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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Seibert

- v -

Entertainment Inc

INDEX NO. 602942/03

MOTION DATE 4/29/05

MOTION SEQ. NO. 007

MOTION CAL. NO. ____

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

HON. RICHARD B. LOWE, III

Dated: 9/6/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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MURIEL SIEBERT & CO., INC.,

Plaintiffs,

-against-

Index No.
602942/03

INTUIT INC.,

Defendants.

----------X

RICHARD B. LOWE, III, J.:

Defendant Intuit Inc. (Intuit) moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the second through sixth causes of action in the complaint of plaintiff Muriel Siebert & Co., Inc. (Siebert), based upon documentary evidence for failure to state a claim upon which relief can be granted. The complaint brings causes of action for breach of contractual obligations to use commercially reasonable efforts (first), breach of express and implied covenants of good faith (second), breach of fiduciary duty (third), breach of contractual obligations to pay shared expenses (fourth), misrepresentation and/or fraud (fifth), and promissory estoppel (sixth).

Siebert, a financial discount brokerage firm, and Intuit, a computer software applications firm, entered into a Strategic Alliance Agreement (SAA) on April 29, 2002. The SAA provided a mechanism for Intuit and Siebert to work together to develop, market, and operate a specialized internet brokerage service (Quicken Brokerage). By June 30, 2003, however, the activity under the SAA had yielded approximately 94% fewer total accounts than had been anticipated. Siebert's complaint of September 17, 2003 seeks to recover losses under the SAA, and punitive damages.

The test to be applied on a motion to dismiss is whether, upon examination of the four corners of the pleading, the factual allegations contained in Siebert's complaint indicate the existence of any causes of action cognizable at law. Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). In order to defeat a motion to dismiss, Siebert's complaint is required to contain statements of sufficient particularity to give the court and the parties notice of the transactions and occurrences intended to be proved, along with the material elements of each cause of action. CPLR 3013.

Choice of Law

The parties agree that Siebert's first, second, and fourth causes of action, all sounding in contract, are governed by California law because of a choice of law clause in the SAA. In this regard, the SAA provides that it

> ... will be governed by California law as applied to agreements entered into and to be performed entirely within California without regard to its choice of law or conflicts of law principles.

SAA, ¶14(i).

It is well settled that parties to a contract may freely select a forum in which to resolve any disputes over contract interpretation or performance. Such a contractual selection of forum is prima facie valid and enforceable unless shown to be unreasonable or in violation of public policy. M/S Bremen v Zapata Off-Shore Co., 407 US 1, 15 (1972) (contractual choice-of-forum clause unenforceable if enforcement would contravene a strong public policy); Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 (1996). Upon no such showing, and upon no objection from either party, California law will be applied to the first, second, and fourth causes of action.

Intuit contends, however, that the third cause of action for breach of fiduciary duty, and the fifth cause of action for misrepresentation and/or fraud, sound in tort, and are, therefore, to be decided in accordance with New York law. Siebert concedes that the fifth cause of action should be decided in accordance with New York law, but argues that on the third cause of action, for breach of fiduciary duty, the court may consider California law because Intuit relies on the SAA in its attempt to dismiss the cause of action, and the SAA's choice of law clause should, then, be applied.

Siebert's reasoning is both compelling, and supported by New York law. The claim for breach of fiduciary duty here is properly regarded as subject to the choice of law because both parties disclaim any fiduciary duty preceding the SAA, and, thus, any claimed fiduciary duties emanated from the SAA. Indeed, Intuit relies on the alleged express disclaimer contained in paragraph 14(p) of the SAA as the basis for its motion to dismiss. Paragraph 14(p) states, in part, that

> the relationship between Intuit and Siebert established by this Agreement (or contemplated by this strategic alliance) is that of independent contractors .... The parties acknowledge and agree that this strategic alliance will not constitute a partnership ... or a joint venture by reason of this Agreement or this strategic alliance or otherwise ... and that this Agreement may not be construed to suggest otherwise.

