Van Deventer v CS SCF Mgt. Ltd.
2007 NY Slip Op 31401(U)
May 29, 2007
Supreme Court, New York County
Docket Number: 0603151/2003
Judge: Herman Cahn
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SCANNED ON 5/31/2007

[* 1]

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

PRESENT: **HERMAN CAHN** PART 49

Index Number : 603151/2003
DEVENTER, JOHN M.
vs
CS SCF MANAGEMENT
Sequence Number : 020
SUMMARY JUDGMENT

C

INDEX NO. _____
MOTION DATE 9/14/06
MOTION SEQ. NO. _____
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

FILED
MAY 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 5/29/07

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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JOHN M. VAN DEVENTER, JAMES R. CLARK, and C2C CONSULTANTS, LTD.,

Plaintiffs,

-against-

Index No. 603151/03

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE FIRST BOSTON, CREDIT SUISSE FIRST BOSTON (USA), CS CAPITAL PARTNERS, LTD., CS STRUCTURED CREDIT FUND, LTD., CREDIT SUISSE FUND ADMINISTRATION LIMITED, and QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

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MAY 31 2007
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NEW YORK

Herman Cahn, J.:

Defendants CS SCF Management Limited (the Manager), Credit Suisse First Boston (Credit Suisse), Credit Suisse First Boston (USA) (CSFB), CS Capital Partners, Ltd. (Capital Fund Owner), CS Structured Credit Fund, Ltd. (Credit Fund), and Credit Suisse Fund Administration Limited (the Administrator) (collectively, the CS defendants) move for partial summary judgment and dismissal of the first, second, third, fourth, sixth, fourteenth and fifteenth causes of action asserted in the first amended complaint, CPLR 3211, 3212 (e). Plaintiffs John M. Van Deventer, James R. Clark and C2C Consultants, Ltd. cross-move for summary judgment in their favor on the second cause of action.

The underlying facts and procedural history of this action have been fully set forth

in the Court's prior orders dated September 14, 2005, and July 6, 2006, and will not be repeated here, except as is necessary for clarification.

Briefly, plaintiffs allege that a joint venture was formed in December 1995 by Van Deventer and Credit Suisse to create and operate a structured credit hedge funds business in which Van Deventer would manage a family of funds (the Funds), sponsored and financially supported by Credit Suisse. Plaintiffs further allege that Van Deventer and Credit Suisse created companies necessary to carry out these roles. In 1996 and again in 1999, the parties entered into a series of restructuring agreements, including a strategic consulting agreement (the SCA) in which the parties set forth, among other things, plaintiffs' rights and obligations as Credit Suisse's investment consultants with regard to the Funds. The 1999 restructuring occurred in connection with the investment of $65 million by non-party Coller International Partners III, Limited (the Coller Fund).

Plaintiffs commenced this action against the CS defendants primarily on allegations that they breached the terms of certain 1999 restructuring agreements, a joint venture agreement and a loan agreement. Specifically, plaintiffs seek to recover certain consulting fees pursuant to the 1999-SCA, including a final consulting fee (the break-up fee) based on the sale of Credit Fund assets following the termination of the 1999-SCA. Plaintiffs also seek to enforce a joint venture agreement, allegedly terminated prior to the expiration of its 10-year term. In addition, plaintiffs seek to enforce a Resource Partners Group Limited loan agreement pursuant to which plaintiff C2CConsultants Ltd. loaned

the Funds $1.5 million.

Defendants' Partial Summary Judgment Motion - 1st, 3rd, 6th Causes of Action

Plaintiffs' Cross-Motion:

The CS defendants now seek partial summary judgment in their favor dismissing the first, third and sixth causes of action. Plaintiffs cross-move for partial summary judgment on a related claim, the second cause of action.

In these claims, plaintiffs allege that the CS defendants breached the 1999-SCA by failing to pay a break-up fee upon the termination of the agreement and by improperly terminating the Credit Fund, and by tortiously interfering with contractual relations by causing the termination of the agreement.

