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

PRESENT: HERMAN CAHN PART 49

Justice

INDEX NO. 603151/03

JOHN M. VAN DEVENTER

Plaintiff

- v -

MOTION DATE 3/26/07

MOTION SEQ. NO. 031

CS SCF MANAGEMENT LTD.

MOTION CAL. NO

Defendant.

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

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

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

June 29, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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), INC., CS CAPITAL PARTNERS, LTD., CS STRUCTURED CREDIT FUND, LTD., CREDIT SUISSE FUND ADMINISTRATION LIMITED, and QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

----------X

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE FIRST BOSTON (USA), INC., CS CAPITAL PARTNERS, LTD., and CS STRUCTURED CREDIT FUND, LTD.,

Counterclaim-Plaintiffs,

-against-

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

Counterclaim-Defendants.

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Herman Cahn, J.:

Motion sequence numbers 027 and 031 are consolidated for purposes of disposition.

In sequence number 027, defendants CS SCF Management Limited (the Manager), Credit Suisse First Boston (CSFB), and Credit Suisse First Boston (USA), Inc. (CSFB USA) move for partial summary judgment on the first, second, third, fourth, sixth, and seventh causes of action

asserted in the first amended complaint, CPLR 3212. In sequence number 031, plaintiff C2C Consultants, Ltd. (C2C) moves for partial summary judgment on the seventh cause of action asserted in the first amended complaint and on the ninth and tenth amended counterclaims. The Manager, CSFB, CSFB USA, and defendants CS Capital Partners, Ltd. (CS Capital) and CS Structured Credit Fund, Ltd. (Credit Fund) (collectively, the CS defendants) cross-move for partial summary judgment on the seventh, eighth, and ninth causes of action asserted in the first amended complaint and on the ninth and tenth amended counterclaims.

The underlying facts and procedural history of this complex commercial action have been fully set forth in this court's decisions and orders determining the parties' numerous prior motions and will not be repeated here, except as pertains to the motions consolidated herein.

CS Defendants' Motion

a. 1st, 2nd, 3rd, 4th and 6th Causes of Action:

The motion designated sequence number 027 is movants' second motion for partial summary judgment on the first, third, fourth, and sixth causes of action and movants' third such motion on the second cause of action, of the first amended complaint. The within motions are not motions to reargue or renew, but are denominated as new motions. While movants' arguments here vary somewhat from motion to motion, they seek the same relief in each motion. A movant is required to present all arguments when seeking relief in the same motion, in the interests of fairness and judicial economy. Duplicative motion practice is palpably improper (see Ofman v Campos, 12 AD3d 581, 582 [2d Dept 2004], lv dismissed 4 NY3d 846 [2005]; Clissuras v Concord Village Owners, 299 AD2d 446 [2d Dept 2002]; 22 NYCRR 130-1.1). Therefore, having once considered and decided those branches of the motion for partial summary

judgment on the first, second, third, fourth, and sixth causes of action, the court will not now reconsider them. The parties are referred to the earlier decisions.

b. 7th Cause of Action:

However, the court will consider the branch of the motion for partial summary judgment on the seventh cause of action.

In the seventh cause of action, C2C alleges that, pursuant to the terms of the strategic consulting agreement executed by the Manager and C2C in 1999 (the 1999-SCA), C2C is entitled to recover certain funds (the clawback amount) held in a particular bank account, referred to either as the pledged account or the escrow account. In the claim, C2C seeks an order irrevocably releasing the lien on the bank account granted in favor of the Manager, pursuant to 1999-SCA § 7.3 (c). C2C also seeks a judicial declaration that neither the Manager, CSFB, its affiliates, nor defendant Credit Suisse Fund Administration Limited[1] (the Administrator) has any interest in, or to, the clawback amount. In addition, C2C seeks an order directing the bank at which the account is maintained (then defendant Queensgate Bank & Trust Company, Ltd., now nonparty Citibank, N.A.[2]) to turn over the account balance to C2C. C2C contends that it is entitled to this relief on the grounds that the 1999-SCA terminated on February 28, 2003 for reasons other than the passage of time, and that C2C did not receive a clawback notice from the Administrator within 90 days after the termination.

In a prior motion, designated sequence number 022, C2C moved for partial summary

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[1]By decision and order dated September 23, 2005, this court dismissed defendant Credit Suisse Fund Administration Limited from this action.

[2]Citibank, N.A. was appointed stakeholder, pursuant to a court order dated November 14, 2005.

judgment on a related cause of action affecting the funds held in the pledged account. In that motion, C2C moved for partial summary judgment on the eighth cause of action for breach of a loan agreement and return of $1,500,000 borrowed from the pledged account by the Manager. The Manager had used the money to provide debt financing to Resource Partners Group Limited (RPG), a Credit Fund asset. In its decision and order, this court granted the motion in part as to liability on the ground that the Credit Fund was contractually bound to repay the loan, and directed the Credit Fund to deposit $1,500,000, together with appropriate interest, into the Citibank escrow account. In that order, the court did not resolve the issues raised by the parties regarding C2C's entitlement to immediate release of the monies in the pledged account or whether C2C is ultimately entitled to retain all, or a portion, of those monies.

