

**Unitel Telecard Distrib. Corp. v Nunez**

2010 NY Slip Op 33785(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 112627/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

UNITEL TELECARD DISTRIBUTION CORP.,  
HECTOR ROJAS and NILESH SANGHAVI,  
Plaintiff,

INDEX NO. 112627/09

MOTION DATE June 2, 2010

MOTION SEQ. NO. 004

-against-

HENRY NUNEZ,  
  
Defendant.

MOTION CAL. NO. \_\_\_\_\_

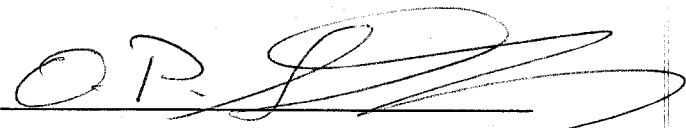
The following papers, numbered 1 to 12 were read on this motion to dismiss an affirmative defense and counterclaim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	<u>5-9</u>
Replying Affidavits _____	<u>10-12</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, plaintiffs' motion for an order pursuant to CPLR § 3211 (a) (7) and (b) dismissing defendant's first affirmative defense and counterclaim alleged in the amended answer and defendants' cross motion to disqualify plaintiffs' counsel from representation of plaintiffs are decided in accordance with the accompanying decision and order.

Dated: 10/8/10

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
UNITEL TELECARD DISTRIBUTION CORP.,  
HECTOR ROJAS and NILFESH SANGHAVI,

DECISION AND  
ORDER

Plaintiffs,

Index No. 112627/2009

-against-

HENRY NUNEZ,

Defendant.

-----X  
O. PETER SHERWOOD, J.:

This is an action arising from defendant Henry Nunez’s (“Nunez” or “defendant”) alleged embezzlement of funds from plaintiff corporation, Unitel Telecard Distribution Corp. (“Unitel”), by which Unitel and the individual plaintiffs, Hector Rojas (“Rojas”) and Nilesh Sanghavi (“Sanghavi”) (collectively “plaintiffs”), seek to recover damages, *inter alia*, for breach of fiduciary duty and a judgment declaring that not later than November 2007 Nunez relinquished all rights, authority and interest in Unitel. Before the court is plaintiffs’ motion for an order pursuant to CPLR § 3211 (a) (7) and (b) dismissing defendant’s counterclaim and first affirmative defense complaint for failure to state a cause of action and on the ground that the defense has no merit.

Defendant opposes the motion and cross moves for an order disqualifying plaintiffs’ counsel Hodgson Russ LLP and the individual attorney, Joseph Goldberg, Esq., a member of Hodgson Russ LLP.

**Background**

The facts as alleged in the complaint are as follows: Unitel is a closely held New York corporation formed on or about May 17, 2002 for the purpose of engaging in the business of, *inter alia*, marketing and distributing prepaid telephone calling cards (Affidavit of Joseph P. Goldberg in Support of Motion, sworn to March 16, 2010 [Goldberg Aff., Ex. “A”, Complaint, ¶¶ 5, 10). Rojas Sanghavi and Nunez were shareholders and employees of Unitel who jointly operated Unitel and

who agreed to make equal capital contributions and to share equally in Unitel's success through distributions or other financial benefits and also to share in its liabilities.<sup>1</sup>

In or about September 2007, Unitel's liabilities exceeded its assets by approximately \$2 million dollars requiring a significant cash infusion to pay outstanding obligations owed to creditors and to continue operations (*id.* ¶ 14; Affidavit of Hector Rojas in Support of Motion sworn to March 16, 2010 [Rojas Aff.] ¶ 4). After auditing Unitel's books, Rojas informed Sanghavi and Nunez of the dire financial situation and asked for additional capital (Complaint ¶ 15; Rojas Aff. ¶ 5). Both Rojas and Sanghavi made capital contributions of not less than \$300,000 and deferred their regular salaries (Complaint ¶ 15). However, Nunez refused to contribute any additional money or defer his salary (*id.* ¶ 16).