It is, thus, "appropriate, if not essential, to consider the contract that provides the context for the fiduciary duty claim." Matter of Lois/USA, Inc., 264 BR 69, 105 (SD NY 2001). Where, as here, a party argues that the SAA provides a context for determining whether Siebert and Intuit had undertaken fiduciary duties/obligations to each other, the contractual relevance of paragraph 14(p) must be judicially determined. Id. Such an analysis of the SAA must incorporate California law.

Moreover, the intention of the parties was that the SAA be treated, for choice-of-law purposes, as if "entered into and to be performed entirely within California...." Under New York law, a choice of law agreement that attempts to encompass the entire relationship of the parties, such as that in the SAA, may be applied to torts arising incident to conduct under the agreement. See Krock v Lipsay, 97 F3d 640, 645 (2nd Cir 1996), citing Turtur v Rothschild Registry Int'l, Inc., 26 F3d 304, 309-10 (2nd Cir 1994) ('sufficiently broad' choice-of-law provision may apply to torts arising incident to a contract).

Intuit attempts to avoid this conclusion by reliance on Cooney v Osgood Machinery, Inc. (81 NY2d 66, 73-74 [1993]), which discusses (in light of Neumeier v Kuehner, 31 NY2d 121 [1972])

the 'place of injury' rule as applied to guest statute cases. This reliance is misplaced. First, Cooney acknowledges that where the situs of the injury is a state where "both parties have purposefully associated themselves in a significant way," the law of that forum may apply. Cooney, 81 NY2d at 74. The SAA was putatively "entered into and to be performed entirely within California without regard to its choice of law."

Second, there is nothing, except Intuit's conclusory allegation, to suggest that the situs of the injury claimed by Siebert is New York. The complaint states that Intuit, from its principal place of business in California, solicited Siebert, and that at least some of the discussions leading to this litigation took place in California. The law of California will be applied to the breach of fiduciary duty claim.

Intuit also argues that as there is no conflict between the laws of New York and those of California on promissory estoppel, the motion to dismiss the sixth cause of action for promissory

estoppel should be determined in accordance with New York law. Siebert has impliedly consented to the application of New York law on the sixth cause of action, as its memorandum in opposition relies exclusively upon New York law. The law of New York will be applied to the sixth cause of action.

Breach of Express and Implied Covenants of Good Faith (Second Cause of Action)

Intuit argues that the second cause of action, combining actions for breach of express and implied covenants of good faith and fair dealing, is fatally defective because it is superfluous and unsupported by the allegations of the complaint.

Siebert alleges that breach of an express obligation arises from Section 10 of the SAA, which calls for Intuit to market and promote the distribution of Siebert & Co. products, as well as Siebert & Co. and/or Intuit jointly-branded products. Complaint ¶ 75. Obviously, then, as even implied in Siebert's own memorandum in opposition, the portion of the complaint that seeks recovery for breach of the express covenant of good faith and fair dealing is entirely subsumed in the cause of action for breach of contract.

With respect to the implied aspect of the second cause of action, in California, as in New York, a covenant of good faith and fair dealing is an implied-in-law term of any contract. See Careau & Co. v Security Pac. Bus. Credit, Inc., 222 Cal App 3d 1371, 1393, 272 Cal Rptr 387, 398 (2nd Dist 1990); accord M. O'Neil Supply Co. v Petroleum Heat & Power Co., 280 NY 50, 54-55 (1939). However, if Siebert's allegations of breach of the covenant "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." Careau & Co., 222 Cal App

3d at 1395; accord Ezrasons, Inc. v American Credit Indem. Co., 257 AD2d 447, 448 (1st Dept 1999).

In California, only the insured-insurer relationship has been well defined as giving rise to a situation where simultaneous actions for breach of contract and breach of the implied covenant of good faith and fair dealing may be maintained. Attempts at expanding this tort liability to other types of relationships have been subject to fits and starts.

