of the jurisdictional test. Accordingly, the court also finds that it may properly exercise personal jurisdiction over all of the individual co-defendants here, pursuant to CPLR 302 (a)(1), and denies those portions of their respective motions that seek dismissal for want of personal jurisdiction.

Because the court finds that CPLR 302 (a)(1) provides a sufficient basis for asserting personal jurisdiction over the individual co-defendants, there is no need for the court to review their alternative dismissal arguments made pursuant to CPLR 302 (a)(2), (a)(3) or (a)(4).

#### B. The E&Y Defendants

E&Y USA and E&Y International have not contested personal jurisdiction. On the other hand, both E&Y Canada (motion sequence number 003) and E&Y Hong Kong (motion sequence number 008) assert that no personal jurisdiction attaches to them pursuant to CPLR 302 (a)(1) or (a)(2). For the following reasons, the court disagrees.

E&Y Canada is in much the same position **as** individual co-defendants Ting, Holmes and Tam. In both 1996 **and** 1997, E&Y Canada submitted auditors’ certificates to Bankers Trust, in New York, stating that it had reviewed STC’s business activities and determined that STC was

not in default of its obligations under the Indenture. As previously discussed, these submissions constitute “purposeful activity” within the meaning of CPLR 302 (a)(1). Further, plaintiff asserts that E&Y Canada knowingly falsified information on the auditors certificates in order to assist STC in concealing its defaults under the Indenture. Although E&Y Canada ~~was~~ not a signatory to the Indenture, STC contracted for E&Y Canada’s services to perform the Indenture. Thus, the foregoing activities are clearly “substantially related” to E&Y Canada’s role, ~~as~~ auditor, in connection with the underlying transaction. Accordingly, the court concludes that personal jurisdiction exists over E&Y Canada, pursuant to CPLR 302 (a)(1), because E&Y Canada transacted business in New York.

As to E&Y Hong Kong, however, plaintiff asserts that personal jurisdiction lies pursuant to CPLR 302 (a)(2). In the complaint, plaintiff specifically claims that E&Y Hong Kong committed the torts of common-law fraud, conspiracy to commit fraud, aiding and abetting fraud and breach of fiduciary duty and vicarious liability. (See Ainsworth Amended Affirmation in Opposition to All Motions, Exhibit A [Amended Complaint], ¶¶ 495-517, 621-626, 633-649). Plaintiff further asserts that E&Y Hong Kong committed these torts at the two 1997 meetings of all of the E&Y co-defendants in New York, where they conspired to conceal E&Y Canada’s malfeasance. (See Ainsworth Affirmation in Opposition [motion sequence number 008], ¶¶ 4-5). In its memorandum, plaintiff argues that these allegations permit the court to exercise personal jurisdiction over E&Y Hong Kong pursuant to theories of agency or co-conspirator. (Id., ¶2, Exhibit A, 12-19). E&Y Hong Kong contests both these theories, but admits that its officers attended the two 1997 New York meetings. (See Memorandum of Law in **Support** of Motion to Dismiss [motion sequence number 008], at 2; Memorandum of Law in Further Support of Motion

to Dismiss, at 2-4). Because E&Y Hong Kong makes this admission, the court finds that CPLR 302 (a)(2) does not require plaintiff to resort to either of the above theories to establish personal jurisdiction over E&Y Hong Kong, because credible allegations that E&Y Hong Kong committed tortious activity in New York satisfy the statute, (See e.g. Bernstein v Kelso & Co., Inc., 231 AD2d 314).

Here, as previously observed, plaintiff asserts that members of E&Y Hong Kong actively participated in the torts of fraud, conspiracy, etc., in New York, to the detriment of the Note-holders, so that E&Y Hong Kong could maintain its lucrative representation of Akai. Plaintiff supports these allegations with the minutes of an October 1997 STC audit committee meeting that Gnat, Davis, Ting, Holmes and Tam signed that recite, in relevant part: 1) that Robert Long had informed Gnat and Davis of the results of the two New York meetings of the E&Y defendants, and 2) specifically state that E&Y Hong Kong had reviewed the SFC transaction and approved it for E&Y Canada's inclusion in the 1997 auditors' certificate, despite the clear indications that it constituted a default under the Indenture. (See Ainsworth Affirmation in Opposition, Exhibit E [Gnat deposition transcript], attachment 32). In response, E&Y Hong Kong merely asserts that it "committed no tort" at the 1997 meetings, and offers, as proof, the fact that it "did not sever its relationship" with Akai after those meetings. (See Memorandum of Law in Further Support of Motion to Dismiss [motion sequence number 008], at 2). This is hardly a convincing rebuttal, because "[o]n a motion to dismiss pursuant to CPLR 321 1, [the court] must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." (See Sokoloff v Harriman