At about the same time, Rojas ascertained that Nunez had misappropriated approximately \$487,000 from Unitel's accounts during the years 2006 and 2007 (Complaint ¶ 17). Such funds were not part of Nunez's salary nor did they constitute a dividend, bonus or any other legitimate payment (*id.*; Rojas Aff. ¶ 6). Rojas demanded that Nunez return the \$487,000 which he allegedly embezzled, but Nunez refused (Complaint ¶¶ 20-21; Rojas Aff. ¶¶ 7-8). In addition, Nunez used corporate assets to finance the purchase of a Mercedes Benz automobile and because Nunez failed to pay monies owed in connection with this purchase, Unitel has been forced to defend a lawsuit to recover the monies owed in excess of \$25,000 (Complaint ¶¶ 23-24). The complaint further alleges that during his tenure with Unitel, Nunez diverted corporate opportunities away from Unitel and took approximately \$600,000 worth of active telephone cards which he then sold keeping the proceeds for himself (Complaint ¶¶ 31-33).

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<sup>1</sup>The complaint alleges that Nunez was an officer of Unitel (Complaint ¶ 37), but does not indicate the respective interests of Rojas, Sanghavi and Nunez in Unitel. However, both defendant's counsel, Allen M. Schwartz, Esq., in his Affirmation in Opposition to plaintiffs' motion, and Nunez in his Affidavit in Opposition to Motion state that Nunez was a holder of 33 1/3% of the shares in Unitel and was also an officer and director of Unitel. In reply, plaintiffs do not dispute such allegations, but simply aver that Nunez voluntarily left Unitel and is no longer a shareholder, employee, officer, or director of Unitel (Plaintiffs' Reply Memorandum of Law, p. 5).

In November 2007, Nunez informed Rojas and Sanghavi that he was immediately leaving Unitel, no longer wanted to be involved with Unitel in any manner, and directed Rojas and Sanghavi to take all necessary steps to remove him from Unitel including his surrender of all rights and interest in Unitel (Complaint ¶¶ 26-27; Rojas Aff. ¶¶ 10-11). In or about late November 2007, Nunez resigned his employment with Unitel and surrendered all rights, interests and benefits he may have acquired during his tenure at Unitel (Rojas Aff. ¶ 12; Goldberg Aff. ¶ 5, Ex. "C" Amended Answer and Counterclaim).

On or about September 3, 2009, plaintiffs commenced the instant action to recover damages upon theories of breach of fiduciary duty, unjust enrichment and conversion and for a judgment declaring that Nunez had, not later than November 2007, relinquished all rights, authority, and interests in Unitel.

In his answer, as amended, Nunez generally denies the material allegations of the complaint except he admits that he was employed by Unitel and was expected to contribute to its operations and further that he had a fiduciary relationship with Unitel, Rojas and Sanghavi with concomitant duties to deal fairly, in good faith and with loyalty to Unitel and the individual plaintiffs (Amended Answer ¶¶ 1-4). Nunez also interposed as a first affirmative defense accord and satisfaction between the parties claiming that pursuant to a written "Points of Contract" agreement, his obligations to plaintiffs, if any, were to be satisfied from his share of a "FET" tax refund (*id.* ¶¶ 5-8). Nunez counterclaimed for the equitable relief of an accounting to determine Unitel's financial condition for the years 2005, 2006 and 2007 (*id.* ¶¶ 10-13). In his ad damnum clause, Nunez acknowledges that he voluntarily left his employment with Unitel in November 2007 (*id.*).

### *Discussion*

#### **1. Plaintiffs' Motion to Dismiss**

It is well settled that on a motion to dismiss pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead (*see Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). In making such a determination, the pleading is to be afforded a liberal construction and the court

must accept as true all facts alleged in the pleading and any submissions made in opposition to the motion to dismiss (*see 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The pleading is also to be accorded the benefit of every favorable inference (*see, Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The motion to dismiss must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232<sup>nd</sup> Owners Corp.*, 98 NY2d at 152, quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275).

