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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 603234/2004
MAYER, LISA
VS.
VILAR, ALBERTO
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 603234/04
MOTION DATE 4/30/09
MOTION SEQ. NO. 02
MOTION CAL. NO.

this motion to/for dismiss

| 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

OTION IS DECIDED IN ACCORDANCE
TH ACCOMPANYING MEMORANDUM
ECISION AND ORDER.

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/28/09

J.S.C.

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

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: PART 54

----------X

LISA MAYER, DEBRA MAYER, DABA, INC. and ABA, INC.,

Plaintiffs,

-against-

ALBERTO VILAR, GARY TANAKA, AMERINDO INVESTMENT ADVISORS, INC. (U.S.), and AMERINDO INVESTMENT ADVISORS, INC. (PANAMA),

Defendants.

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Index No.:603234/2004

**DECISION and ORDER**



**KORNREICH, SHIRLEY WERNER, J.:**

This is an action for fraud, breach of contract, conversion, breach of fiduciary duty, violations of General Business Law (GBL) 349, and an accounting. The action arises from the investment by plaintiffs Lisa Mayer and Debra Mayer (the Mayers) of approximately $11 million with defendants Alberto Vilar (Vilar) and Gary Tanaka (Tanaka) and their investment firms, defendants Amerindo Investment Advisors, Inc. (U.S.) and Amerindo Investment Advisors, Inc. (Panama) (collectively "Amerindo, Inc."). Tanaka moves to dismiss the amended complaint pursuant to CPLR 3016(b) and 3211(a)(5) and (7), arguing that: the claims against him are time-barred; that they fail to state a claim on which relief can be granted; and that the fraud claim is not pled with the requisite detail. The Mayers and plaintiff corporations DABA, INC. and ABA, INC., trusts which held the Mayers' assets, oppose the motion. For the reasons stated briefly below, the motion to dismiss is denied.

I. *Background*

In 2004, Vilar and Amerindo commenced an action against the Mayers and an investigator named Edward Adams, Jr., claiming slander arising from their investigation into what Vilar, Tanaka and Amerindo had done with the Mayers' invested funds. The Mayers counterclaimed and Vilar and Amerindo replied. Vilar and Amerindo, thereafter, withdrew their claims in full.

Per court order dated July 7, 2005, but not entered until August 11, 2005, the court granted the Mayers' motion to amend the counterclaim and caption to reflect their status as plaintiffs and to add DABA, Inc. and ABA, Inc. as plaintiffs, Tanaka as a defendant, and fraud as a claim. That same order required service of the amended complaint on Tanaka within 20 days of "entry" of the order. At or about the same time, Vilar and Tanaka were arrested and charged with numerous federal offenses stemming from their dealings with the Mayers and other Amerindo customers. On August 16, 2005, the court stayed the civil action pending resolution of the criminal proceedings. A jury found Vilar and Tanaka guilty of multiple offenses on November 19, 2008, thereby lifting the stay of the civil proceedings in accordance with the terms of the 2005 order granting the stay. Tanaka then was served with the amended complaint on November 26, 2008. By subsequent order filed May 4, 2009, a default judgment as to liability was entered against the Amerindo entities.

A. *The Original Counterclaim*

The original counterclaim, dated November 10, 2004, alleged breach of contract, conversion, breach of fiduciary duty, violations of GBL 349, and an accounting, arising from the following facts and series of events. Vilar and Tanaka owned and operated Amerindo. Beginning

around 1985, Mary and Herbert Mayer and their daughters, Lisa and Debra, began investing funds with Amerindo. By the mid-1990's, Amerindo managed virtually all of the Mayers' funds. In or about 1993, pursuant to defendants' instructions, the Mayers set up a trust with a trust company selected by Vilar and they formed two Bahamian corporations that were owned by the trust. These companies owned all or substantially all of the Mayers' assets being held by defendants. Plaintiffs DABA and ABA are successors to these corporations.

The bulk of the Mayers' investments were placed in Guaranteed Deposits, which were for a specific term (usually 1, 2 or 3 years), and earning a fixed rate of interest (generally greater than 10% per annum). These Guaranteed Deposits were made pursuant to a Subscription Agreement that provided, *inter alia*, that "within thirty (30) days of the annual expiration date or renewal date of the Deposit Account, unless the Fixed Deposit has been renewed by mutual agreement, upon receipt of written demand from the undersigned, [Amerindo will] return to the undersigned the Deposit Account, together with interest accrued thereon[.]" There also was a written guarantee, pursuant to which Vilar, Tanaka and Amerindo, each, "absolutely and unconditionally guarantee[d] the due payment by [Amerindo] of both the Funds [*i.e.*, principal] and a minimum annual return on the investment [at the agreed-upon fixed rate]." Amended Complaint, Exh. A.