Estates Development Corp., 96 NY2d 409,414). The court, therefore, finds that plaintiff **has** presented sufficient proof that E&Y Hong Kong engaged in tortious activity in New **York**, and now must only determine whether that particular nonresident defendant has sufficient minimum contacts with this state “so that maintenance of the \* \* \* suit” here does not offend notions of “fair play and substantial justice.” (Banco Nacional Ultramarino, S.A. v Chan, 169 Misc 2d 182, 187). The court can discern no offence, because, as with the defendants in Banco Nacional Ultramarino, E&Y Hong Kong grounds its entire jurisdictional argument on the fact that it does business elsewhere, even though it allegedly committed torts in this state. In that action, the available evidence indicated that the defendants had used New York bank accounts in a money laundering scheme, while the evidence here indicates that E&Y Hong Kong came to New **York**, met and conspired to commit fraud. Thus, this court fully accepts the rationale, expressed in Banco Nacional Ultramarino, that it “would be a gross violation of common sense and reality to shelter such activities” simply because E&Y Hong Kong has no permanent presence here, (Id., at 189). Accordingly, the court concludes that personal jurisdiction exists over E&Y Hong Kong, pursuant to CPLR 302 (a)(2).

The court rejects, **as** insufficiently supported, plaintiff’s additional argument, that E&Y Hong Kong is subject to personal jurisdiction pursuant to CPLR 301 or **302** (a)(1). The “evidence” that plaintiff relies on consists of a document from the New York State Secretary of State’s office indicating that a company called “Semi-Tech (Global) *Corp.*” filed incorporation papers in New **York** in **1992**, **and** that Holmes was its “Chairman or CEO.” (See Ainsworth Affirmation in Opposition [motion sequence number 008], Exhibit D). Plaintiff asserts that “Semi-Tech (Global) *Corp.*” later became Akai, and that E&Y Hong Kong was Akai’s auditor.

(Id., ¶¶ 4, 6). The court finds that that document is insufficient proof that E&Y Hong Kong either did or transacted business in New York, within the meaning of the statutes.

### III. Dismissal for Forum Non Conveniens

In addition to their individual motions, Holmes, Tam, Davis, Gnat, Smith and E&Y Canada have submitted a “joint motion” that seeks to dismiss the amended complaint pursuant to the doctrine of forum non conveniens (motion sequence number 009). Ting also raises this argument in his own dismissal motion (motion sequence number 011). The first set of moving co-defendants are Canadian citizens, while Ting is a Hong Kong citizen. However, for the following reasons, the court rejects their arguments.

It is well settled that the burden of establishing that New York is an inconvenient forum rests squarely with the party challenging that forum. See e.g. Terrones v Morera, 295 AD2d 254, 255, citing Islamic Republic of Iran v Pahlavi, 62 NY2d 474,479, cert. denied 469 US 1108 (1985). Among the factors that the court must consider when reviewing a forum non conveniens argument are: (1) the burden on the New York courts; (2) the potential hardship to the defendant; (3) the convenience of the witnesses; and (4) the unavailability of an alternative forum in which plaintiff may bring suit. (See e.g. World Point Trading PTE. Ltd. v Credito Italiano, 225 A.D.2d 153, 158, citing Islamic Republic of Iran v Pahlavi, 62 NY2d at 479, supra.) Although it is not determinative, the location of the residence of a plaintiff is generally considered “the most significant factor in the equation.” (See e.g. Sweeney v Hertz Corp., 250 AD2d 385,386 [internal citations omitted]).