In Wallis v Superior Court (160 Cal App 3d 1109, 1118, 207 Cal Rptr 123, 129 [4th Dist 1984]), the court delineated characteristics of the relationship between parties to a contract that might lead to tort liability in addition to liability for breach of contract. In summary, the court found that additional tort liability may exist where: (i) the parties are of unequal bargaining power; (ii) one of the parties did not have a profit motive; (iii) ordinary contract damages were not adequate; (iv) one party is especially vulnerable; and (iv) the other party takes advantage of this vulnerability.

That five-part test was called into question for the purpose of analyzing an employer-employee relationship.[1] In any event, Siebert does not make allegations that satisfy the five-part test, but states that Intuit had an implied obligation arising from its repeated assurances that for Quicken Brokerage, Intuit would move beyond the 'Switzerland approach' of managing finances. Seibert describes the 'Switzerland approach' as connoting Intuit's intention, rather than remaining a neutral or passive provider of finance computer applications, to compete against

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[1] "[T]he Foley court did limit its holding to the employer-employee relationship and did not expressly reject the Wallis definitional efforts; however, it did suggest that it is still an open question as to whether 'the special relationship model is an appropriate one to follow in determining whether to expand tort recovery.'" Careau & Co., 222 Cal App 3d at 1398.

financial institutions that are parties to Open Financial Exchange (OFX) agreements with Intuit.

According to the complaint a feature of the partnership was to be the utilization of Intuit's OFX access in an alert system (the Alert System) that would inform potential customers of better investment opportunities with Quicken Brokerage. Siebert alleges that Intuit deliberately withheld the implementation of the Alert System after realizing that the promises that it had made to Siebert would conflict with Intuit's other business interests, and that decision, in turn, damaged the prospects for the partnership.

This decision by Intuit may have constituted a "deliberate act, which unfairly frustrate[d] the agreed common purposes [of the SAA] and disappoint[ed] the reasonable expectations of [Siebert,] thereby depriving [Siebert] of the benefits of the agreement." Careau & Co., 222 Cal App 3d at 1395, 272 Cal Rptr at 400.

Whether the actions of Intuit meet the criteria of a breach of the implied covenant of good faith and fair dealing, or whether Siebert had a "reasonable expectation" that the Alert System would be implemented, however, are questions of fact, that "must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties." Id.; see also CPLR 3211(a)(7).

Further, the function of the court is not, as suggested by the logic of Intuit, to "mechanically inquire whether the same facts are alleged and whether the same remedy is sought. Rather, the challenge brought by Careau and its progeny is to distinguish two claims based on the same facts." Celador Intern. Ltd. v Walt Disney Co., 347 F Supp 2d 846, 853 (CD Cal 2004). Here, the crux of Siebert's second cause of action is that Intuit knowingly frustrated Siebert's rights to, and expectations based upon the SAA. See Guz v Bechtel Nat. Inc., 24 Cal 4th 317,

349-353, 100 Cal Rptr 352, 375-377 (2000); Celador Intern. Ltd., 347 F Supp 2d at 853. That is, arguably, a separate claim than one for breach of the SAA.

The motion to dismiss the second cause of action, for breach of express and implied covenants of good faith and fair dealing, is granted to the extent that the portion of the cause of action that seeks recovery for breach of the express covenant of good faith and fair dealing is dismissed, and the motion is otherwise denied.

Breach of Fiduciary Duty (Third Cause of Action)

"In order to plead a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." Pierce v Lyman, 1 Cal App 4th 1093, 1101, 3 Cal Rptr 236, 240 (2nd Dist 1991).

Siebert argues that both Intuit and Siebert mutually relied on each other's areas of competence and expertise, and that the level of reliance given in the relationship rises, as a matter of law, to that of fiduciaries. Siebert contends that Intuit breached its fiduciary obligations by failing to institute the Alert System, which was the basis of the business model presented to Siebert, and of the eventual SAA.

Intuit, relying on New York law, argues that there can be no fiduciary relationship between the parties as the SAA explicitly states that the relationship between Intuit and Siebert is that of independent contractors, not of partnership, or joint venture. SAA, ¶14(p).