The Within Motion:

Movants now seek partial summary judgment on the seventh cause of action on the ground that C2C is not entitled to enforce the 1999-SCA, contending that C2C fraudulently induced the Manager and the Funds to execute the agreement and, later, breached material provisions of the agreement.

Movants contend that the 1999-SCA is permeated by fraud and allege that C2C intentionally concealed material facts, including its reincorporation under a new name and new ownership immediately prior to the execution of the agreement, and that, had the Manager known that plaintiff John M. Van Deventer was no longer a C2C owner and would no longer perform the duties of an owner, it would not have entered into the agreement.

In opposition, C2C contends that the undisputed record demonstrates that movants knew of the changes prior to the agreement's execution and that, in any event, C2C disclosed the

changes to movants in discovery responses produced in 2005.

Specifically, movants contend that they have recently learned that the original C2C, then named Cabot International Consultants Ltd. (CIC), a party to the SCA executed in 1996, and owned by Van Deventer and plaintiff James R. Clark, was restructured for tax purposes, with Steven W. Siegler as owner of all the voting shares, immediately prior to execution of the 1999-SCA.

However, the record includes ample evidence demonstrating that one or more of movants' officers or employees knew of, and acquiesced in, these changes at the time that they occurred. In December 1999, Siegler, than a CIC director and Cabot Square general counsel, suggested replacing CIC with an entity having a different tax status, and discussed the idea, first, with Van Deventer and, then, with Omar Martin Cordes, the CSFB managing director and officer involved with the 1999 restructuring. The CIC/C2C minute book demonstrates that Karla J. Bodden and Dennis Hunter, both CS Capital Fund and Credit Fund directors, and directors of CIC and the new entity, named C2C II Consultants Ltd., attended the board meetings at which C2C was dissolved and its name changed. The minute book also demonstrates that both participated in the corporate actions establishing the new entity, authorizing the new entity's execution of the 1999-SCA, creating the new entity's shareholding structure, and authorizing the new entity's issuance of 100% of the voting shares to Siegler and the issuance of participating non-voting shares to Van Deventer and Clark, as well as to other individuals. In addition, the minute book indicates that Bodden and Hunter attended both Funds' board meetings during which entry into the 1999-SCA with the new entity was authorized. Moreover, Bodden executed the 1999-SCA on behalf of both the new entity, CS Capital and the Credit Fund, and so had ample opportunity to see that

neither Van Deventer nor Clark executed the 1999-SCA, either as the new entity's representatives or in their individual capacities.

In addition, Henry Harford, Esq., Cayman Islands counsel to both Funds, the Manager, C2C, Bodden, Hunter, and CSFB, personally advised movants and the parties to the 1999-SCA and worked on all Cayman Islands legal matters relating to the 1999 restructuring, including the incorporation of CS Capital and the incorporation of, and issuance of shares in, the new entity. He also apparently reviewed the 1999-SCA.

Further, on January 31, 2005, plaintiffs produced C2C's corporate records, including its register of shareholders, of both voting and nonparticipating shares, and officers. In addition, in plaintiffs' answers to interrogatories dated May 9, 2005, C2C identified the principals, directors, investors, and employees of the various Cabot Square entities, with the exception of Cabot Square Capital Partners II, L.P. (CSCP II), and identified the roles played by Siegler in those various entities.

Clearly then, movants knew in 1999, prior to the execution of the 1999-SCA, and, certainly no later than May 2005, of the restructuring of the original C2C and the shifting of voting shares and daily operational control from Van Deventer and Clark to Siegler and others. Therefore, movants could have conducted discovery on the theories of fraud, fraudulent inducement, and mistake and moved to amend their answer to include affirmative defenses based on those legal theories much earlier in this lawsuit. To permit discovery on these matters to begin at this late stage would be to unnecessarily delay resolution of this action. Trial of the action, originally scheduled to begin on January 9, 2007, has already been rescheduled for October 9, 2007, to permit the parties to conclude depositions. It will not be rescheduled again to

permit assertion of new and additional affirmative defenses of which movants were aware several years ago.

Moreover, movants have failed to allege facts sufficient to support legally viable affirmative defenses based on fraudulent inducement and unilateral mistake during the negotiation and execution of the 1999-SCA. "A party asserting fraudulent inducement is required to identify a material representation, known to be false and made with the intention of inducing reliance, and actual reliance resulting in damages" or the claim will be dismissed (Nurnberg v Hobo Corp., 30 AD3d 359, 360 [1st Dept 2006] [emphasis added]). A matter is material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

(Restatement [Second] of Torts § 538; see Chase Manhattan Bank v Motorola, Inc., 184 F Supp 2d 384, 394 [SDNY 2002] [applying New York law].) "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [act]" (TSC Indus., Inc. v Northway, Inc., 426 US 438, 449 [1976]).

In order to avoid performance of a contract based on a theory of unilateral mistake, a party to the agreement must demonstrate that the other fraudulently misled him or her and that the contract does not express the intended agreement (Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 443 [1st Dept 2007]).