Here, the U.S. Bankruptcy Court for the Southern District of New York created plaintiff Semi Tech that maintains its principal place of business in New York County. (See Ainsworth

Amended Affirmation in Opposition to All Motions, Exhibit A [Amended Complaint], ¶¶ 5-6). Further, the majority of the Note-holder creditors that Semi-Tech represents are also New York residents, and some intervened in the earlier New York action when STC sought to obtain a preliminary injunction. (Id., at ¶¶ 323-328). Nonetheless, the co-defendants argue that both the “public and private interests at issue” dictate that this action should be in Canada. (See Memorandum of Law in Support of Motion to Dismiss (motion sequence number 009), at 8-13). They specifically assert that “the [instant] claims are alleged primarily against Canadian officers, directors and public accountants, and will be determined pursuant to Canadian law regarding: (1) fiduciary duties Canadian directors and officers owe to Canadian corporations (2) the professional standards applicable to Canadian accountants and (3) the requirements of Canadian securities law related to disclosure in Canada when a Canadian corporation replaces Canadian auditors.” (Id., at 8). The court disagrees, first because these arguments clearly omit that: (1) both Indenture trustees, whose successors in interest Semi-Tech now represents, were New York corporations; and (2) the Pledge, by which STC secured the Indenture trustees’ performance under the Indenture, contained New York State choice of law and forum selection clauses.<sup>9</sup> (See Ainsworth Amended Affirmation in Opposition to **All** Motions, Exhibit M). Thus, it is both apparent that there is a substantial connection between this state **and** these underlying transactions and it is not at all certain that this action will involve only issues of Canadian law. The Court of Appeals **has** long considered the existence of such a “nexus” to be the strongest public policy reason for a New York court to retain jurisdiction over a matter challenged on

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<sup>9</sup> As previously mentioned, it is unclear what choice of law and forum selection provisions the Indenture itself contained.

forum non conveniens grounds. (See e.g. Silver v Great Am. Ins. Co., 29 NY2d 356).

The court next notes that a number of the moving co-defendants were involved in both the New York action in this court and in the Bankruptcy action prosecuted in the federal courthouse located next door to this one. The co-defendants are, thus, in no position to claim that this action constitutes any special “burden” on a New York court. In a similar scenario, the Appellate Division, First Department, characterized as “improvident” a court’s dismissal of an action in which a defendant, who had tried an action in U.S. District Court, performed an about face and claimed that New York State Supreme Court was an inconvenient forum for a subsequent, identical, action. (See Excess Ins. Co., Ltd. v Factory Mut. Ins. Co., \_\_ AD2d \_\_, 726 NYS2d 666). That court also reached the same conclusion in a situation where, as here, the parties had made substantial efforts at discovery before the defendant mounted his forum non conveniens challenge. (See Anagnostou v Stifel, 204 AD2d 61). Finally, many of the co-defendants are international businessmen who sit on the boards of corporations in different countries. Thus, it is difficult to imagine how litigating this action in New York will impose any prejudice upon them. Besides, they offer no convincing argument on this point. In light of the foregoing, the private, as well as the public, interests implicated in this action militate in favor of this court retaining jurisdiction.

#### IV. Dismissal for Insufficient Pleadings

All of the E&Y defendants seek to dismiss plaintiff Semi-Tech’s fraud claims (including the 9<sup>th</sup> through 13<sup>th</sup> causes of action) for failure to plead with particularity pursuant to CPLR 3016 (b). (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 007] at 15-16). However, the Court of Appeals has long held that “[t]his provision requires only that

the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly **as** to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud.’” (Lanzi v Brooks, 43 NY2d 778,780, quoting Jered Contracting Corp. v New York City Trans. Auth., 22 NY2d 187, 194). These situations exist when the circumstances of the fraud “are peculiarly within the knowledge of the party against whom the [claim] is being asserted.” (Houbigant, Inc. v Deloitte & Touche LLP, 303AD2d 92, 98, quoting Jered Contracting Corp. v New York City Trans. Auth., 22 NY2d at 197, supra.)

