

**Ross Organic Specialty Sales, Inc. v Evonik
Goldschmidt Corp.**

2012 NY Slip Op 33496(U)

May 31, 2012

Sup Ct, New York County

Docket Number: 651685/11

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Index Number : 651685/2011
ROSS ORGANIC SPECIALTY SALES, INC.
vs.
EVONIK GOLDSCHMIDT CORP.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 5/31/12

Signature of Jeffrey K. Oing, J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----x
ROSS ORGANIC SPECIALTY SALES, INC.,

Plaintiff,

-against-

EVONIK GOLDSCHMIDT CORPORATION,
EVONIK DEGUSSA CORPORATION, and
JOHN DOES 1-10,

Defendants.
-----x

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DECISION AND ORDER

JEFFREY K. OING, J. :

Background

In 1987, William C. Ross ("Ross") founded plaintiff, Ross Organic Speciality Sales ("Ross Organic"). Ross continues to run the company with the help of his two daughters. In October 2006, Ross Organic entered into a Personal Care Distributor Agreement (the "distribution agreement") with Goldschmidt Chemical Corporation ("Goldschmidt Chemical"). Goldschmidt Chemical is defendant Evonik Goldschmidt Corporation's ("Evonik") predecessor-in-interest.

The distribution agreement granted Ross Organic the exclusive right to sell and distribute Evonik's products to customers in certain U.S. states. Section 3.1 of the distribution agreement, entitled "Term; Termination", provides as follows:

Except as otherwise provided herein, this Agreement shall be in effect for an initial term of three (3)

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years ("Initial Term") and shall automatically renew for successive renewal terms of one (1) year each (the Initial Term together with any and all renewal terms may collectively be referred to as the "Term"); provided; however that either party shall have the right to terminate this Agreement, effective on the last day of any Term, by one party giving at least ninety (90) days written notice of termination to the other party in accordance with the provisions of Section 16.5.

Section 3.4 provides:

Should termination be effected by Goldschmidt in accordance with Section 3.1 or 3.2, Goldschmidt will continue to pay commissions on sales of Product in the Territory to Company as set forth in Schedule IX attached hereto.

(Moving Papers, Ex. B).

On or about July 23, 2009, Evonik met with several Ross Organic employees, including Ross. Ross Organic alleges that Evonik's representative brought a letter, dated July 22, 2009, which was left with him for his counter-signature (Moving Papers, Ex. C). The letter was an amendment to the distribution agreement (the "amendment" or the "amended section 3.1") and provided as follows:

Evonik and [sic] have agreed to renew the Agreement following the end of the Initial Term for an additional six (6) months (through April 30, 2010). Accordingly, the parties agree to amend the Agreement as follows:

Delete Section 3.1 in its entirety and replace such Section with the following new Section 3.1:

3.1 Except as otherwise provided herein, this Agreement shall be in effect for an initial term of three (3) years ("Initial Term"), and shall

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automatically renew for one six-month term (the Initial Term together with any and all renewal terms may collectively be referred to as the "Term") at which time this Agreement shall terminate unless further extended upon the written Agreement of both parties.

In all other respects, the terms and conditions of the Agreement shall be deemed to have remained in effect.

(Moving Papers, Ex. C).

Ross Organic proffers an e-mail that Evonik sent to it later that day, which provides in relevant part:

Please review the letter signed by Lauren and left with Bill, which indicated that the contract will be extended with a minor modification for 6 months from the expiration date of October 26, 2009. Sign both copies and send one copy back to us for our records. Please confirm by email by Friday, July 24, if you are willing to agree to the letter.

(Moving Papers, Ex. D).

Ross Organic points out that Evonik gave it only one day to decide whether it would agree to the amendment. Ross further claims that it believed the purpose of the amendment was to give Evonik a few months to renegotiate its distributor agreement without the parties' distribution agreement renewing for a full year as provided under the original section 3.1 (Complaint, ¶ 28). As such, Ross Organic alleges that "on Friday, July 24, 2009, Ross - relying on the representations of Evonik's agents, Ms. Kjeldsen and Ms. Daraska, who had informed him that Ross Organics had done a 'great job' and that the Amendment 'indicated that the contract will be extended with a minor modification' -

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signed the amendment on behalf of Ross Organics" (Complaint, ¶ 29).