Movants do not allege any specific misrepresentation by Van Deventer, Clark, or any

individual representing C2C, nor do they contend that they ever requested confirmation of Van Deventer's ownership of the new entity or even attempted to make ownership by Van Deventer a term of the 1999-SCA, although that contract was heavily negotiated by attorneys on both sides. The court also notes that the numerous Cabot Square entities created by Van Deventer and Clark were often interrelated and that, while not an owner of the new entity replacing the original C2C, Van Deventer was a member of Cabot Square Capital Ltd. (CSC), the new entity's manager.

In addition, the record conclusively demonstrates that movants were aware that Van Deventer did not intend to work full-time as their investment consultant. Two 1999-SCA negotiators on behalf of the Manager and the Funds testified at deposition that, during the 1999-SCA negotiations, they suggested adding a "key-man provision" requiring Van Deventer to work full-time as its consultant and permitting CSFB to terminate the agreement in the event that he ceased to do so, and that plaintiffs refused to agree to the addition (see Judith Sian Morse, Oct. 11, 2006, dep tr, at 100:21 to 101:9, 102:15 to 103:7; Stephen Foster, Oct. 18, 2006, dep tr, vol. 1, at 242:16 to 243:14).

For these reasons, movants cannot demonstrate the existence of material misrepresentations or fraudulent omissions by plaintiffs. "A false representation as to a material fact is necessary to sustain a claim for fraud" (Marine Midland Bank, N.A. v Idar Gem Distribs., 133 AD2d 525, 526 [4th Dept 1987]).

Moreover, assuming that the alleged misrepresentations or omissions occurred, movants have not demonstrated that they were material and would have affected their decision to enter into the 1999-SCA. Not only did movants fail to request that Van Deventer's ownership of the new entity be made a requirement of the contract, but the record includes evidence affirmatively

demonstrating that the Manager did not consider ownership to be an important factor. David Mitchison, a director and the president of the Manager and the Administrator, testified at a deposition that, while he believed Van Deventer and Clark had remained C2C principals after the restructuring, he did not care who the principals were (see David Mitchison, Nov. 17, 2006, dep tr, at 57:13-18).

The record also establishes that, after creation of the new entity and execution of the 1999-SCA, Van Deventer continued to act as the primary investment consultant for both Funds. Stephen Foster, now a director of the Credit Suisse Prime Services Department and formerly a member of the boards of directors of the Manager, the Credit Fund, and CS Capital, a director in the Funds Development Group of CSFB (Europe) Ltd., and head of the Credit Suisse Regional Treasury Administration, testified at deposition that, throughout the contractual relationship, he received regular reports by telephone from, and had regular meetings with, Van Deventer, representing the Cabot Square entities and that a degree of trust grew between Van Deventer and himself (see Foster dep tr, vol. 1, at 67:2 to 68:1-2, 200:22 to 201:12; Foster, Nov. 29, 2006, dep tr, vol. 2, at 301:17-21).

The record also demonstrates that movants could not have justifiably relied on C2C's alleged fraudulent misrepresentations or omissions. As discussed above, movants allege that they merely assumed that Van Deventer would remain owner of C2C, even after the restructuring, but never asked him whether that were true. The court notes that, even assuming movants did not know the full details of the restructuring, certain negotiated sections of the 1999-SCA indicate that Van Deventer would not be performing the functions of an owner. For example, the 1999-SCA notice provisions require that all notices to C2C be sent to Bodden and

Siegler (see 1999-SCA § 13.2).

Moreover, Van Deventer did not execute the 1999-SCA, either in a representative or individual capacity. "Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, he cannot claim justifiable reliance" (Stuart Silver Assocs. v Baco Dev. Corp., 245 AD2d 96, 98-99 [1st Dept 1997]).

Next, movants contend that partial summary judgment on the seventh cause of action should be granted in their favor because the record conclusively establishes that C2C or its "associated persons," as defined by 1999-SCA § 11.3, breached numerous material provisions of the 1999-SCA and that, therefore, C2C may not seek to enforce the agreement.

In opposition, C2C contends that it did not breach any provisions of the 1999-SCA and that, even if breaches occurred, they were not material.

Although a party may be discharged from performing his or her obligations under a contract where the other party has materially breached the contract by failing to substantially perform (Jafari v Wally Findlay Galleries, 741 F Supp 64, 68 [SDNY 1990] [applying New York law]), the record on these motions does not support movants' claims of material breach by C2C.

Movants' contention that Van Deventer and Clark materially breached the exclusivity provision set forth in 1999-SCA § 10 by serving as key investment professionals of the new fund (CSCP II) raised in 2002 is not sufficiently proven to warrant the court's granting summary judgment to movants thereon. Assuming that Van Deventer and Clark were associated persons, it could be argued that the exclusivity provision did not prohibit them from raising another fund in 2002. The provision provides, in relevant part, that:

> During the term of this Agreement, neither the Consultant nor any Associated Person may perform similar functions and duties or act as a general partner, manager, trustee, adviser, administrator, consultant or sponsor, for any similar entity or fund (other than Credit Suisse or an Associated Person thereof) without the prior written consent of the Manager

(1999-SCA § 10.1).