Plaintiff avers that it has had only limited discovery from E&Y Canada and E&Y USA, **and** none at all from E&Y Hong Kong or E&Y International, at this juncture. (See Ainsworth Amended Affirmation in Opposition to All Motions, ¶¶ 49-51, Exhibit G). Nonetheless, the amended complaint clearly states that the E&Y defendants met twice in New York in August of 1997, where they resolved to persuade STC to join them in deceiving the Ontario Securities Commission into permitting E&Y Canada to withdraw **as** STC’s auditor. (Id., Exhibit A (Amended complaint), ¶¶ 201-215). The amended complaint further states that, as a result of this deception, E&Y Hong Kong continued its lucrative position **as** Akai’s auditor, while E&Y Canada, E&Y USA and E&Y International simultaneously distanced themselves from STC **and**, **thus**, from being named in any litigation against STC by Note-holders who STC’s and E&Y Canada’s malfeasance damaged. (Id., ¶¶ 250-265). None of the E&Y defendants’ memoranda offer any rationale as to how these allegations are not sufficient “to inform [the defendants] with respect to the incidents complained of.” (Lanzi v Brooks, 43 NY2d at 780, supra). Accordingly, the court finds that the claims are sufficient.

Further, documents from Davis' deposition show that in 1997, E&Y Canada sought and received permission from STC to access and utilize E&Y Hong Kong's audits of Akai's corporate dealings, specifically regarding the SFC transaction, when it prepared its **STC** auditor's certificates for Bankers Trust. (Id., Exhibit B, Attachments 30, 31, 50). Construing this evidence in the light most favorable to the plaintiff, it is possible to conclude that the E&Y defendants may have acquired knowledge that STC had violated the Indenture **as** a result of their sharing of information. Because the frauds that the E&Y defendants are alleged to have subsequently perpetrated would necessarily have resulted from this knowledge, it is clear that the circumstances of fraud "are peculiarly within the knowledge of the party against whom the [claims are] being asserted." (Houbigant, Inc. v Deloitte & Touche LLP, 303 AD2d at 98, supra). Accordingly, the court finds that plaintiffs' fraud claims are sufficiently pled and denies those portions of the E&Y defendants' motions that seek to dismiss pursuant to CPLR 3016(b).

#### V. Dismissal for Failure to State a Claim

##### A. The Individual Defendants

Gnat moves to dismiss plaintiff Semi-Tech's **fifth** cause of action charging him with breach of fiduciary duty, pursuant to CPLR 3211(a)(7). (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 17-22). Gnat specifically argues that plaintiff asserts this cause of action on behalf of both STC and the Note-holders, yet Gnat owed no fiduciary duties to those Note-holders because STC was still solvent when he resigned his position **as** a director in 1997. (Id., at 18-20). **As** previously discussed, however, the liquidation plan clearly empowers plaintiff to bring claims on behalf of both STC's creditors and STC's estate in bankruptcy. Gnat's argument is unavailing because it cannot overcome plaintiffs

authority to bring a claim of breach of fiduciary duty against him on behalf of STC's estate.

Accordingly, the court rejects Gnat's argument, and denies that portion of his motion that seeks dismissal for failure to state a claim.

## B. The E&Y Defendants

### The Fraud Claims

The E&Y defendants also seek to dismiss plaintiff Semi-Tech's causes of action for common law fraud the ninth through thirteenth causes of action, on the grounds that they fail to state a claim, pursuant to CPLR 3211(a)(7). The elements of these causes of action are: "[a] defendant's knowing misrepresentation of a material fact, made with intent to deceive, [a] plaintiff's reasonable reliance, and damages." (See e.g. Salles v Chase Manhattan Bank, 754 NYS2d 236,239). The E&Y defendants argue that the amended complaint fails to adequately plead reasonable reliance, intent to defraud or "proximate cause." (See e.g. Memorandum of Law in Support of Motion (motion sequence number 007), at 16-21). The court disagrees for the following reasons.

Each of the E&Y defendants argues a different point with respect to "reasonable reliance." First, E&Y Canada argues that the complaint is deficient as to this element because it fails to allege that the plaintiff, or any of those it represents, directly received any "statement, report or omission" from E&Y Canada upon which they might have relied. (See Memorandum of Law in **Support** of Motion [motion sequence number 003], at 20). E&Y Canada cites the Court of Appeals' holding in Securities Investor Protection Corp. v BDO Seidman, L.L.P. (95 NY2d 702) to support this argument. (*Id.*) This decision is unhelpful to E&Y Canada, however, because it distinguishes between situations where a plaintiff is unaware of the alleged

misrepresentations that **an** accountant has made to a third party and those where the plaintiff has received and relied upon the accountant's misrepresentations. (Securities Investor Protection Corp. v BDO Seidman, L.L.P., 95 NY2d at 710, siting Tindle v Birkett, 171 NY 520). The Court of Appeals found that the plaintiff had adequately pled "reasonable reliance" upon the accountants' statements in the former situation, but not in the latter, because although the Seidman "complaint allege[d that the accountant had] made a variety of misrepresentations, it also allege[d that the plaintiff<sup>3</sup> did not specifically know of any of them." (Id.; see also Corcoran v Frank B. Hall & Co., Inc., 149 AD2d 165, 175-176)(recognizing that **an** accountant's misrepresentations **as** to a corporation's financial status could give rise to a cause of action for common law fraud by the corporation itself, as well **as** its creditors).