Later that year, by e-mail correspondence, dated December 3, 2009, Evonik informed Ross of the following:

Based on our discussion last week, I would like to formalize our intent so we can determine [the] best use of time for our next discussions. We have stated to you our concerns regarding the development of the Ross/Evonik business since 2006 until now as well as the differences in strategy/culture alignment between the two companies. In addition, we have shared with you the intent of the Evonik Distribution Excellence North America (DENA) program to streamline our efforts with few strategic partners to leverage our reach in the market. With these factors in view, we have made the decision to terminate the distribution relationship with Ross as indicated in the letter below.

(Moving Papers, Ex. E [emphasis added]). Attached to the December 3, 2009 e-mail was a termination letter to Ross from Evonik, dated November 23, 2009, which provides:

This letter is to confirm that pursuant to Section 3.1 of the [distribution agreement] between Goldschmidt Chemical Corporation, now by change of name, Evonik Goldschmidt Corporation, and Ross Organic Specialty Sales, Inc., dated the 26th day of October 2006 and amended the 24th of July 2009 ... the [distribution agreement] shall terminate according to its terms effective April 30, 2010.

(Moving Papers, Ex. F).

Ross Organic alleges that Evonik's termination of the distribution agreement pursuant to section 3.1 triggered Evonik's obligation under section 3.4 of the distribution agreement to pay post-termination commissions to it.

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In addition to its claims for the post-termination commissions, Ross Organic asserts that in March 2010, before the April 30, 2010 termination date, Evonik unilaterally, and without notice, reduced Ross Organic's credit limit. Ross Organic claims that it had already placed orders on behalf of its customers in excess of the new, lowered credit limit, and that Evonik refused to ship the products to Ross Organic until it paid more than \$250,000 to reduce its credit line.

Ross Organic also claims that Evonik refused further purchase orders from it and that as a consequence Ross Organic was unable to deliver Evonik's products to its customers in a timely manner. As a result of Evonik's conduct, Ross Organic claims that its relationship with its customers was damaged.

Relief Sought

Defendants, Evonik and Evonik Degussa Corporation ("Evonik Degussa"), move, pursuant to CPLR 3211(a)[1] and [7], for an order dismissing Ross Organic's seven causes of action: 1) breach of contract; 2) fraudulent inducement; 3) negligent misrepresentation; 4) unjust enrichment; 5) breach of the implied duty of good faith and fair dealing; 6) tortious interference with business relationships; and 7) unfair competition.

Discussion

Evonik Degussa

Regarding Evonik Degussa, the only parties to the distribution agreement were Ross Organic and Goldschmidt Chemical, Evonik's predecessor-in-interest. Moreover, the complaint fails to set forth any allegations that Evonik Degussa was a party to the distribution agreement. Thus, in the absence of any allegations showing a nexus between the claims asserted herein and Evonik Degussa, the complaint is dismissed against defendant Evonik Degussa.

Accordingly, that branch of the motion seeking dismissal of this action against Evonik Degussa is granted, and the action is dismissed as against it. The Court turns to that branch of the motion regarding defendant Evonik.

Breach of Contract (1st cause of action)

Evonik argues that the documentary evidence conclusively disposes of Ross Organic's breach of contract claim. In that regard, Ross Organic's alleged entitlement to post-termination commissions under section 3.4 of the distribution agreement only arises in the event termination is "effected by [Evonik] Goldschmidt in accordance with Section 3.1 or 3.2" (Moving Papers, Ex. B). Evonik argues that because the termination of the distribution agreement was not "effected" by Evonik Ross

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Organic has no viable claim for post-termination commissions against it.