The counterclaim details plaintiffs' efforts to invoke the subscription agreement and the guarantee and, thereby, get back their deposited funds of approximately $11 million, as well as the promised interest. In sum, Amerindo and Vilar breached their commitments in the Guaranteed Deposit by, *inter alia*: "failing and refusing to credit the Deposit with the contracted-for interest of 11% per annum; failing and refusing to make monthly interest payments as agreed; failing and refusing to refund the principal and accrued interest when the Deposit matured on

December 31, 2003; and failing and refusing to refund those sums at any time thereafter." Exh. A The counterclaim further alleged that: defendants violated New York GBL 349 by engaging in deceptive acts and practices; Vilar breached his fiduciary duty to the Mayer family; plaintiffs are entitled to an accounting of the Intouch and ATGF investments Amerindo purportedly made on their behalf; and Amerindo committed a breach of contract by failing to turn over, or to account for, the Intouch Shares that it represented it purchased for plaintiffs.

B. *The Amended Complaint*

The amended complaint, in addition to amending the caption to change the party designations in light of Vilar's and Amerindo's withdrawal of their claim, fleshed out some of the factual allegations, added Tanaka as a party defendant, and added a detailed fraud claim including, but not limited to, allegations that: "Defendants made repeated representations to plaintiffs that the Guaranteed Deposits were backed by the assets of each Amerindo entity, and were personally guaranteed by Vilar and Tanaka.." The allegations supporting the fraud claim will be discussed in greater detail below. Tanaka is a named defendant in the following causes of action: Breach of Contract (First), Conversion (Second), Violations of GBL 349 (Third), and Fraud (Seventh).

C. *Indictment and Conviction*

After the action was commenced, Tanaka and Vilar were arrested and indicted for numerous federal offenses, including at least two counts directly related to the Mayers' Guaranteed Deposit. Specifically, Count 1 of the Superseding Indictment alleged:

> Beginning in or about 1986, ALBERTO WILLIAM VILAR, a/k/a "Albert Vilar," and GARY ALAN TANAKA, the defendants, solicited and caused others to solicit victims to invest in Amerindo Guaranteed Fixed Rate Deposit Accounts

> ("GFRDAs") - a sham product offered by the defendants to Amerindo clients. The defendants induced clients to invest in GFRDAs by promising to invest the majority of each investor's funds in short-term debt instruments, with little or no risk, that would earn a fixed rate, generally at a rate substantially above the prevailing rates available from banks and other institutions. ... In truth and in fact, as the defendants well knew, Amerindo ... failed to provide GFRDA investors with the promised rate of return on their GFRDA investments.

Count 3 of the Superseding Indictment charged Tanaka and Vilar with Securities Fraud in connection with the Guaranteed Accounts:

> From on or about 1986 through on or about May 26, 2005, in the Southern District of New York and elsewhere, ALBERTO WILLIAM VILAR, a/k/a "Albert Vilar," and GARY ALAN TANAKA, the defendants, unlawfully, willfully, and knowingly, directly and indirectly, ... (a) employ[ed] devices, schemes, and artifices to defraud; (b) [made] untrue statements of material facts and omitt[ed] to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engag[ed] in transactions, acts, practices, and courses of business which operated and would operate as a fraud and deceit upon persons in connection with the purchase and sale of notes in the form of Amerindo Guaranteed Fixed rate Deposit Accounts.

Vilar and Tanaka were convicted on both counts 1 and 3.[1] During the trial, Tanaka, through his attorney, admitted to the Mayers' investment of more than $11 Million, that the investment was guaranteed and that he and Amerindo owed them their money. Tanaka's position at the criminal trial was that the dispute was civil in nature and never should have become the subject of a criminal indictment.

II. *Conclusions of Law*

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and

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[1]Vilar was convicted on all counts of the Indictment. Tanaka was convicted of counts 1, 3 and 4.

determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone,* 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 (1976). CPLR 3026 mandates that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.." Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.