However, as determined above, California law applies to the third cause of action. In California, a determination as to the status of parties as joint adventurers depends on actual intention, not necessarily upon the express one. Thus, "[t]he acts and conduct of the parties engaged in the accomplishment of the apparent purposes [of a contract] may speak above the

expressed declarations of the parties to the contrary." Universal Sales Corp. v California Press Mfg. Co., 20 Cal 2d 751, 764-765, 128 P2d 665, 673-674 (1942); April Enters., Inc. v KTTV, 147 Cal App 3d 805, 820, 195 Cal Rptr 421 (2nd Dist 1983) (conduct of parties may create a joint adventure despite an express declaration to the contrary in a contract).

If it is determined that Siebert and Intuit in fact were joint adventurers, then their relationship would give rise to fiduciary duties (Nelson v Abraham, 29 Cal 2d 745, 750, 177 P2d 931, 933 [1947]) which would not, as Intuit argues, be confuted by the presence of a clause in the SAA to the contrary. See Wolf v Superior Court, 107 Cal App 4th 25, 40 (previously published at 106 Cal App 4th 625), 130 Cal Rptr 860, 871 (2nd Dist 2003). The determination of the status of the parties as joint adventurers is one of intention, and intention is a matter of fact. April Enters., Inc., 147 Cal App 3d at 820. Fact determinations should not be made upon a motion to dismiss. CPLR 3211(a)(7). As the motion to dismiss the cause of action for breach of fiduciary duty depends on the determination of the parties' status as joint adventurers, the motion to dismiss the third cause of action is denied.

Breach of Contractual Obligations to Pay Shared Expenses (Fourth Cause of Action)

In the fourth cause of action, Siebert alleges that Intuit failed to reimburse Siebert for: (i) half of a $1.5 million dollar deposit paid to the Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation (Pershing Deposit) for the creation of the brokerage platform; and (ii) half of $940,000 spent to develop a Customer Relationship Management (CRM) System for Quicken Brokerage. Siebert maintains that Intuit has an obligation under Section 13(ee) and 4(b) of the SAA to make these payments.

Intuit argues that under the SAA, the parties are only entitled to recover expenses

incurred in furtherance of Quicken Brokerage, where the expenses are expressly identified as "Incremental Expenses" and have been approved as such. Section 13(ee) of the SAA defines "Incremental Expenses" as

> those costs and expenses incurred by either party that are directly related to the creation, growth, support, maintenance and operation of the Joint Brokerage Service as set forth in the annual business and financial plan approved by the Steering Committee (which, for the Start-up Period, shall be the Initial Business Plan) .... Incremental Expenses shall include, but not be limited to ... any other costs that are directly related to the joint revenue stream and/or the Joint Brokerage Service.

Section 4(b) of the SAA provides for the sharing of expenses, and states that "the parties will not be reimbursed for any costs or expenses incurred in connection with the strategic alliance except for Incremental Expenses."

Intuit avers that the Pershing Deposit and the CRM System expenditures are not Incremental Expenses because they "were not expressly identified and, more importantly, did not satisfy any of the contractual conditions required for an expenditure to qualify as an Incremental Expense." This unsupported assertion is insufficient to grant a motion to dismiss. See Mark Hampton, Inc. v Bergreen, 173 AD2d 220, 220 (1st Dept 1991).

The conclusory nature of this assertion is revealed by Intuit's statement, on its own motion to dismiss, that "[a]ny number of legitimate Incremental Expenses were not expressly identified in the Agreement."

Meanwhile, Siebert's statement that the Pershing Deposit and the CRM expense fell within the category of Incremental Expenses, is reasonable in light of the clause of the definition that such Expenses include "costs that are directly related to the joint revenue stream and/or the Joint Brokerage Service." SAA, ¶13(ee). Cron v Hargro Fabrics, Inc., 91 NY2d 362 (1998).

As there is nothing inherently incredible about the allegations of the complaint that the expenditures were Incremental Expenses, the motion to dismiss the fourth cause of action is denied.