In making these motions, the parties have raised the very same factual and legal issues that they previously raised in connection with plaintiffs' prior motion for partial summary judgment on the second cause of action.

The prior and present motions are based on the following circumstances, contentions and allegations: In January 2003, the participating shareholders of the Credit and Capital Funds passed special resolutions allegedly reducing the end date of the Credit Fund's term from October 31, 2006 to February 28, 2003, and amending the Capital Fund's articles of incorporation to extend the duration of the Fund's term from January 31, 2003 to February 28, 2003. There is no dispute that, in so doing, the Capital Fund shareholders were acting under authority accorded them by the Capital Fund's articles of

incorporation (see Capital Fund Restated Arts. of Assoc., §§ 100 [2], 145 [1]).

However, plaintiffs contend that the Credit Fund shareholders voting to shorten the Credit Fund's term did not have the authority to do so (see Credit Fund Restated Arts. of Assoc., §§ 100 [2], 145 [1] [a], 145 [b]). The CS defendants contend that they did not need to amend the Credit Fund articles of association because the Credit Fund listing particulars provided that the Fund's term would be conformed to the Capital Fund's term (see Credit Fund Listing Particulars, at 10 ("[The Credit Fund] has a fixed term ending on 31st October 2006, however the [Credit Fund's] term will be reduced or extended to coincide with the term of [CS Capital]"). On February 28, 2003, the participating shareholders passed another special resolution, allegedly formally placing the Credit Fund into liquidation.

The practical effect of the modifications of the original termination dates was that the Credit Fund and the Capital Fund terminated on the same day, which was prior to the sale of all of the Credit Fund's assets. There is no dispute that, once the Funds ended, the 1999-SCA also terminated, and C2C lost its position as the Funds' exclusive strategic consultant and its ability to earn fees by actively selling the remaining assets. A Credit Suisse wholly-owned subsidiary, rather than C2C, liquidated the remaining assets.

C2C subsequently demanded payment of a break-up fee, totaling approximately $16 million. This was allegedly calculated in accordance with the evaluation procedures

set forth in section 9.2[1] (the break-up fee provision) of the 1999-SCA by failing to pay a break-up fee upon termination of the agreement. C2C contends that, pursuant to the break-up fee provision, it is entitled to payment of the fee upon termination of the 1999-SCA for any reason, other than the passage of time[2] or its own misconduct.

The CS defendants have refused to pay the demanded fee and seek summary judgment and dismissal of each of plaintiffs' claims for breach of the 1999-SCA, on the ground that the Funds and the 1999-SCA naturally expired by the passage of time and that, therefore, their contractual obligation to pay plaintiffs a break-up fee has not been

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[1] The break-up fee provision provides in relevant part that:

> Upon termination of this Agreement for whatever reason[,] other than pursuant to clause 9.1 (a), [C2C] shall be entitled to receive all fees and other moneys due to it and unpaid up until the effective date of the termination. Upon the wrongful termination of this Agreement or termination other than pursuant to clauses 9.1 (a), (b) or (c) of this Agreement . . . , [C2C] shall be entitled to payment of an amount equal to the value of this Agreement had the termination not occurred.

(1999-SCA, § 9.2 [emphasis added]).

In relevant part, section 9.1 of the 1999-SCA provides that "[t]his Agreement shall continue in effect until the later of January 31, 2003 or termination of the [later of the Capital Fund or Credit Fund] to terminate in accordance with the provisions of the [Capital and Credit] Fund Instruments" (1999-SCA, § 9.1). Subsection 9.1 (a) provides that the Manager may terminate the 1999-SCA upon written notice, if the Fund auditor certifies that C2C has wilfully or consistently materially breached the agreement and the breach is not cured within 60 days. Subsection 9.1 (b) provides that the Manager may terminate the agreement upon written notice upon C2C's uncured breach of the agreement, C2C's bankruptcy, a drop in the value of the Fund assets below a specified threshold amount, or the death or permanent disability of both Van Deventer and Clark. Subsection 9.1 (c) authorizes termination of the agreement by written consent of both the Manager and C2C.