Here, by contrast, the amended complaint states that the Note-holders received and relied on both E&Y Canada's allegedly fraudulent auditors' reports and on its deceptive letter to the Ontario Securities Commission, either when they purchased their Notes from Bankers Trust, or when they refrained from selling them, or taking other action against STC to preserve their rights. (See Ainsworth Amended Affirmation in Opposition to All Motions, Exhibit A (Amended complaint), ¶¶ 447-448, 460, 472-473, 487-488, 508-510). Accordingly, the court finds that plaintiff Semi-Tech has adequately pled the element of "reasonable reliance" in its fraud claims against E&Y Canada.

The remaining E&Y defendants each argue that the complaint is devoid of allegations that anyone relied upon their specific misrepresentations. (See e.g. Memorandum of Law in Support of Motion [motion sequence number 007], at 16-21). Plaintiff responds that these co-defendants **are**, nonetheless, liable for the misrepresentations of their co-conspirator, E&Y

Canada. (See e.g. Memorandum of Law in Opposition to Motion [motion sequence number 007], at 18). The Appellate Division, First Department, has stated that a plaintiff could satisfy the “reasonable reliance” element of a common-law fraud, through a conspiracy theory, by alleging facts from which the court could infer that the co-conspirator defendants had agreed to cooperate in a fraudulent scheme with another defendant, against whom the plaintiffs had alleged some particular acts of fraud. (See e.g.; Abrahami v UPC Const. Co., Inc., 176 AD2d 180). Although the Appellate Division, First Department, upheld dismissal of the fraud claim in Abrahami, this court finds that this complaint contains both the requisite “fraudulent act” allegations against E&Y Canada (discussed above), **and** the requisite “fraudulent agreement” allegations against the remaining E&Y defendants (i.e. their attendance at the 1997 meetings **and** the subsequent, resulting dissimulations by STC and E&Y Canada). Accordingly, the court finds that the complaint satisfies the standard for co-conspirator fraud that the Appellate Division, First Department, outlined and that plaintiff Semi-Tech has adequately pled the element of reliance against all of the E&Y defendants.

The E&Y defendants direct their second argument at the element of “intent to defraud,” i.e. scienter. (See e.g. Memorandum of Law in **Support** of Motion [motion sequence number 007], at 19-20). However, as mentioned earlier, the courts of this state recognize that “[t]he element of scienter, that is, the requirement that the defendant h e w of the falsity of the representation being made to the plaintiff, is, \* \* \*, the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof.” (See Houbigant, Inc. v Deloitte & Touche LLP, 303 AD2d at 98, supra). Accordingly, “in the context of a CPLR 3211 dismissal motion,” a plaintiff need only make “a particularized factual assertion which supports the

inference of scienter [emphasis added],” because “[t]o require a ‘showing’ of an evidentiary nature \* \* \* improperly imports a *summary* judgment standard into the orbit of CPLR 3211 analysis, and is beyond what is required to uphold the sufficiency of a pleading [emphasis added].” (Id.).

Here, the amended complaint includes statements: 1) that E&Y Canada submitted fraudulent auditors’ certificates to Bankers Trust on STC’s behalf; 2) that the E&Y defendants met twice in New York in 1997 where they conspired to obtain E&Y’s Canada’s release from its position as STC’s auditor under a false pretext; 3) that E&Y Canada did subsequently obtain that permission; and 4) that the private correspondence between STC’s officers and directors belies STC’s and E&Y Canada’s public statements regarding its withdrawal. (See Ainsworth Affirmation in Opposition to All Motions, Exhibit A [Amended Complaint], ¶¶ 123-130, 201-214, 221-225, 229-240). Plaintiff further claims that E&Y Canada did so: 1) in order to avoid being held liable for breach of the Indenture along with STC; 2) to cover up the supporting role that E&Y USA and E&Y Hong Kong played in that breach; and 3) so that all of the E&Y defendants could continue to reap profits from continuing to represent STC’s international affiliate companies. (Id., ¶¶ 241-265). The court finds that, pursuant to the standard applicable to a 3211(a)(7) motion, it is possible to draw these inferences from the allegations. Accordingly, the court finds that plaintiff has adequately pled the element of scienter in its causes of action for common law fraud.