#### **A. Counterclaim for an Accounting**

In his counterclaim for an equitable accounting, Nunez alleges that in the tax year 2006 Unitel filed a request for a "FET" 1120 tax refund of \$13,754,416.00 and that the parties entered into an agreement, memorialized in a "Points of Contract" agreement prepared by plaintiffs, which provided that "after payment of all liabilities except for payment of tax liabilities, professional fees and personal monies owed to the parties, any monies remaining would be divided 25% to defendant and 75% to Rojas and Sanghevi" (Amended Answer ¶¶ 5-7, 10-11).<sup>2</sup> Nunez alleges further that he does not have access to information necessary to determine the sum to which he is entitled. On that basis, he counterclaims for the equitable relief of an accounting for the years 2005, 2006 and 2007 to determine Unitel's financial condition and to determine the transfer of corporate assets without remitting any payment to defendant of his share of the "FET" tax refund.

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1<sup>st</sup> Dept 1997], quoting *Palazzo v Palazzo*, 121 AD2d 261, 265 [1<sup>st</sup> Dept 1986]). The party seeking an accounting must also allege that no adequate legal remedy exists (*see, Kastle v Steibel*, 120 AD2d 868, 869 [3d Dept 1986]; *Feng Luo v Yang*, 25 Misc3d 1208 [A] \*3 [Sup. Ct. Queens Co. 2009]).

Plaintiffs contend that defendant's counterclaim must be dismissed because defendant fails

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<sup>2</sup>The so-called "Points of Contract" agreement, which is annexed to the Goldberg Affidavit as Exhibit "D", is undated and not signed by any of the parties to this lawsuit.

to allege the existence of a fiduciary relationship, that the agreement upon which defendant predicates his right to an accounting is nothing more than an unsigned draft memorandum which is unenforceable, and defendant has failed to allege that he demanded an accounting and that plaintiffs refused such demand.

Defendant's opposition to the motion does not address plaintiffs' arguments with respect to the requisite elements of an equitable claim for an accounting. Rather, his arguments are addressed to his right to inspect Unitel's books and records based upon his status as a shareholder, officer and director of Unitel. As plaintiffs correctly aver, such common-law right of a shareholder to inspect a corporation's books and records when sought in good faith and for a legitimate purpose is distinct from an equitable right to an accounting available to one in a fiduciary relationship with a corporation. Notwithstanding the infirmities of defendant's opposition to the branch of plaintiffs' motion as seeks dismissal of his counterclaim, the court will determine whether such counterclaim is properly pleaded. Initially, the court notes that plaintiffs in their complaint allege the existence of a fiduciary relationship between plaintiffs and Nunez (Complaint ¶¶ 43-44). Even if plaintiffs did not make such admission, as a general principle a corporate officer has a fiduciary duty to the corporation (*see, Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422 [1<sup>st</sup> Dept 2010]; *JP Morgan Chsae & Co. v Travelers Indem. Co.*, 73 AD3d 9 [1<sup>st</sup> Dept 2010]). The fact that Nunez resigned from the corporation does not preclude a finding of a fiduciary duty with respect to his tenure at Unitel particularly since he is seeking an accounting only with respect to the years prior to his resignation. Moreover, given the inadequacy of the unsigned and undated memorandum to establish the existence of an enforceable agreement between the parties with respect to the distribution of the tax proceeds, defendant does not appear to have an adequate remedy at law (*see, Kastle*, 120 AD2d at 870).

Additionally, Nunez asserts in his affidavit in opposition that when he elected to retire from Unitel he agreed to accept only 25% of the tax refund proceeds rather than his full one-third share, taking into account the corporate debts and in lieu of obtaining an accounting and payment for his corporate shares (Nunez Aff. ¶ 9). He trusted the corporate attorney, Joseph Goldberg, to ensure that

he received the agreed upon share of the tax refund and believes that plaintiffs have wrongfully withheld such monies.

Assuming the facts asserted by defendant are true, defendant has adequately stated a counterclaim for an equitable accounting based upon a reasonable view of the facts and a liberal view of the pleadings.