[2] The 1999-SCA provides in relevant part that, "On termination of the [1999-SCA] for any reason other than the passage of time, all Assets shall be deemed distributed in kind on the effective date of such termination" (1999-SCA, § 7.3 [c]).

triggered.

By decision and order dated July 6, 2006, the Court granted in part and denied in part plaintiffs' prior motion. The Court denied that branch of the motion for partial summary judgment on the second cause of action for breach of the 1999-SCA by failing to pay the break-up fee, holding that section 9.2 of the 1999-SCA was internally inconsistent because one section of the provision supported the CS defendants' interpretation, while another supported C2C's. The Court, therefore, found the provision to be ambiguous and summary judgment to be inappropriate, citing W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 (1990); American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 (1st Dept 1990), appeal denied 77 NY2d 807 (1991). See CPLR 3212.

In the present motion by the CS defendants for partial summary judgment on the first, third and sixth causes of action, each based upon allegations of breach of the 1999-SCA, the parties fail to present any evidence that might have some bearing on the resolution of this ambiguity and instead continue to vociferously dispute whether the 1999-SCA and the Credit Fund were terminated by the passage of time, plaintiffs' alleged misconduct, or affirmative action, either proper or improper, by either side. The voluminous party and non-party deposition excerpts, contracts, governmental filings and contemporaneous correspondence submitted by the parties do not resolve any of these issues. Instead, they raise numerous genuine triable issues of material fact, many

requiring credibility determinations, mandating denial of summary judgment in favor of either party (see S.J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974]; CPLR 3212 [b]).

Therefore, the branches of the motion for partial summary judgment on the first, third and sixth causes of action are denied.

That branch of plaintiffs' cross-motion for partial summary judgment on the second cause of action for breach of the 1999-SCA by failing to pay the break-up fee is denied. Successive motions for summary judgment on issues that have already been decided by the Court are improper, in the absence of newly discovered evidence not available to the movant at the time the initial motion was filed, as duplicative of its prior motion for the same relief (Batac v Associated Sec. Specialists, 183 AD2d 678, 678 [1st Dept 1992]; Graney Dev. Corp. v Taksen, 62 AD2d 1148, 1149 [4 Dept 1978]). Plaintiffs have not based the cross motion on any such evidence. Moreover, as discussed above, summary judgment is not appropriate where, as here, genuine triable issues of material fact exist.

Defendants' Motion - 4th, 14th, 15th Causes of Action:

The CS defendants next seek summary judgment in their favor on the fourth, fourteenth and fifteenth causes of action for breach of a 10-year joint venture agreement and breach of the fiduciary duty among joint ventures as barred by the applicable statute of frauds (see General Obligations Law [GOL] § 5-701) and for failure to state a cause of

action.

In opposition, plaintiffs contend that there existed a 10-year overarching joint venture agreement between Van Deventer and Credit Suisse that is separate and apart from the contractual relationship between the companies formed by Van Deventer and Credit Suisse that does not come within the ambit of the statute. Plaintiffs also contend that, even assuming that it is within the statute, the agreement is memorialized in one or more writings sufficient to satisfy the statute.

Section 5-701 (a) (1) of the GOL provides that every agreement that, by its terms, is not to be performed within one year of its making is void unless it is memorialized in writing subscribed by the party to be charged. The statute applies to joint venture agreements having a term in excess of one year (Sugar Creek Stores, Inc. v Pitts, 198 AD2d 833, 834 [4th Dept 1993]; see RTC Properties, Inc. v Bio Resources, Ltd., 295 AD2d 285, 286 [1st Dept], lv dismissed 99 NY2d 531 [2002]).

Here, the joint venture agreement alleged by plaintiffs has a 10-year term, commencing January 1996. Therefore, unless its material terms are memorialized in a writing, the agreement is void and unenforceable.