Thus, the exclusivity provision prohibits associated persons from undertaking for another fund functions similar to those undertaken by C2C for the CS Capital and Credit Funds. C2C's functions and duties are set forth in section 3 of the 1999-SCA.

In addition, J.C. Cheysson, CSFB's chief operating officer, admitted that, during a meeting held in 2000, he advised Van Deventer that CSFB was no longer interested in working with him or Cabot Square and wanted to recover its investment as soon as practical (see J.C. Cheysson, Sept. 6, 2006 letter to Van Deventer). Cheysson also admitted that he advised Van Deventer that he was free to raise funds independently (see id.).

More significantly, however, is the deposition testimony by CSFB officers and employees that they knew by late 1998 or early 1999 that Van Deventer was interested in raising a new fund without CSFB's involvement and were willing to, and did, affirmatively assist him in his efforts (see Foster dep tr, vol. 1, at 81:15-20, 84:6 to 85:21; Foster dep tr, vol. 2, at 328:22 to 329:3). Foster testified that he was instructed by his superiors to support Van Deventer's fundraising efforts by making positive statements about CSFB's experience with Van Deventer with regard to the Credit Fund (see id. vol. 1, at 86:3 to 87:6, 88:10 to 89:13, 94:13 to 95:3, 122:12 to 123:14; vol. 2, at 256:17 to 257:2, 276:21 to 277:1, 299:24 to 300:17). Similarly, Cordes testified that he was aware that Van Deventer was raising another fund, that he never advised Van Deventer that

he was prohibited from raising another fund, and that he gave positive references for Van Deventer and Cabot Square to potential and actual investors in the new fund (see Omar Martin Cordes, May 20, 2005, dep tr, at 46:11 to 47:13, 48:13 to 49:10). Given CSFB's active encouragement and assistance in attracting investors to the new fund, movants can certainly not be granted summary judgment on the claim that Van Deventer raised the new fund in breach of the exclusivity provision or that such action constituted a material breach of the 1999-SCA.

Movants' contention that C2C breached material provisions of the 1999-SCA by intentionally providing written strategic reports that were sloppy and riddled with errors is similarly contradicted by deposition testimony of their own officers and employees. The 1999-SCA requires C2C to provide the Manager with at least three written strategic reports each 12-month period, beginning with the date of the agreement's execution (see 1999-SCA § 3.1). The agreement also requires C2C to give the Manager the benefit of its best judgment in the performance of its contractual duties and obligations (see id., § 4.1). However, Foster testified at deposition that the main purpose of the strategic report requirement was to provide written evidence that C2C's consulting actions occurred outside the United Kingdom (see Foster dep tr, vol. 1, at 48:4-24). Foster further testified that the written reports were not meaningful, but were, instead, a mere formality, because he had frequent meetings with Cabot Square and did not need to have its investment advice written down in a report (see id. vol. 1, at 48:25 to 49:1-13). In view of these admissions, movants have not demonstrated that the strategic reports, even if improperly prepared, constituted material breaches of sections 3 and 4 of the 1999-SCA.

Therefore, that branch of the motion for partial summary judgment in the CS defendants' favor on the grounds of fraudulent inducement, breach of contract, and unilateral mistake on the

seventh cause of action of the first amended complaint, is denied.

C2C's Motion

In a related motion, designated sequence number 031, concerning disposition of the pledged account monies, C2C moves for partial summary judgment in its favor on the seventh cause of action asserted in the first amended complaint and on the ninth and tenth amended counterclaims, primarily on the ground that the CS defendants failed to issue an enforceable clawback notice and that, therefore, C2C is entitled under the relevant contract terms to receive the pledged account monies.

The CS defendants cross-move for partial summary judgment in their favor on the seventh, eighth, and ninth causes of action asserted in the first amended complaint and on the ninth and tenth amended counterclaims, contending that the purpose of the contract provisions upon which C2C relies was to provide for the interim custody of the pledged account monies and are not relevant to the identification of the party ultimately entitled to the money. The CS defendants further contend that the Manager is ultimately entitled to receive the money on the grounds that the Funds' net operating profit was negative in 2003 and that C2C is not entitled to enforce the 1999-SCA because it fraudulently induced the Manager and the Funds to enter into the 1999-SCA and, subsequently, materially breached that agreement.

In the ninth amended counterclaim, the Manager and the Funds seek a judgment declaring that C2C owes the Manager the "consultant excess amount," regardless of whether, and to whom, the collateral in the pledged account is released, and declaring that the collateral in the pledged account shall be released to the Manager.

In the tenth amended counterclaim, the Manager and the Funds seek to reform the

pledged account agreement (the PAA) and the 1999-SCA on a theory of mutual mistake to provide that nonparty KPMG, the Funds' auditor, is required merely to review the arithmetical accuracy of the Administrator's clawback calculations, rather than the accuracy of the net operating profit figures. In support, they allege that, at the time that they executed the 1999-SCA, they believed that KPMG would be able to deliver a clawback notice in compliance with 1999-SCA § 7.3 (b).