### **B. Affirmative Defense of Accord and Satisfaction**

Nunez alleges that pursuant to the alleged "Points of the Contract" agreement his obligations to Unitel and the individual plaintiffs were to be satisfied from his share of the "FET" tax recovery and he contends that such alleged agreement constitutes an accord and satisfaction. It well settled that the party asserting an affirmative defense has the burden of proof with respect thereto (*see, Latha Restaurant Corp. v Tower Ins. Co.*, 285 AD2d 437 [1<sup>st</sup> Dept 2001]) and that on a motion to strike the defense pursuant to CPLR § 3211 (b), "the defendant is entitled to all reasonable inferences to be drawn from the submitted proof" (*Capital Telephone Co. v Motorola Communications & Electronics, Inc.*, 208 AD2d 1150 [3d Dept 1994]). In addition, CPLR § 3013 provides, in relevant part, that "[s]tatements in a pleading shall be sufficiently particular to give the court and p[arties] notice of the transactions . . . . Intended to be proved and the material elements of each cause of action or defense."

In order to make out a defense of accord and satisfaction, defendant must demonstrate: (1) a dispute as to the amount due, and (2) knowing acceptance by the creditor of a lesser amount (*see Marine Midland Bank, N.A. v Scallen*, 161 AD2d 103 [1<sup>st</sup> Dept 1990]). Defendant is also required to establish that "a stipulated performance will be accepted in the future, in lieu of an existing claim (*see, Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [ ]; *Rose Inn of Ithaca, Inc. v Great Amer. Ins. Co.*, 73 AD3d 737 [3d Dept 2010]). "Inasmuch as an accord and satisfaction constitutes a contract, it must be shown that the parties set forth the essential elements thereof and had a meeting of the minds to resolve the disputed claim" (*Rose Inn of Ithaca, Inc.*, 73 AD3d at 737).

Here, the documentary evidence consisting of the unsigned memorandum titled "Points of the Contract" upon which defendant predicates this affirmative defense falls short of demonstrating

either a dispute as to monies owed or an agreement between the parties that a lesser amount would be accepted by plaintiffs. Since such writing, even if it could be said to establish the elements of the defense of accord and satisfaction, constitutes an executory accord, at best, since it is not signed by either defendant or a corporate representative (*see*, General Obligations Law § 15-501 [2]). Accordingly, defendant's defense of accord and satisfaction must be dismissed.

## **2. Defendant's Cross Motion for Disqualification**

At the outset, the court acknowledges the exchange of correspondence by the parties with the court concerning the untimeliness of defendant's opposition to the motion and his cross motion as such papers were not served within the time required under CPLR §§ 2214 (b) and 2215. Such failure to comply with CPLR §§ 2214 or 2215 may be excused in the absence of prejudice (*see*, *Andejo Corp. v South St. Seaport L.P.*, 40 AD3d 407, 408 [1<sup>st</sup> Dept 2007]; *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340 [1<sup>st</sup> Dept 2004]).

A review of the papers indicates that the initial return date of plaintiffs' motion was April 22, 2010. The parties entered into a stipulation adjourning the motion from April 22 to June 2, 2010. The cross motion papers were e-mailed to plaintiffs' counsel on May 20, 2010, but such papers were not properly filed with the court. At defense counsel's request, the parties executed a further stipulation adjourning the motion from June 2 to June 16, 2010, which stipulation was "so-ordered". However, defense counsel failed to file such stipulation with the motion submission part and on June 2, 2010, plaintiffs' motion was marked submitted without opposition. Thereafter, defendant, unaware that the motion had already been accepted on submission, sought a further adjournment from June 16 to July 8, 2010. Defendant requests that the court accept the late filing of his opposition and cross motion papers *nunc pro tunc*. Plaintiffs oppose defendant's application contending that the current posture of the motion practice is due to defense counsel's failure to properly file the stipulation of adjournment, rather than any misconduct of the part of plaintiffs' counsel, and, therefore, defendant should be required to properly file his cross motion rather than having the court deem such cross motion filed *nunc pro tunc*.