In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v Orofino Realty Co., supra,* at 635. "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* at 636. As the Court of Appeals explained in the *Rovello* case, "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless the affidavits establish conclusively that Plaintiff has no cause of action." *Id.* The test is whether the pleadings give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved." *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept. 1983); *see Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept. 1993).

In addition, CPLR 3016(b) provides that where fraud is alleged, "the circumstances constituting the wrong shall be stated in detail." The detail alleged must be sufficient "to clearly inform a defendant with respect to the incidents complained of." *Lanzi v Brooks*, 43 NY2d 778, 780 (1977). Allegations that the statements were false and were known by the defendant to be false when made by the defendant are sufficient to plead the defendant's knowledge of falsity. *Black v Chittenden*, 69 NY2d 665, 668 (1986).

A. *Breach of Contract*

This claim seeks recovery against defendants for breach of contract in connection with the Guaranteed Deposits. Tanaka claims that plaintiffs have not sufficiently alleged a contract with him because the amended complaint does not set forth the terms, date or breach of the alleged contract.

To state a valid cause of action for breach of contract, a plaintiff must allege the terms and existence of a contract between the parties, performance by plaintiff, breach by defendant and damages incurred by plaintiff. *See, e.g. Noise in the Attic Productions v London Records*, 10 AD3d 303, 307 (1st Dept. 2004); *see also Kraft v Sheridan*, 134 AD2d 217 (1st Dept. 1987); *Pernet v Peabody Engineering Corp.*, 20 AD2d 781, 781-782 (1st Dept. 1964). The complaint alleges all the elements of a breach of contract action as against Tanaka individually.

The parties entered into a Subscription Agreement and, through a series of correspondence, defendants offered and the Mayers agreed to re-new their Fixed Rate Deposit at a rate of 11% per annum, payable on a monthly basis, for a fixed period of three years. The investment would mature on December 31, 2003. The Mayers could redeem their entire investment instead of renew. Vilar represented by letter that the "Guarantee for the Fixed rate Deposit Account includes myself, Gary [Tanaka] and the various Amerindo companies...." Exh. F. The Mayers renewed their more than $11 Million investment. Defendants, thereafter, cut the interest rate on the fixed deposit contrary to the agreement and refused the Mayers' request to redeem their investment. To date, defendants have not returned the Mayers' investment and have not paid the additional promised rate of interest. These allegations establish the existence of an individually and jointly guaranteed contract to pay the fixed rate of interest and to return the

Mayers' investment, as well as the breach.

Even if these allegations were not sufficient, plaintiffs have submitted an affirmation of counsel attaching a transcript from the criminal trial of the opening statement of Tanaka's counsel. In that statement counsel asserts that his client, Gary Tanaka, does not deny he guaranteed the Mayers' investment, that the investment was made, and that he owes them money. Exh. G. These were judicial admissions. Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary. *See Prince, Richardson on Evidence § 8-215* (Farrell 11th ed.). Commonly encountered formal judicial admissions include facts formally admitted in open court. *Id.*; *see also Echavarria v Cromwell Assocs.*, 232 AD2d 347 (1st Dept.1996) (court properly directed verdict based on counsel's admissions of negligence during opening statement).

Moreover, Tanaka is collaterally estopped by his conviction from denying his debt to the plaintiffs, as well as the promises he made (or were made on his behalf) to plaintiffs. *See, e.g., S. T. Grand, Inc. v City of New York,* 32 NY2d 300, 304-305 (1973) (criminal conviction for bribery conclusively establishes illegality of contract). Here, Tanaka was convicted of conspiracy and securities fraud by, among other acts, inducing investors (including plaintiffs) to invest substantial sums of money by making promises and guarantees of a fixed rate of interest, return of the invested funds on demand, and payment of Amerindo's debt.

Nor does plaintiffs' claim violate the Statute of Frauds. Under General Obligations Law 5-701, a contract that cannot be completed within one year must be "in writing, and subscribed by the party to be charged therewith, or by his lawful agent." This requirement "may be satisfied by separate, connected writings, not all of which must be signed ...." *Strain v Strain,* 228 AD2d

491 (2d dept. 1996) (sufficiency of writings question of fact precluding summary judgment). Here, there are multiple writings establishing the parties' agreement. Tanaka signed at least one (dated August 18, 2003), and others were signed by his apparent agents, his wife and Vilar.