This is C2C's second motion for partial summary judgment on the seventh cause of action based upon 1999-SCA § 7.3 and the CS defendants' alleged failure to issue an enforceable clawback notice. By decision and order dated September 14, 2005, this court denied, with leave to renew, the prior motion, designated sequence number 005, as premature inasmuch as issue had not yet been joined and because genuine triable issues of material fact existed requiring discovery regarding, among other things, the interpretation and the parties' performance of the PAA, the 1999-SCA, and the type of services the contracting parties intended KPMG to provide in connection with 1999-SCA § 7.3.

In the motion and cross motion at bar, the parties now dispute primarily whether two letters dated August 24, 2004, one, by the Administrator and the other, by KPMG, and forwarded by the Administrator to C2C, when read together, constitute a timely clawback notice pursuant section 9.1 (b) of the amended fund management agreement dated March 14, 2000 (the 2000-FMA) and 1999-SCA § 7.3.

C2C contends that, if they do not constitute the clawback notice, then the pledged account monies should have been released to it on August 24, 2004, 90 days after sale of the Fund's last asset and that, therefore, it is entitled to the immediate release of escrow monies. The CS

defendants contend that the letters do satisfy the clawback notice provisions and that, in any event, these provisions govern only the temporary disposition of those monies and that the Manager is ultimately entitled to receive and retain the escrow monies.

The well-established law of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied

(American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990], appeal denied 77 NY2d 807 [1991] [internal citations omitted]). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" (W.W.W. Associates v Giancontieri, 77 NY2d 157, 162 [1990]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (id. at 162).

Clawback Contract Provisions

The 2000-FMA requires that, each time an asset of the Credit Fund is sold or otherwise disposed, the Fund must pay the Manager a performance fee representing 20% of the net profit on the transaction (see 2000-FMA § 9.1 [b]). The 1999-SCA requires the Manager to then pay C2C a portion of that performance fee as a consulting fee (see 1999-SCA § 7). Further, after the sale of the last Credit Fund asset, if the total returns for the Credit Fund do not reach a specified

minimum threshold, then the Manager must refund to the Credit Fund a portion of the performance fees, referred to as the "clawback amount" (see 2000-FMA § 9.1 [c]). The 1999-SCA provides that, if the Manager is required to make such a refund, then C2C must reimburse the Manager a prescribed portion of that refund, referred to as the "consultant excess amount" (see 1999-SCA § 7.3 [b]).

C2C secured its potential obligation to repay the consultant excess amount by pledging an account (the pledged account) at Queensgate Bank to the Manager (see 1999-SCA § 7). C2C, the Manager, and Queensgate Bank entered into the PAA, which sets forth their respective responsibilities regarding the pledged account. The PAA provision governing the release of the pledged account monies mirrors the 1999-SCA release provision (see PAA § 3 [c], [d]; 1999-SCA § 7.3). During the course of the parties' contractual relationship, C2C deposited approximately $6,100,000 into the pledged account. It is this money that C2C and the CS defendants now seek.

Section 7.3 of the 1999-SCA, the provision at the heart of the parties' dispute regarding the immediate release of the pledged account money, provides in relevant part that:

> [t]he Pledge shall be released pursuant to joint instructions of the Manager and the Consultant, and in the absence of such instructions, in the following manner:
>
> (i) within 90 days after the disposition (whether by sale, realization or valuation pursuant to a deemed sale by virtue of a distribution in kind) of the last Asset (other than Cash or cash equivalents) (the 'Disposition'), the Administrator and the Auditor shall deliver a notice to the Consultant certifying either (A) a final determination of the Consultant Excess Amount or (B) a good faith estimate of the Consultant Excess Amount (the 'Clawback Notice')

(1999-SCA § 7.3 [d] [i] [emphases added]).

The provision, thus, provides that the escrow monies must be released to C2C within 90 days after sale of the Credit Fund's last asset, unless both the Administrator and KPMG deliver a timely clawback notice to C2C. The provision specifies that, in the notice, the Administrator and KPMG must certify that either a final determination or a good faith estimate of C2C's clawback liability has been made. The provision further provides that, if no clawback notice is received by C2C within the 90 days, the Manager's security over the balance of the pledge amount shall be released (see id., § 7.3 [d] [iv]; PAA § 3 [c]).

By letter dated August 24, 2004, and addressed to C2C, the Manager, and Queensgate Bank, the Administrator referenced the 2000-FMA, the PAA, and the 1999-SCA and advised that the Fund's net operating profit was currently estimated to be negative and that the Administrator had made a good faith estimate that the consultant excess amount is not less than the full amount currently on deposit in the pledged account.

The Administrator also annexed a letter prepared by KPMG and addressed solely to the Administrator. In that letter, KPMG advised that the scope of its review was not an audit and will not give the same level of assurance as an audit. KPMG also advised that the Administrator's clawback calculation discloses a net operating loss for the Fund and that the Fund's unaudited management accounts approved by the Administrator's directors were found to be in agreement with the stated loss. It further advised that it had re-performed the Administrator's calculations of the clawback and consultant excess amounts and found the calculations to be arithmetically correct.

The KPMG letter does not satisfy the clawback notice contractual requirements regarding certification by an auditor.