The court will excuse defendant's failure to comply with CPLR §§ 2214 and 2215 as there is no evidence in the record that plaintiffs have been prejudiced and they also have had a sufficient opportunity to respond to the arguments raised in defendant's opposition and cross motion papers (*see, Andejo Corp.*, 40 AD3d at 408; *Walker*, 11 AD3d at 340).

The basis of defendant's cross motion to disqualify Joseph Goldberg and the firm of Hodgson Russ LLP, of which Mr. Goldberg is a member, is that from the inception of Unitel in 2002, Mr. Goldberg was paid for legal services rendered to the corporation and for shareholders' services, including services for Nunez; Nunez trusted and relied upon Mr. Goldberg with respect to protecting his interests and status in Unitel as an employee, shareholder and officer; Nunez met with Mr. Goldberg together with the individual plaintiffs Rojas and Sanghavi with respect to the terms of his severance agreement with Unitel; and Nunez met with Mr. Goldberg to discuss the final preparation of the Severance Agreement and to complete the documents necessary for his retirement from Unitel and, at that time, left with Goldberg the "agreement" received from Rojas regarding the "FET" tax refund.

In opposition, plaintiffs submit an affirmation of Joseph Goldberg, Esq. in which he acknowledges that both he and his law firm have represented Unitel since 2002, primarily with respect to the prosecution or defense of litigation. He does not recall ever communicating with Mr. Nunez without either Rojas or Sanghavi being present. Nor did he or his firm represent Nunez individually except on one occasion when he represented Unitel, as well as Rojas, Nunez and Viacom Communication Group in an action commenced on or about December 8, 2006, in the United States District Court for the Southern District of New York against Espana Networks, Inc. and others (the "Espana Action") concerning breach of contract, trademark infringement and theft of Unitel's intellectual property. Mr. Goldberg asserts that in the Espana Action all of the plaintiffs therein, including Nunez, had identical interests, all fees for the litigation were paid by Unitel, and he did not obtain any confidential information from Nunez (Affirmation of Joseph Goldberg in Opposition to Cross Motion ¶¶ 3-5). Mr. Goldberg asserts further that the subject matter of the Espana Action is in no way related to the subject matter of the instant action. The Espana Action

was resolved on January 12, 2007, in a confidential settlement agreement (*id.* ¶¶ 5, 7). Thus, Hodgson Russ represented Nunez three and one-half years ago for a total of five weeks on an unrelated matter in the course of which Hodgson Russ did not obtain any confidential information from Nunez. Mr. Goldberg also denies meeting with Nunez privately on any occasion, much less several times. He also denies preparing Unitel's shareholders' agreement. Any particulars he obtained concerning the facts of this case, namely Nunez's alleged embezzlement of corporate funds, were from Rojas and Sanghavi and not from Nunez. Indeed, he denies ever discussing with Nunez the particulars of this action (*id.* ¶¶ 7-12).

With respect to Nunez's counterclaim, Mr. Goldberg states that he met with Nunez together with Rojas and Sanghevi for a "settlement meeting" which lasted less than an hour and, at that time, advised Rojas, Sanghevi and Nunez several times that he was Unitel's counsel and did not represent any of them individually. He did not advise any of the individual plaintiffs or defendant during the meeting. It was only after Rojas, Sanghevi and Nunez failed to work out a settlement that the instant action was commenced, but Mr. Goldberg contends that the complaint was not dependent upon any confidential information obtained from Nunez. While Mr. Goldberg acknowledges that "it is conceivable that [he] may have to appear as a witness" concerning the meeting he had with Nunez, Rojas and Sanghavi, he understands that at trial none of the individual parties to this action would be entitled to introduce any of the matters discussed at that meeting and he is confident that any testimony he could provide would not be adverse to Unitel, Rojas or Sanghevi. In an exercise of caution, Mr. Goldberg states that while he will remain involved in other aspects of this case, he will agree not to act as trial counsel in this matter and Hodgson Russ LLP will assign another attorney to serve this role (*id.* ¶¶ 13-16).