Tanaka further claims that the breach of contract claim against him is untimely. The statute of limitations is six years from the date of breach. CPLR 213. CPLR 304 states in relevant part that "[an] action is commenced and jurisdiction acquired by service of a summons." The summons and amended complaint were first served on Tanaka on November 26, 2008. The claim is timely. As alleged in the amended complaint, through a series of letters beginning on or about January 28, 2003, Amerindo, Vilar and Tanaka breached the Guaranteed Deposit obligation by unilaterally reducing the fixed interest payment, then refusing to return the Mayers' investment pursuant to their repeated demands. The amended complaint was served on Tanaka well within the six year statute of limitations.

B. *Conversion*

Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 (1st Dept. 1982). Although the court finds that plaintiffs have adequately pled the elements of a conversion claim, the claim is dismissed as it is duplicative of the breach of contract claim. *See, e.g., Retty Fin., Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341 (1st Dept. 2002) (conversion claim dismissed as duplicative of breach of contract claim). Plaintiffs base both claims on defendants' refusal and failure to return their investment pursuant to their repeated demands. The court therefore need not reach the statute of limitations issue as to the conversion claim.

C. *General Business Law 349*

A plaintiff under GBL 349 (consumer fraud statute) must prove three elements: (1) that the challenged act or practice was consumer-oriented; (2) that it was misleading in a material way; and (3) that the plaintiff suffered injury as a result of the deceptive act. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 24-25 (1995) (bank's cap of principal on which interest earned in savings accounts allegedly deceptive consumer practice under statute). The alleged deceptive investment scheme comes within the ambit of GBL 349. *See Breakwaters Townhomes Ass'n v Breakwaters of Buffalo,* 207 AD2d 963 (4th Dept. 1994) (securities transactions); *Board of Managers of Bayberry Greens Condominium v Bayberry Greens Assoc.*, 174 AD2d 595 (2d Dept. 1991) (condominium transactions).

Tanaka claims that a GBL 349 claim is not viable because the alleged deceptive investment scheme was not consumer oriented and it was directed at the Mayers in Puerto Rico, not New York. As the Court of Appeals stated in *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 324-325 (2002), to qualify as a prohibited act under the statute, "the transaction in which the consumer is deceived must occur in New York." The transaction must also be directed at the public at large and can not be a private, "single-shot" transaction. The amended complaint, as read with the Indictment and other documents attached to plaintiffs' counsel's affirmation, and construed liberally, shows that the investment scheme allegedly perpetrated by defendants deceived consumers in New York, including the Mayers, and was not a "single-shot" private transaction.

The amended complaint alleges that Amerindo, although licensed to do business in New York, has its principal place of business in Panama. Further, the Mayers resided in Puerto Rico

until they moved to New York in 2004 and the original investment, as well as the renewal of that investment, occurred before 2004. Letters containing the alleged deceptive investment promises originated from both Amerindo's New York and Panamanian addresses and, according to the Indictment, one of these letters (dated August 18, 2003) was sent to "victim 3" (Lisa Mayer) in Scarsdale, New York. That letter is in fact attached to counsel's affirmation and indicates on the front that it was faxed to the Mayers at a 914 area code, which the court notes is in Westchester County, New York. The Indictment also identifies other victims in New York and further details the scheme, specifying that Guaranteed Deposits were deposited and held fraudulently in Amerindo's brokerage accounts, including "an account held in the name of a Panamanian corporation." Exh. G. This account and others were in New York. The court finds, as a matter of law, that consumers were deceived in New York.

Tanaka also argues that the GBL 349 claim against him is untimely. The limitation period is three years. CPLR 214(2). It accrues when plaintiff first suffers injury as a result of the deceptive practice. *Gaidon v. Guardian Life Inso. Co. of America,* 96 N.Y.2d 201, 209-210 (2001). This claim accrued no earlier than January 28, 2003 when Amerindo reneged on the terms of the Guaranteed Deposit by unilaterally lowering the interest rate it had agreed to pay. A claim for violation of GBL 349 was asserted against Vilar and Amerindo in the original counterclaim filed on November 10, 2004. That same claim included in the amended complaint against all named defendants is timely as to Tanaka because it relates back to the original claim. As the Court of Appeals explained in *Buran v Coupal,* 87 NY2d 173, 177, 180 (1995),

> [W]hat is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes

> where the two defendants are 'united in interest.'... [T]he primary consideration in such cases [is] whether the *defendant* could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all.