Contrary to plaintiffs' contention, the December 13, 1995, letter agreement to Van Deventer drafted and executed by Credit Suisse does not contain all material terms of the alleged agreement. The essential elements of a joint venture agreement are: the intent of the parties to act as joint venturers, to contribute property, financial resources, efforts,

skill or knowledge, and to share jointly in the control of the enterprise and its profits and losses (Natuzzi v Rabady, 177 AD2d 620, 622 [2d Dept 1991]). In the letter agreement, Credit Suisse agrees to fund Van Deventer's set up of a structured credit investment fund to be owned 100% by Credit Suisse (see 12/13/95 Letter Agr., ¶ 1). Credit Suisse also sets forth its monetary investment obligations, including the payment of Van Deventer's personal remuneration for his services (see id., ¶ 2); however, at no point do the parties agree to share losses from the alleged joint venture. While Credit Suisse agrees to pay Van Deventer a break-up fee, should it withdraw from the business, (see id., ¶ 4), at no point do the parties refer to a 10-year term. They do refer to a five-year term regarding the vesting of revenue allocatable to Van Deventer's firm, defined as the Advisor, and the dissolution of the Advisor (see id., ¶ 5). The five-year term expired at the end of 2001, well before the CS defendants' alleged misconduct in 2003. For these reasons, the December 13, 1995 letter agreement, by itself, does not support the existence of the joint venture agreement as alleged by plaintiffs.

Plaintiffs' contention that there exists documentary evidence, when taken together, that demonstrates the existence of the alleged joint venture agreement is similarly without merit. "The statute of frauds does not require the 'memorandum . . . to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion'" (Crabtree v Elizabeth Arden Sales Corp., 305 NY 48, 54 [1953], quoting Marks v Cowdin, 226 NY

138, 145 [1919]; Nausch v AON Corp., 2 AD3d 101, 101-102 [1st Dept 2003]; see GOL §§ 5-701 [a] [1], 5-701 [a] [3] [d]). However, the writings must contain all the essential terms of the alleged agreement and at least one must be signed by the party to be charged (id. at 54).

The documentation relied upon by plaintiffs, even when pieced together, does not evidence the claimed joint venture agreement. Plaintiffs cite to the December 13, 1995 letter agreement discussed above, the October 30, 1996 letter agreement executed by Credit Suisse and Van Deventer and the October 31, 1996 Credit Fund call option agreement executed by Credit Suisse and Van Deventer. They also cite to statements from former senior officers of the CS defendants and to statements and documents from the CS defendants' former attorneys. A review of the cited evidence reveals that they do not demonstrate an agreement to share profits and losses for a 10-year period but, at most, indicate an agreement to set up companies to perform certain roles in the creation and management of a structured credit investment fund business. Certainly, there is no dispute that Van Deventer and Credit Suisse created the companies required by the letter agreements and that the companies entered into a series of restructuring agreements in 1996 and again in 1999.

While some of the documents include terms such as, "joint venture," "venture" or "work together," when these terms are read in context, it is clear that they are not used as specific defining terms of a 10-year joint venture agreement. Merely applying a label

such as "venture" or "partnership" to a business arrangement memorialized in a contract does not, by itself, create a joint venture or subject the parties to partnership fiduciary obligations (see Cleland v Thirion, 268 AD2d 842, 843 [3d Dept 2000]). Here, the terms appear to be used merely to express Credit Suisse's pleasure at continuing a business relationship with Van Deventer and his companies, as defined by the restructuring agreements. For example, in the October 30, 1996 letter agreement drafted by Credit Suisse, the company writes that "[w]e look forward to continuing to run a profitable and efficient venture together." However, in the same letter agreement, the parties agree that, in consideration of Van Deventer's companies (C2C and Cabot International Consultants, Ltd. [CIC]) entering into the 1996 restructuring agreements, Credit Suisse will use its best efforts to ensure that its companies comply with those agreements. Significantly, the parties agree that the December 13, 1995 letter agreement is superceded by the 1996 restructuring agreements.