The requirement that KPMG's certification must be made jointly to the contracting parties in order for the clawback notice to be enforceable is acknowledged in e-mails prepared and sent by Todd Betke, Esq., a partner at the law firm representing the CS defendants in this litigation and the drafter of the Administrator's August 24, 2004 letter. In an e-mail dated August 17, 2004, Betke stated that, "[a]s you know, the Administrator and the auditor are required to issue" the clawback notice. Upon receipt of this e-mail, KPMG advised that it could not cosign the clawback notice with the Administrator because, to do so, might violate its internal policies regarding independence from audit clients, inasmuch as KPMG is also the worldwide auditor for the Credit Suisse Group companies. On August 18, 2004, Betke issued an e-mail to the CS defendants, KPMG, and the Administrator in which he states that "KPMG's involvement in this matter is required under the terms of the Strategic Consulting Agreement and the Pledged Account Agreement, both of which require that the Clawback Notice be issued jointly by the Administrator and KPMG" (emphasis added).

C2C was never authorized by KPMG as a recipient entitled to rely on its findings, in contravention of 1999-SCA § 7.3 (d) (i), which requires that C2C receive the auditor's report. In the letter, KPMG states that it would consent to the provision of its letter to C2C only on condition that C2C agree to be bound by the terms of an engagement letter dated August 24, 2004. KPMG also states that, until C2C executed the engagement letter, C2C was not entitled to place reliance on the KPMG letter. Although C2C twice requested a copy of the engagement letter from the Administrator, the CS defendants denied the requests. Contrary to the CS defendants' contention, the mere fact that the Administrator forwarded an unauthorized copy of the KPMG letter to C2C does not satisfy the contractual requirement. As a result of KPMG's

condition precedent and the CS defendants' refusal to provide C2C with a copy of the engagement letter, C2C was never an authorized recipient of the KPMG letter and was never entitled to rely on KPMG's findings.

In addition, KPMG performed merely an arithmetical check of calculations using Fund financial figures provided by the Administrator and did not independently certify the accuracy of the figures itself, in contravention of 1999-SCA § 7.3 (d) (i) which requires that KPMG certify the Administrator's estimates. The section expressly requires that the auditor "certify" a good faith estimate of the consultant excess amount (see 1999-SCA § 7.3 [d] [i]). "Certify" in a similar context has been defined by the courts as meaning a representation by an accountant to those who see the financial statement that the figures are accurate in all material respects (Ingenito v Bermec Corp., 441 F Supp 525, 549 [SDNY 1977]; Gold v DCL Inc., 399 F Supp 1123, 1127 [SDNY 1973] [where an auditor certifies financial statements, it "holds itself out as an independent professional source of assurance that the audited company's financial presentations are accurate and reliable"]; Matter of Thalmann v Bullock, 144 AD2d 174, 175 [3d Dept 1988] ["(A)n individual who certifies a document does more than merely state a fact, he actually vouches, attests or warrants that the information being certified is true"]). There is no real dispute that KPMG did not certify the truth of the figures provided by the Administrator and Betke and performed only an arithmetical check of the equation.

In the letter, KPMG states that it carried out "certain agreed procedures" in respect of "certain information." There is no dispute that the "certain information" is set forth on a two-page spreadsheet entitled, "Clawback Calculation," prepared by Betke. C2C's clawback liability, if any, is based on a two-step procedure described by Betke in the August 18, 2004, e-mail issued

to the CS defendants, KPMG, and the Administrator. In the e-mail, Betke states that, first, the net operating profit of the Credit and CS Capital Funds must be determined by deducting the cost of each Fund asset from its sale price, then totaling the aggregate net proceeds. He also states that, second, the net operating profit value must be plugged into the clawback equation.

There is also no real dispute that the net operating profit calculation step is the determinative one and the second step, the execution of the clawback equation, is simply a mechanical arithmetical calculation. As Betke recognized in his August 18, 2004 e-mail, an enforceable clawback notice would require KPMG to perform an audit in order to confirm the aggregate net operating profit of the fund across all investments. However, KPMG clearly states in its letter that it merely verified the Administrator's arithmetic in the clawback calculation, did not perform an audit on the accuracy of the figures themselves, and did not certify, confirm, validate, attest, or offer any opinion concerning whether the Funds' net operating profit was positive or negative.

Thus, the record conclusively demonstrates that KPMG performed only a minor part of the certification process and merely used the net operating profit values provided by Betke, without performing any audit of the accuracy of these values.

Contrary to the CS defendants' contention, KPMG's refusal to provide the necessary certification does not excuse the CS defendants from complying with the 1999-SCA clawback notice requirements. KPMG is not a party to the 1999-SCA. "A contracting party who agrees to render a performance or produce a result when success depends upon the cooperation of a nonparty is not usually excused when the nonparty fails to cooperate" (Corbin on Contracts § 75.8 [rev ed 2001]). "Impossibility excuses a party's performance only when the destruction of

the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (Kel Kim Corp. v Central Markets, 70 NY2d 900, 902 [1987]).