Finally, the court finds that the E&Y defendants’ argument, that plaintiff failed to plead

“proximate cause,”<sup>10</sup> is inapposite, because the Court of Appeals has clearly stated that this is only an element of a GBL § 349 “deceptive practice” claim and not of a claim of common-law fraud. (See *Stutman v Chemical Bank*, 95 NY2d 24). Accordingly, the court denies those portions of the E&Y defendants’ respective motions requesting dismissal, pursuant to CPLR 3211(a)(7), of plaintiffs causes of action for common-law fraud.

### The Conspiracy Claims

The E&Y defendants each argue in their respective memoranda for court to dismiss plaintiff Semi-Tech’s fifteenth (“fraud **and** conspiracy to commit fraud”) and nineteenth causes of action (“fraud and aiding and abetting fraud”), pursuant to CPLR 3211(a)(7). The E&Y defendants correctly assert that New York does not recognize **an** independent tort of conspiracy. (See *Alexander & Alexander of New York Inc. v. Fritzen*, 68 NY2d 968,969). However, as previously stated, the Appellate Division, First Department, has indicated that a complaint containing allegations of fact **from** which to infer that co-conspirator defendants have agreed to cooperate in a fraudulent scheme with another defendant, against whom plaintiff has alleged particular acts of **fraud**, is sufficient to impose equal liability for fraud upon those co-defendants. (See e.g., *Abrahami v UPC Const. Co., Inc.*, 176AD2d 180). Further, this court has already found that this complaint satisfies this standard. Accordingly, the court denies those portions of the E&Y defendants’ respective motions seeking dismissal of plaintiff Semi-Tech’s fifteenth cause of action.

In a similar vein, the Appellate Division, First Department, has indicated that, to make

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<sup>10</sup> See e.g. Memorandum of Law in Support of Motion (motion sequence number 007), at 20-21.

out a claim of “aiding and abetting fraud,” a complaint would have to contain an allegation of fact permitting the inference that one defendant knew of, or intended to aid its co-defendant in, the commission of a fraud. (See e.g. Joel v Weber, 197 AD2d 396; National Westminster Bank USA v Wechsel, 124 AD2d 144). The court finds that the amended complaint satisfies this standard also, both for the reasons mentioned in the preceding paragraph and because there is evidence in the exhibits that, in 1997, E&Y Canada sought **and** received permission from STC to access and utilize E&Y Hong Kong’s audits of Akai’s corporate dealings, specifically for the SFC transaction, when E&Y Canada prepared its auditor’s certificates for Bankers Trust. (Id., Exhibit B, Attachments 30, 31, 50). For the purposes of this motion, the court may infer from the foregoing that the other E&Y defendants both knew of, and intended to aid E&Y Canada in, the commission of fraud upon Bankers Trust and the other Note-holders, when these defendants held the two meetings in 1997. Accordingly, the court also denies those portions of the E&Y defendants’ respective motions seeking dismissal of plaintiffs nineteenth cause of action.

#### Lack of Privity/Statute of Limitations

E&Y Canada also moves to dismiss plaintiff Semi-Tech’s seventeenth and eighteenth causes of action, that assert negligent misrepresentation and accounting malpractice, respectively, for lack of privity **and** failure to meet the requisite statute of limitations. (See Memorandum of Law in Support of Motion to Dismiss (motion sequence number 003), at 13-17). Semi-Tech does not contend that it has brought these claims on behalf of anyone other than the Noteholders.