Similarly, in the Credit Fund call option agreement, Van Deventer and Credit Suisse expressly agree to "work together" (Credit Fund Call Option Agr. Background, § A). While the call option agreement references a 10-year term, when the provision is read in context, it is clear that the term applies only to that agreement and not to a joint venture agreement (see id.).

None of the documents upon which plaintiffs rely indicate the existence of a joint venture having a 10-year term. The duration of an agreement is a material term (see

Ginsberg Mach. Co. v J. & H. Label Processing Corp., 341 F2d 825, 828 [2d Cir 1965]). It is particularly important here where plaintiffs claim that the joint venture had a 10-year term and survived the execution of numerous other written agreements in which the parties disclaimed that their business dealings gave rise to the existence of a partnership and its attendant fiduciary duties.

Inasmuch as plaintiffs have failed to produce one writing or series of writings, that contain the material terms of the alleged joint venture agreement, the claimed agreement is void and unenforceable.

In any event, assuming, for purposes of these motions only, that the parties had formed a joint venture having a 10-year term, that agreement was superceded by the subsequent comprehensive restructuring agreements related to the Capital and Credit Funds that were executed in 1996. Further, these agreements were themselves superseded by the restructuring agreements executed in 1999.

Plaintiffs admit in the first amended complaint that:

> Cabot entered into a number of agreements with Credit Suisse relating to, among other things, the governance of and the parties' respective responsibilities to the joint venture. These agreements carefully memorialized the parties' agreement to the October 31, 2006 Termination Date and Credit Suisse's obligation to pay a Break-up Fee if it abandoned the joint venture prior to the Termination Date. These agreements which defined the rights and obligations of Cabot and Credit Suisse in the joint venture superseded the December 13, 1995 firm offer from Credit Suisse to Van Deventer.

(First Am Compl, ¶ 36 [emphasis added]). Plaintiffs further admit that, pursuant to the

1999 restructuring, the original governing agreements executed in 1996 "were all terminated and replaced with new contracts" (id., ¶ 88).

Moreover, in both the 1996 and 1999 restructuring agreements, the contracting parties expressly disclaim the creation of any partnership-like relationship between plaintiffs and the CS defendants. Both the 1996-SCA and the 1999-SCA provide that C2C "shall for all purposes be an independent contractor and not an employee of [the Manager] or the Funds, nor shall anything herein be construed as making [the Manager] or a Fund a partner with C2C or any of its Associated Persons or clients" (1996-SCA, § 4.4 [emphasis added]; 1999-SCA, § 4.4 [emphasis added]). The 1996-SCA and 1999-SCA define Van Deventer and Clark as "associated persons" within the meaning of the provision (see id., § 11.3; 1999-SCA, § 11.3).

Plaintiffs also contend that the partial performance by themselves and the CS defendants of an oral joint venture agreement having a 10-year term demonstrates the existence of such an agreement. Plaintiffs further contend that the partial performance consisted of the plaintiffs' and the CS defendants' creation of companies, entry into agreements and their interaction for more than eight years in furtherance of the alleged joint venture.

If parties to an oral agreement partially perform the agreement, then the oral agreement will be removed from the reach of the statute of frauds (Richbell Information Servs., Inc. v Jupiter Partners, L.P., 309 AD2d 288, 297-298 [1st Dept 2003]).

Significantly, however,

> [t]he doctrine of part performance may be invoked only if plaintiff's actions can be characterized as 'unequivocally referable' to the agreement alleged. It is not sufficient . . . that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be 'unintelligible or at least extraordinary', explainable only with reference to the oral agreement"

(Anostario v Vicinanzo, 59 NY2d 662, 664 [1983], quoting Burns v McCormick, 233 NY 230, 232 [1922]).

A joint venture "is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership" (Gramercy Equities Corp. v Dumont, 72 NY2d 560, 565 [1988]). Further,

> a fiduciary relationship does not arise by operation of law, but must spring from the parties themselves, who agree to and accept the responsibilities that flow from such a contractual fiduciary bond. Courts look to the parties' agreements to discover, not generate, the nexus of relationship and the particular contractual expression establishing the parties' interdependency. . . . Unless the particular agreement establishes a relationship of trust, one will not spring from a . . . contract in and of itself, for without some agreed-to nexus, there is no relationship of trust and, thus, no duty of highest loyalty.