The record demonstrates that KPMG was apparently willing to perform an audit, or, independent review, of the Administrator's clawback calculation (see Joe Guariglia, a CSFB employee, Aug. 19, 2004 e-mail) and that it did not because the CS defendants failed to provide it with necessary supporting details and documentation. Ashley Paxton, a KPMG partner who wrote the KPMG letter, and who worked on the Funds' net operating profit values and clawback calculation, testified at deposition that Credit Suisse did not send enough details regarding the transactions that were deducted from the gross proceeds to enable KPMG to verify and reconcile the net operating profit values received provided by the Administrator and had to assume the accuracy of the Administrator's net operating loss figures (see Ashley Paxton, Dec. 8, 2005, dep tr, vol. 1, at 49:13 to 51:11, 72:12 to 74:5, 125:21 to 126:10; Paxton, Dec. 9, 2005, dep tr, vol. 2, at 59:10 to 60:25, 71:5-17). Paxton further testified that KPMG did not issue a clawback notice, certify a final determination of the consulting excess amount, or certify a good faith estimate of the consultant excess amount, as those terms are defined in 1999-SCA § 7.3 (d) (i), to the Administrator or C2C (see id. vol.1, at 33:18 to 35:1), nor could it, even if it had received additional documentation, because of its concerns about maintaining its independence (see id. vol. 1, at 123:11-20).

In addition, in KPMG's May 2005 report of its audit of the Funds for the fiscal year ending January 31, 2003, which included the Funds' net operating profit and supporting figures

used in the Betke clawback calculations, KPMG disclaimed any responsibility for the accuracy of the financial statements, stating:

> due to the lack of evidence, we were unable to ascertain whether the treatment of items in the consolidated revenue account and of liabilities and provisions in the consolidated balance sheet are appropriate. Accordingly, we are unable to determine whether adjustments, if any, are required with respect to these amounts.
>
> Because of the significance of the matters discussed in the preceding paragraph, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the consolidated financial statements as of the end of the year ended 31 January 2003

(KPMG May 2005 report on its fiscal year 2003 CS Capital and Credit Funds audit).

The record, thus, conclusively demonstrates that KPMG declined to certify, validate, confirm, or test the net operating profits values upon which the Administrator and Betke based the clawback calculation and its good faith estimate of C2C's clawback liability.

For the foregoing reasons, that branch of C2C's motion for partial summary judgment in its favor on the seventh cause of action asserted in the first amended complaint and on the ninth and tenth amended counterclaims is granted on the grounds that the CS defendants failed to timely serve the clawback notice required by the contract, and, therefore, C2C is entitled to the immediate release of the monies maintained in the escrow account. The court notes that this holding has no bearing on C2C's ultimate entitlement to retain all, or a portion of, these monies or its obligation to pay the Manager the consultant excess amount.

Consultant Excess Amount

The CS defendants next argue, in the alternative, that the relevant contract provisions do not require them to issue a clawback notice in order to trigger C2C's obligation to pay the

Manager the consultant excess amount, an amount allegedly equal to the monies now held in escrow. They further contend that 1999-SCA § 7.3 (b) requires merely that, if the Funds' 2003 net operating profit is negative, then the Manager is required by 2000-FMA § 9.1 (c) to pay a clawback amount, which in turn triggers C2C's contractual obligation to reimburse the Manager for the consultant excess amount.

In reply, C2C stresses that, with this motion, it is seeking the immediate release of the escrow money under 1999-SCA § 7.3 (d) (i) and is fully cognizant of its contractual obligation to reimburse the Manager for a portion of the clawback amount, if the CS defendants prove at trial that the Fund had a negative net operating profit for fiscal year 2003 and that the Manager made a clawback payment (see plaintiffs' memo of law, Mar. 22, 2007, at 1, 2). As C2C correctly notes, whether it or the Manager is ultimately entitled to all, or a portion, of the escrow monies are issues separate and apart from C2C's contractual entitlement to release of the escrow monies no later than August 24, 2004, 90 days after sale of the last Fund asset, in the absence of an enforceable clawback notice (see id.). The issues of ultimate entitlement to the consultant excess amount, if any, and the amount itself, require a factual determination regarding whether the Funds showed a positive or negative net operating profit for fiscal year 2003 (see id.). That issue, in turn, raises triable issues, including the weight to be accorded the lengthy expert witness reports on the Funds' 2003 net operating profit figures and the Administrator's clawback estimate prepared by the parties' expert witnesses.

In his report, Dr. Finnerty, C2C's expert, concludes that, in his opinion, the Manager owes C2C $10.8 million, together with interest from February 8, 2003; the Credit Fund's investments were liquidated at significant discounts to their fair market values; KPMG's inability to render an

opinion on the consolidated financial statements for CS Capital makes the reported $169.5 million in assets as of January 31, 2003 unreliable as a measure of the value of the assets or as a basis for a net operating profit calculation; and certain expenses should have been excluded from the calculation of the Credit Fund's 2003 net operating profit.

On the other hand, Mr. Matyszczyk, CS' expert, concludes that, in his opinion, the Fund shows an overall net operating loss of $22,475,726; the expenses now disputed by C2C were properly deducted from the Fund's gross operating profit; and certain operating expenses of approximately $36.5 million should have been included in the Administrator's clawback calculation and in the calculation of the net operating loss.

Clearly, then, the parties' experts have arrived at diametrically opposed conclusions, which require a trial on these issues.