This argument is unavailing. Amended section 3.1 provides that the distribution agreement will terminate unless further extended upon written agreement of both parties. Evonik's amendment to section 3.1 eliminated the need for it to take any affirmative step in order to terminate the distribution agreement. By doing so, however, the amendment created an ambiguity in the distribution agreement. The amendment essentially rendered that part of section 3.4, which entitled Ross Organic to commissions if the distribution agreement is terminated pursuant to section 3.1, meaningless. Consequently, Evonik's argument that the distribution agreement conclusively disposes of Ross' breach of contract claim fails. A court cannot adopt an interpretation of a contract that renders a portion of the contract meaningless (Diamond Castle Partners IV PRC, LP v IAC/InterActive Corp., 82 AD3d 421 [1st Dept 2011]).

Accordingly, that branch of the motion to dismiss the breach of contract claim is denied.

Fraudulent Inducement (2d cause of action)

Evonik claims that the complaint fails to allege a misrepresentation that is collateral or extraneous to the distribution agreement. It argues that plaintiff's claim is based on the allegation that Evonik's employees, Lauren Kjeldsen

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and Christine Daraska, "induced Ross Organics to sign the Amendment based upon their false representations that Ross Ogranics had done a 'great job' and that the Amendment 'indicated that the contract will be extended with a minor modification'" (Complaint, ¶ 60). Evonik argues that such "representations" are simply allegations about Kjeldsen's and Daraska's state of mind and are not sufficiently collateral or extraneous to the distribution agreement to give rise to a fraud claim. It further argues that the alleged misrepresentations attributed to Kjeldsen and Daraska constitute non-actionable statements of opinion that provide no basis for a fraud claim (see Mandarin Trading Ltd v Wildenstein, 16 NY3d 173 [2011]). Evonik also argues that Ross Organic cannot allege the requisite element of detrimental reliance to set forth a claim for fraudulent inducement. Evonik asserts that Ross Organic has no one to blame but itself if one of its officers or employees did not read the one and one-half page letter amendment and compare it with the original section 3.1 contained in the distribution agreement. These arguments are compelling.

"To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment" (Merrill Lynch v Wise Metals Group, LLC, 19 AD3d 273

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[1st Dept 2005]). A claim for fraud must be distinct from a claim for breach of contract (Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 [1987]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract ... and not merely a misrepresented intent to perform" (The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 [1st Dept 2004]).

Here, Ross Organic alleges that Evonik's fraudulent misrepresentations - both oral and in writing - induced it to enter into the amendment. It contends that each of Evonik's fraudulent misrepresentations, namely, that Evonik was developing a new form distributor agreement (Complaint, ¶ 28), that Ross Organic had done a "great job", such that Ross Organic would expect to enter into a new form distributor agreement with Evonik (Moving Papers, Ex. D), and that the amendment was a "minor modification" (Moving Papers, Ex. D), were misrepresentations of present facts that were distinct from and collateral to the amendment, and were made prior to, and as an inducement for, executing the amendment. These present allegations are insufficient to plead a claim for fraudulent inducement.

The statement by Evonik employees that Ross Organic was doing a "great job" is a non-actionable statement of opinion

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(Mandarin Trading Ltd. v Wildenstein, 16 NY3d at 179). Further, the statement was in response to Ross Organic's "efforts for replacement business at various customers" (Moving Papers, Ex. D), and not a general evaluation of Ross Organic's work.

As for Ross Organic's reliance on Evonik's characterization of the amendment as "minor", it failed to allege sufficiently the requisite element of detrimental reliance on this statement. Ross Organic had the means to discover the true nature of the transaction by the exercise of ordinary due diligence (Miller v Icon Group LLC, 77 AD3d 586 [1st Dept 2010] ["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 on [the other party's] misrepresentations"]). The amended section 3.1 was plainly provided in the July 22, 2009 letter to Ross from Kjeldsen (Moving Papers, Ex. C).

While the allegation that Evonik indicated to Ross Organic that the purpose of the amendment was to give Evonik a few months to develop a new form distributor agreement may be sufficient to give rise to an actionable claim for fraudulent misrepresentation, the claim cannot be sustained in the absence of an allegation attributing the statement to an Evonik employee. In fact, in the complaint, Ross Organic alleges that "[b]ased on past practice and conversations with Evonik's representatives, it

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was [its] understanding that Evonik wanted to renegotiate the form of it[s] agreement with its distributors" and that it "believed that the Amendment was to give Evonik a few months to renegotiate its distributor agreements" (Complaint, ¶ 28).