(Emphasis in original.) The *Buran* court observed that the "linchpin" of the relation back doctrine is whether the defendant had actual notice of the claim within the limitations period.

An individual defendant is united in interest with a corporation he owns and/or operates. *Euroway Contraccting Corp. v Mastermind Estate Dev. Corp.*, 59 AD3d 157 (1st Dept. 2009). Among the allegations in the Indictment are that, Tanaka "was one of the original founders of Amerindo, U.S., and was ... a shareholder, officer and director of Amerindo U.S., and one of the two shareholders, directors, and officers of Amerindo Panama and Amerindo U.K. ...." The amended complaint also alleges that Tanaka is a principal of Amerindo. In addition, Tanaka and Vilar are co-guarantors of Amerindo's investment liability, which under the law equates to unity of interest. *See Todd Equipment Leasing Co., Inc. v Logistic Distro Date, Inc.*, 90 AD2d 793 (2d Dept. 1982) (finding claim of breach related back to original claim against co-guarantor). The court, accepting the allegations of the amended complaint and the supporting Indictment as true, finds that Tanaka is united in interest with Vilar, that he had actual notice of all the claims in the civil suit since its inception, and that but for a mistake the civil claim would have been brought against him within the limitations period..

Finally, plaintiffs only need to show that "plain error" occurred by failing to add Tanaka until after the statute of limitations had run. *See Buran, supra,* 87 NY2d at 182. The evidence submitted to the court shows that plaintiffs failed to add Tanaka because (1) the original counterclaim was asserted against the only plaintiffs at the time, Vilar and Amerindo, and (2)

service of the amended complaint was delayed because the civil matter was stayed pending completion of the criminal case. The GBL 349 claim against Tanaka may therefore proceed.

D. *Fraud*

To maintain an action based on fraudulent representation, "it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the Plaintiff of a benefit and that the Plaintiff was thereby deceived and damaged....The essential constituents of the action are fixed as representation of a material existing fact, falsity, *scienter*, deception and injury." *Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 407 (1958). *See Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413 (1996) (discussing pleading standard for fraud). Under CPLR 3016 a claim for fraud must be pled in detail. The court finds the allegations sufficiently detailed to meet the pleading requirement for civil fraud.

The amended complaint includes allegations of specific material representations and promises (by Tanaka or on his behalf) to plaintiffs that were false, including that the Guaranteed Deposit was personally guaranteed, that it was invested in a manner to earn a fixed rate or return, and that plaintiffs could redeem their investment. The allegations further establish that Tanaka knowingly and intentionally made these false representations and promises to deceive plaintiffs, that plaintiffs relied on them and were injured in an amount not less than $11,224,936.46. On its face the amended complaint is sufficient. The added detail of the appended Indictment fleshes out the allegations further, and the convictions remove any doubt that the civil fraud claim is not only well pled, but well founded. It is duplicitous of Tanaka to claim lack of notice regarding the fraud claim when he has been convicted of conspiracy to defraud and securities fraud, which conviction serves to estop him from denying his liability. *See S. T. Grand, Inc. v City of New*

*York, supra,* 32 NY2d at 304-305.

The fraud claim also is timely. The statute of limitations for fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or with reasonable diligence could have discovered it." CPLR 213(8). Injury is an element of fraud, so the cause of action did not accrue until plaintiffs suffered actual injury. *See Insurance Co. of the State of Pa. v HSBC Bank USA*, 37 AD3d 251 (1st Dept. 2007) (finding cause of action accrues when all facts necessary to sustain claim have occurred), citing, *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Surety Co.*, 89 NY2d 214, 221 (1996). The civil fraud claim accrued when plaintiffs first suffered injury from the fraud. This occurred no earlier than January 28, 2003 when Amerindo reneged on the terms of the Guaranteed Deposit by unilaterally lowering the interest rate it had agreed to pay. So, the limitations period could not have run until six years after that date or two years after plaintiffs could have reasonably discovered the fraud. There are insufficient facts for the court to find that plaintiffs could have reasonably discovered the *fraud*, as opposed to the contract breach, more than two years before the amended complaint was served on Tanaka. Accordingly, it is hereby

ORDERED that Gary Tanaka's motion to dismiss the amended complaint is granted in part as to the Second Cause of Action for Conversion and denied as to the remaining claims.

ENTER:

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Date: July 27, 2009
New York, N. Y.

J.S.C.