Contract Reformation

The CS defendants contend, in the alternative, that, if the August 24, 2004 letters are held insufficient to constitute the contractually required clawback notice, then the court should grant summary judgment in their favor on the ninth and tenth amended counterclaims and reform the 1999-SCA and the PAA to reflect the intent of the parties and the realities of KPMG's capabilities and inability to certify the clawback amount, on the ground of mutual mistake.

> Reformation . . . 'is not a mechanism to interject into the writings terms or provisions not agreed upon . . . . Nor may it be used to relieve a party from a hard or oppressive bargain. The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties: [T]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'

(Greater NY Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d at 442-43 [internal citations and quotation marks omitted], quoting William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 29 [1st Dept 1992], lv dismissed in part, denied in part 80 NY2d 1005 [1992]).

A contracting party's negligence, or conscious ignorance, of the true facts does not warrant reformation or rescission of the contract, but, instead, requires that the agreement be enforced as written (P.K. Development v Elvem Dev. Corp., 226 AD2d 200, 201-02 [1st Dept 1996]; Soggs v Crocco, 247 AD2d 887, 889 [4th Dept 1998]). "[T]he party must bear the risk of mistake if it chooses to act on its otherwise limited knowledge" (P.K. Development, 226 AD2d at 202). Apparently, neither side asked KPMG whether it could conduct an independent audit as required by the 1999-SCA and the PAA until 2004, long after execution of these agreements. KPMG was the CS defendants' auditor at the time the agreements were negotiated and, thus, the CS defendants should have been aware that KPMG might have concerns about maintaining its independence when asked to provide an independent audit and could have been contacted and questioned by them, but was not. Moreover, once having discovered that KPMG would not provide the required certification, the CS defendants took no action to locate and retain a different auditor. The court notes that nothing in the contract requires that the certification be performed by KPMG or prohibits a certification by an auditor other than KPMG. In these circumstances, contract reformation is not appropriate.

CS Defendants' Cross Motion

RPG Loan Agr.

In the cross motion, the CS defendants seek summary judgment in their favor on the

eighth and ninth causes of action asserted in the first amended complaint on the ground that C2C is not ultimately entitled to recover the monies held in the escrow account because the Funds' net operating profit is negative and because C2C fraudulently induced the Manager to enter into the 1999-SCA and materially breached that agreement. As discussed above, the court has previously considered a motion for partial summary judgment on the eighth cause of action to enforce the RPG loan agreement. While the motion was made by C2C, the court notes that, in their opposition to the motion, the CS defendants ask the court to search the record and grant them summary judgment. In its decision and order on the motion designated as sequence number 022, the court granted in part C2C's motion for summary judgment as to liability and directed the Credit Fund to deposit $1,500,000, together with appropriate interest, in the Citibank escrow account, pursuant to the terms of the RPG loan agreement and the PAA.

In a related claim, on the ninth cause of action, C2C alleges that the Manager, the Administrator, the Funds and CSFB breached the RPG loan agreement by failing to use best endeavors to ensure a realisation in full and/or repayment by RPG of the RPG loan in full and by using their influence and taking actions intended to obstruct repayment of the monies owed to C2C pursuant to the terms of the RPG loan agreement.

As held above, whether C2C is required to reimburse the Manager for all or a portion of the clawback amount and to pay a consultant excess fee presents numerous triable issues reserved for trial.

Therefore, those branches of the cross motion for summary judgment in favor of the CS defendants on the eighth and ninth causes of action and for dismissal of those claims are denied.

The court has considered the parties' remaining arguments on the motions and cross motion and finds them to be without merit.

Accordingly, it is

ORDERED that motion sequence number 027 for partial summary judgment in favor of defendants on the first, second, third, fourth, and sixth causes of action asserted in the first amended complaint is denied as previously decided, and is denied on the merits with regard to the seventh cause of action asserted in the first amended complaint; and it is further

ORDERED that motion sequence number 031 is granted to the extent that:

1) partial summary judgment on the seventh cause of action asserted in the first amended complaint is granted in favor of plaintiff C2C Consultants, Ltd. and against defendants CS SCF Management Limited, Credit Suisse First Boston, Credit Suisse First Boston (USA), Inc., CS Capital Partners, Ltd., and CS Structured Credit Fund, Ltd., pursuant to section 7.3 (d) of the 1999 strategic consulting agreement, and these defendants are directed to release their liens, if any, on the monies held in the escrow account maintained at nonparty Citibank, N.A. and to instruct Citibank, N.A. to immediately release these monies to plaintiff C2C Consultants, Ltd. within two weeks after service of a copy of this order upon the defendants' attorneys with notice of entry;

2) summary judgment on the ninth amended counterclaim for breach of the Resource Partners Group Limited loan agreement is denied; and

3) summary judgment on the tenth amended counterclaim for reformation of the 1999-SCA and PAA is granted in favor of plaintiff C2C Consultants, Ltd., and the counterclaim is severed and dismissed; and it is further

ORDERED that the cross motion for partial summary judgment in favor of the moving defendants is denied in its entirety; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 29, 2007

ENTER:

J.S.C.