Misrepresentation and/or Fraud (Fifth Cause of Action)

Siebert alleges that Intuit breached its warranty in section 7(a) of the SAA, which states that Intuit represents and warrants that entering into the SAA "does not, and the consummation of the transactions contemplated hereby ... does not and will not, conflict with, result in a violation or breach of, or constitute a default under, any agreement or contract to which [Intuit] is a party."

Siebert states that Intuit eventually refused to provide the Alert System because of either: (i) pressure and threats from one or more financial institutions which were party to OFX Agreements with Intuit; or (ii) Intuit had reversed its decision to move away from the 'Switzerland approach.'

Thus, Siebert argues, either Intuit negligently disregarded, or should have known, that a conflict would arise from its existing relationships with financial institutions, or Intuit made a representation and warranty which it knew was untrue and material.

Under either of these theories, the fifth cause of action is duplicative of the first cause of action for breach of contract. If Intuit entered into the SAA negligently, or with reckless disregard as to whether their warranty was true, the relief available to Siebert is damages for breach of the warranty, not for fraud. See SAA, §8, 14(t); Briefstein v P.J. Rotondo Const. Co., 8 AD2d 349, 351 (1st Dept 1959) (even where there is an intention not to perform, actionable relief hangs on breach, not on fraud); accord Spellman v Columbia Manicure Mfg. Co., Inc., 111

AD2d 320, 323-324 (2nd Dept 1985).

This conclusion is maintained especially as Siebert states, "[a]fter balancing the harm to established OFX business against the speculative future success of the Joint Brokerage business," Intuit adopted a stratagem adverse to the SAA, then they have breached the SAA. See Complaint, ¶58; see also Affidavit of Muriel F. Siebert, ¶ 23-28 (alleging that Intuit used privacy concerns as an pretext to hide the decision, after three months, to recommit to the 'Switzerland approach'). This statement, in no way implies, as is required to maintain a fraud claim under New York law, a present intention, at the time of entering into the SAA, by Intuit to deceive Siebert. Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956 (1986); Eastman Kodak Co. v Roopak Enters., Ltd., 202 AD2d 220, 221-222 (1st Dept 1994). Rather, the allegations of the complaint imply that Intuit actually intended to abandon the 'Switzerland approach' upon entering into the SAA, but then thought better of it. Such allegations negate a present intention to deceive.

Further, even if Intuit did not intend to keep its part of the bargain governed by the SAA, this fact alone is insufficient to maintain a cause of action in fraud. Sandra Greer Real Estate, Inc. v Johansen Org., 182 AD2d 468, 469 (1st Dept 1992); Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 (1st Dept 1988).

Dismissal of the fifth cause of action would normally be premature because "where a fiduciary relationship exists, the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive." Kaufman v Cohen, 307 AD2d 113, 119-120 (1st Dept 2003) (internal quotation marks and citations omitted). Here, however, the record does not support, nor has Siebert even alleged, an

intent to deceive when Intuit entered the SAA. As such, the fifth cause of action for misrepresentation and/or fraud is dismissed.

Promissory Estoppel (Sixth Cause of Action)

Siebert claims that both before and after Intuit entered the SAA, Intuit promised to institute the Alert System, that Siebert reasonably relied upon that promise, and that Siebert was, thereby, injured. These claims satisfy the essential elements of a cause of action for promissory estoppel. See e.g. New York City Health and Hosps. Corp. v St. Barnabas Hosp., 10 AD3d 489, 491 (1st Dept 2004).

Citing Lieber v TBS Group, Inc. (224 AD2d 272, 272-273 [1st Dept 1996]) and Gebbia v Toronto-Dominion Bank (306 AD2d 37, 38 [1st Dept 2003]), Intuit argues that Siebert could not reasonably rely upon the promise alleged because the SAA contains a merger clause. See SAA, §14(q). These cases are inapposite, as Siebert alleges that a promise was made after the execution of the SAA. Even Intuit's Memorandum in Support only goes so far as to state that "Siebert, as a matter of law, cannot reasonably have relied on any pre-contractual oral statement or promise, including those included in the 2001 Business Model." Emphasis added.