Under these circumstances, that branch of the motion to dismiss the fraudulent inducement claim is granted, and it is dismissed.

Negligent Misrepresentation (3d cause of action)

"[A] claim for negligent misrepresentation requires the plaintiff to demonstrate: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" ((Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 [2011])). Further, "liability ... has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance ... is justified (Kimmell v Schaefer, 89 NY2d 257 [1996])).

Here, Ross Organic's negligent misrepresentation claim rests entirely on the following allegations:

The parties extensive course of dealing created a relationship between Ross Organics and Evonik that was one of trust and reliance. Evonik knew that Ross Organics would rely upon its representations about the Amendment.

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Evonik knew that the representations about the Amendment that it provided to Ross Organics were for a serious purpose and that Ross Organics intended to rely and act upon those representations.

(Complaint, ¶¶ 71-72).

Generally, a "special relationship" is not present where sophisticated commercial entities, as here, enter an agreement through an arm's-length business transaction (Parisi v Metroflag Polo, LLC, 51 AD3d 424 [1st Dept 2008]). In addition, the number of years or transactions undertaken by two business entities, as here, does not create a relationship of trust (MBIA Insurance Co. v GMAC Mortgage LLC, 30 Misc 3d 856 [Sup Ct, New York County 2010]).

Accordingly, that branch of the motion to dismiss the negligent misrepresentation claim is granted, and it is dismissed.

Unjust Enrichment (4th cause of action)

To state a claim for unjust enrichment, a claimant must allege that (1) the other party was enriched, (2) at claimant's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 [2011]). The existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi-contract for events arising out of the same subject matter

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(Clark-Fitzpatrick, Inc. v Long Island Rail Road Company, 70 NY2d 382 [1987]).

Evonik argues that the rights and obligations of the parties are governed by the distribution agreement. Thus, the unjust enrichment claim is unavailable.

In its unjust enrichment cause of action, Ross alleges, inter alia, the following:

Evonik, through its wrongful conduct described in this Complaint, has and will continue to reap substantial profit from those funds which it wrongfully has retained and which should rightfully be paid to Ross Organics as Post-Termination Commission.

Evonik, through its wrongful conduct described in this Complaint, has damaged Ross Organics' relationships with its customers and wrongfully taken Ross Organics' business.

(Complaint, ¶¶ 79 and 80).

Based on these allegations, the unjust enrichment claim, as it relates to post-termination commissions, is duplicative of the breach of contract claim. As for Ross Organic's allegation that Evonik was enriched at its expense by damaging its relationship with its customers, and wrongfully taking its business, these allegations are duplicative of the breach of the implied covenant of good faith and fair dealing.

Accordingly, that branch of the motion to dismiss the unjust enrichment claim is granted, and it is dismissed.

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Breach of Implied Duty of Good Faith and Fair Dealing (5th cause of action)

"Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (O'Neill v Warburg, Pincus & Company, 39 AD3d 281 [1st Dept 2007]). New York does not recognize a separate cause of action for breach of implied covenant of good faith and fair dealing when "it is premised on the same conduct that underlies the breach of contract cause of action and is 'intrinsically tied to the damages allegedly resulting from a breach of contract'" (MBIA Insurance Corp. v Merrill Lynch, 81 AD3d 419 [1st Dept 2011], quoting The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 [1st Dept 2004]).

Evonik argues that this cause of action is based on the same allegations that make up the breach of contract claim, and seeks the same damages. As such, it duplicative and should be dismissed.

Ross Organic claims that this cause of action is based on conduct wholly distinct from the conduct that underlies its breach of contract claim. As a result of Evonik's unjustified reduction of its credit limit, and Evonik's refusal to ship products to it, Ross Organic was unable to fulfill its customers'

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orders, causing it to suffer business losses, which are different from the compensatory damages sought in the breach of contract claim (Complaint, ¶¶ 39-51). Ross Organic asserts that these allegations are sufficient to show that Evonik deprived it of the right to receive the benefits under the distribution agreement.