(Northeast Gen. Corp. v Wellington Adv., Inc., 82 NY2d 158, 160 [1993]).

Here, the conduct cited by plaintiffs is not unequivocally referable to the joint venture agreement, as alleged. Instead, their conduct could be explained as preparatory steps taken with a view toward consummation of an agreement in the future and,

therefore, cannot support a claim of partial performance. Once Van Deventer and Credit Suisse created the companies, their subsequent conduct appears to have been undertaken in fulfillment of the parties' obligations under the 1996-SCA and, later, the 1999-SCA and the other restructuring agreements executed in 1999.

Having failed to demonstrate the existence of a written joint venture agreement, plaintiffs have also failed to demonstrate the existence of a fiduciary duty running from the CS defendants to Van Deventer, as joint venturers. Among sophisticated business people, fiduciary duties must be reflected in written documents (see id. at 160).

For the foregoing reasons, the branches of the motion for partial summary judgment in the CS defendants' favor on the fourth, fourteenth and fifteenth causes of action are granted and these claims are dismissed.

That branch of plaintiffs' motion to impose sanctions against the CS defendants for spoliation of evidence is denied. "Spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them" (Abar v Freightliner Corp., 208 AD2d 999, 1001 [3d Dept 1994]). The record does not support a finding that spoliation of evidence relating to the formation of the joint venture once in the possession of Omar Martin Cordes, a former managing director of the CSFB Leveraged Funds Group in London, England, occurred.

Cordes testified at deposition that he was actively involved in the negotiation of

the 1999 reorganization contracts (see Cordes 5/20/05, Dep Tr, at 14:7-10). Inasmuch as Cordes was not employed by CSFB prior to 1999 (see id. at 52:2-4), he could not have been involved in the negotiations surrounding the 1996 reorganization. Cordes testified that he has had no personal involvement with the Credit or Capital Funds since April 2000 (see id. at 86:13-19) and has not been involved with the Leveraged Funds Group since June or July 2002 (see id. at 44:6-17). Plaintiffs served and filed the complaint in October 7, 2003, more than a year later. Cordes further testified that he ceased his employment at Credit Suisse in December 2003 (see id. at 9:23-24), which was approximately three months before plaintiffs served their initial demands for the production of documents in March 2004. There is no dispute that Credit Suisse's in-house legal department requested Cordes to gather and arrange for copying his preserved documents and that Cordes' hard copy archived files were searched for relevant documentation (see id. at 25:9-14, 84:9-11). While plaintiffs contend that hundreds of e-mails relating to the matter were not preserved by Cordes, the record is devoid of any evidence demonstrating that the e-mails were destroyed after the complaint was filed or that, in 2003, Cordes possessed any relevant documents or e-mails generated during the 1999-2000 time period. For these reasons, it appears unlikely that Cordes would have been personally involved in the alleged formation of the joint venture in 1996 or could have intentionally destroyed such documentation during the pendency of the action.

Accordingly, it is

ORDERED that the motion is granted to the extent that summary judgment in favor of defendants CS SCF Management Limited, Credit Suisse First Boston, Credit Suisse First Boston (USA), Inc., CS Capital Partners, Ltd., and Credit Suisse Fund Administration Limited on the fourth, fourteenth and fifteenth causes of action is granted and these claims are dismissed, and that the balance of defendants' motion is denied; and it is further

ORDERED that plaintiffs' cross motion is denied in its entirety.

Dated: May 29, 2007

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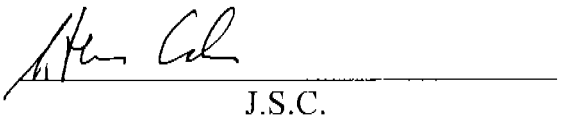

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