Citing Clark-Fitzpatrick, Inc. v Long Island R.R. Co. (70 NY2d 382, 388 [1987]), Intuit argues that Siebert cannot recover under a theory of promissory estoppel because "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Id. This argument is unavailing because Intuit has not identified any particular reference to the subject of the promise (the Alert System) in the SAA.

Intuit also cites Makastchian v Oxford Health Plans, Inc. (270 AD2d 25, 27 [1st Dept

2000]) to show that the claim for promissory estoppel is duplicative of the claim for breach of contract. However, while Makastchian suggests that under some circumstances a claim for promissory estoppel may be subsumed under a breach of contract claim, that suggestion is tempered with the admonition that the court "[does] not dispute plaintiffs' right to assert these theories." Id. Siebert is not required to choose between alternate theories at this stage of the litigation because "[c]auses of action or defenses may be stated alternatively or hypothetically." CPLR 3014; Plant City Steel Corp. v National Mach. Exch., Inc., 23 NY2d 472, 477 (1969). Thus, dismissal of the cause of action for promissory estoppel is premature, and the motion to dismiss is denied. See Finkelstein v Warner Music Group Inc., 14 AD3d 415, 416 (1st Dept 2005).

Punitive Damages

Siebert claims that Intuit is subject to punitive damages on the third (breach of fiduciary duty) and fifth (misrepresentation and/or fraud) claims. As the fifth claim has been dismissed, there can be no finding of punitive damages in relation thereto.

On the third cause of action, which is governed by California law, in order to recover for punitive damages Siebert must show "by clear and convincing evidence that [Intuit] has been guilty of oppression, fraud, or malice...." Cal Civ Code §3294. Siebert has made no allegation of oppression, and the claim for fraud has been dismissed. Thus, in order for Siebert to recover, a showing of malice in fact (as opposed to malice implied by law) is required. Bertero v National Gen. Corp., 13 Cal3d 43, 66, 118 Cal Rpte 184, 200-201 (1974).

Malice in fact requires a showing of a "motive and willingness to vex, harass, annoy, or injure." G. D. Searle & Co. v Superior Court, 49 Cal App 3d 22, 29, 122 Cal Rptr 218, 223 (3rd

Dist 1975). Here, not only has Siebert failed to make any such showing, but Siebert explains that Intuit was responding to a threat from other financial institutions, and made the decision to renege on instituting the Alert System "[a]fter balancing the harm to established OFX business against the speculative future success of the Joint Brokerage business." See Complaint, ¶58; see also Affidavit of Muriel F. Siebert, ¶ 23-28.

To award punitive damages under such circumstances would be improper. The United States Supreme Court has held that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." State Farm Mut. Auto. Ins. Co. v Campbell, 538 US 408, 419 (2003); see also Estate of Roth v Erhal Holding Corp., 141 AD2d 693, 695-696 (2nd Dept 1988) (punitive damages unavailable even for intentional breach of agreement). As such, the prayer for punitive damages is dismissed.

Accordingly, it is hereby

ORDERED that the motion to of defendant Intuit Inc., pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the second through the sixth causes of action of the complaint of plaintiff Muriel Siebert & Co., Inc., is granted to the extent that the fifth cause of action for misrepresentation and/or fraud is dismissed, and the portion of the second cause of action that seeks recovery for breach of the express covenant of good faith and fair dealing is also dismissed. The motion is otherwise denied; and it is further

ORDERED that the defendant Intuit, Inc. is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: September 6, 2005

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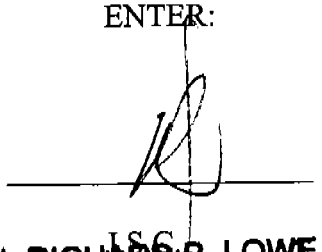

J.S.C.

HON. RICHARD B. LOWE, III