To hold an accountant liable for negligent misrepresentation or malpractice to non-contracting third parties, there must be circumstances “sufficiently approaching privity,” so that: “(1) the accountants must have been aware that the financial reports were to be used for a

particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; **and** (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party's or parties' reliance." (See Security Pacific Business Credit, Inc. v Peat Marwick Main & Co., 79 NY2d 695, 702, and cases cited therein; LaSalle Nat. Bank v Ernst & Young LLP, 285 AD2d 101). Here, at the very least, plaintiff has failed to allege conduct on the **part** of the accountants linking it to plaintiff acting on behalf of the Noteholders. (See Houbigant, Inc. v Deloitte & Touche LLP, 303 AD2d 92). Therefore, the causes of action for negligent misrepresentation **and** accounting malpractice against E&Y Canada are dismissed. Because the court is dismissing these claims for lack of privity, there is no need to address E&Y Canada's statute of limitations argument.

#### Vicarious Liability

Finally, E&Y International moves to dismiss plaintiffs twenty-first cause of action for "vicarious liability," on the grounds that the complaint fails to state a valid claim pursuant to a "partnership by estoppel" theory. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 006], at 10-18). The other E&Y defendants all join in this request. The first point in E&Y International's brief is that the term "vicarious liability" refers to a theory of tort liability and not to an independent cause of action. (Id., at 10). Although this point is correct (see e.g. Crawford v Signet Bank, 179 F3d 926 [DC Cir 1999], cert. denied 528 US 1145 [2000]), the next **point** of argument in E&Y International's brief is not. The great deal of space that E&Y International devotes to its discourse on "partnership by estoppel" is wasted, because "partnership by estoppel" is not the only theory of liability that plaintiff asserts to support its fraud claims against the E&Y defendants. (See Memorandum of Law in Support of Motion to

Dismiss [motion sequence number 006], at 10-18). The court has already found that the Amended Complaint contains sufficient allegations for plaintiff to assert liability against those defendants pursuant to conspiracy and aiding or abetting theories. Although this would be sufficient to save plaintiff's cause of action for the time being, the court now also finds that the amended complaint also contains sufficient allegations, although just barely, to assert the elements of a partnership by estoppel too.

Partnership Law § 27, entitled "Partner by Estoppel," provides that:

When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in **an** existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

Plaintiff supports its allegation of partnership by estoppel against the E&Y defendants primarily:

1) by claiming that they use the "Ernst & Young, LLP" logo on their firm letterhead in **an** inconsistent and misleading manner that could cause **an** observer to conclude that all of E&Y's individual offices were members of a "global partnership;" and 2) by claiming that E&Y's promotional material is similarly misleading. (See Ainsworth Affirmation in Opposition to All Motions, Exhibit A [Amended complaint], ¶¶ 72-85). E&Y International rejects this and asserts both that all individual E&Y LLP offices are actually separate entities, and that it, E&Y International LLC, is merely a company that "services" them and is not their corporate parent. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 006], at 8-10). However, all these motions, seeking dismissal pursuant to CPLR 321.1, are "directed to the sufficiency of pleadings and not to the proof." (See Imprimis Investors LLC v Insight

Venture Management, Inc., 300 AD2d 109, 110). Judged under that standard, plaintiffs allegations satisfy the strictures of Partnership Law § 27, because the allegations point to “written conduct” in which the various E&Y offices “represent” themselves to be a “global partnership.” As previously noted, E&Y International has not participated in any discovery prior to this motion. (See Ainsworth Amended Affirmation in Opposition to All Motions, ¶¶ 49-51). Accordingly, the court rejects E&Y International’s argument and denies those portions of the E&Y defendants’ respective motions that seek to dismiss plaintiffs twenty-first cause of action.

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the respective motions of co-defendants James H. Ting, Frank E. Holmes, Chuck C.H. **Tam**, Douglas A.C. Davis, Albert Gnat, Kenneth C. Smith, Ernst & Young L.L.P. (an Ontario Limited Liability Partnership), Ernst & Young L.L.P. (a Delaware Limited Liability Partnership), Ernst & Young (a Hong Kong Partnership), and Ernst & Young International, LTD., all of which seek to dismiss the first amended complaint of plaintiff Semi-Tech Litigation, L.L.C., are denied; except as to plaintiffs’ claims for negligent misrepresentation (17<sup>th</sup> cause of action) and accounting malpractice (18<sup>th</sup> cause of action) against E&Y Canada; and it is further

ORDERED the complaint is deemed amended accordingly; and it is further

ORDERED that the remainder of the action severed shall continue.

The parties are directed to appear for a status conference on September 16, 2004 at 11:00 am in the courtroom, room 248, 60 Centre Street.

Dated: March 22, 2004

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