Plaintiffs contend that Nunez's affidavit submitted in support of the cross motion should be rejected by the court because it was signed in the Dominican Republic and is unaccompanied by a certificate authenticating the affidavit as required by CPLR § 2309. This is not a fatal defect since such affidavit may be given *nunc pro tunc* effect once properly acknowledged (*see, Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1<sup>st</sup> Dept 2007]; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833,

834 [3d Dept 1989]; *Eastern Star Acupuncture, P.C. v Clarendon Nat. Ins.*, 26 Misc3d 131 [A] [App Term, 1<sup>st</sup> Dept 2010]). Therefore, the court will accept the affidavit notwithstanding the defect particularly since plaintiffs have not disputed the authority of the notary or demonstrated any prejudice resulting from the defect (*see, Sparaco v Sparaco*, 309 AD2d 1029 [3d Dept 2003], *lv denied* 2 NY3d 702 [2004]; *cf. Matter of Family Offense Proceeding*, 44 AD3d 332 [1<sup>st</sup> Dept 2007]; *Moccia*, 40 AD3d at 504). Alternatively, plaintiffs contend that, at best, Nunez's statements in his affidavit describe Mr. Goldberg as acting as the attorney for Unitel rather than for any individual shareholders.

Disqualification motions are carefully scrutinized because they seek to deprive a party of a right to representation by the attorney of its choice and thereby limit a valued right of a party (*see, S & s Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). However, an attorney has traditionally been prohibited from representing a party in a lawsuit where an opposing party is the attorney's former client as such attorney owes a continuing duty to a former client not to reveal confidential information learned in the course of a professional relationship (*see, Greene v Greene*, 47 NY2d 447 [1979]). To obtain disqualification, such former client need only show a reasonable probability that confidential information may be disclosed in the course of the litigation (*id.*).

The party seeking the disqualification of opposing counsel has the burden of showing: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and the former client are materially adverse" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]). Disqualification of a party's counsel may be required when it is likely that such attorney may be called as a witness, but only when it is likely that such testimony is necessary to the party's case (*see S&S Hotel Ventures*, 69 NY2d at 445-446). The burden of demonstrating the necessity of such testimony is on the party seeking the disqualification (*id.*). The court should consider such factors as the significance of the matter, the availability of other evidence and the weight of the testimony (*see Brooks v Lewin*, 48 AD3d 289 [1<sup>st</sup> Dept 2008]).

Defendant has failed to meet his burden of demonstrating the requisite factors for disqualification. While there was an association between Nunez and the Hodgson Russ law firm through Mr. Goldberg during Nunez's tenure at Unitel, Nunez's statements in his affidavit fail to demonstrate that he had a personal attorney-client relationship with the Hodgson Russ law firm or Mr. Goldberg. In any event, plaintiffs have successfully rebutted any presumption that Goldberg or Hodgson Russ LLP possess confidential information or acquired any material confidences made by Nunez and must necessarily be disqualified. Moreover, there is no nexus between the representation of Unitel and Nunez by Hodgson Russ in the Espana Action and its representation of Unitel, Rojas and Sanghevi in this matter and any such relationship between Nunez and Hodgson Russ in the Espana Action is too attenuated from the instant action to present a potential conflict.

***Conclusion***

Based upon the foregoing discussion, it is hereby

**ORDERED**, that so much of plaintiffs' motion as seeks dismissal of defendant's first affirmative defense in the amended answer alleging accord and satisfaction is granted and the first affirmative defense is dismissed. In all other respects, the motion is denied; and it is further

**ORDERED**, that defendant's cross motion to disqualify plaintiffs' counsel is denied; and it is further

**ORDERED**, that the attorneys for the parties shall appear for a preliminary conference in Part 61, 60 Centre Street, Room 341, on November 17, 2010, at 9:30 a.m.

This constitutes the decision and order of the Court.

DATED: 10/8/10

ENTER,



**O. PETER SHERWOOD**

**J.S.C.**