Evonik points out, however, that section 6.1 of the distribution agreement gives it the right to decline a purchase order from Ross Organic (Moving Papers, Ex. B, Section 6.1 ["All purchase orders shall be subject to acceptance by Goldschmidt"]). As such, Ross Organic's argument is based on the faulty premise that Evonik had an obligation to accept every purchase order that was submitted by Ross Organic.

While section 6.1 of the distribution agreement provides that all purchase orders are subject to acceptance by Evonik, the implied covenant of good faith and fair dealing obligated Evonik to exercise its discretion in good faith, not arbitrarily, or irrationally (Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., 41 AD3d 269 [1st Dept 2007]).

Here, Ross Organic has sufficiently set forth allegations that Evonik's conduct was unjustified. As such, it has properly pleaded a cause of action for breach of the implied covenant of good faith and fair dealing. Accordingly, that branch of the motion to dismiss this cause of action is denied.

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Tortious Interference With Business Relationships (6th cause of action)

In the complaint, Ross Organic alleges that:

As a result of Evonik's wrongful conduct, Ross Organics was unable to deliver Evonik's products to its customers in a timely manner, which caused damage to Ross Organics' relationships with its customers.

In an effort to mitigate the damage that Evonik caused it with its customers, Ross Organics instructed its customers to cancel their orders with Ross Organics and to place those orders directly with Evonik, as that was the only way Ross Organics' customers would receive their orders in a timely fashion.

Moreover, in some circumstances, Evonik instructed Ross Organics' customers to cancel their purchase orders with Ross Organics and to place those orders directly with Evonik.

Evonik used dishonest and improper means to intentionally interfere with Ross Organics' business relationships by, inter alia, reducing Ross Organics' credit limit, refusing to ship its products to Ross Organics on a timely basis (or at all), and insisting on Ross Organics' customers placing their orders directly with Evonik (rather than with Ross Organics).

(Complaint, ¶¶ 48-50, 93).

A claim for tortious interference with contract requires that Ross Organic allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract, and damages resulting therefrom" (Lama Holding Company v Smith Barney Inc., 88 NY2d 413 [1996]). Importantly, the alleged conduct constituting tortious interference by a defendant is conduct directed at the party with

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which the plaintiff has a relationship, not the plaintiff itself (Carvel Corporation v Noonan, 3 NY3d 182 [2004]).

Based on the facts alleged in the complaint, Ross Organic has failed to state a cause of action for tortious interference with contract. In that regard, Ross Organic failed to allege that Evonik intentionally induced its customers to cancel their orders. Ross Organic also fails to allege that by cancelling their orders it considered its customers to be in breach of contract with it. In fact, Ross Organic states in its complaint that it contacted its customers itself and told them to place their orders directly with Evonik. Further, nowhere in the complaint does Ross Organic allege that its customers cancelled their orders even though it was ready and able to fill their orders. Indeed, the complaint makes it clear that Ross Organic's customers cancelled their orders because Ross was unable to fill their orders.

To the extent that Evonik instructed Ross Organic's customers to cancel their purchase orders with Ross Organic, and to place those orders directly with Evonik (Complaint, ¶ 50), Ross Organic fails to allege that it was in a position to fulfill these customers' orders at that time. And, moreover, by cancelling their orders and placing them with Evonik, Ross Organic considered its customers to be in breach of their contracts with Ross Organic.

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Accordingly, that branch of the motion to dismiss the claim for tortious interference with contractual relations is granted, and it is dismissed.

Unfair Competition (7th cause of action)

"A cause of action based on unfair competition may be predicated upon trademark infringement or dilution in violation of General Business Law §§ 360-k and 360-l, or upon the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (Out Of The Box Promotions, LLC v Koschitzki, 55 AD3d 575 [2nd Dept 2008]).

The complaint sets forth no allegations that Evonik misappropriated Ross Organic's commercial advantage by exploiting proprietary information or trade secrets. As such, that branch of the motion to dismiss the unfair competition cause of action is granted, and it is dismissed.

Accordingly, it is

ORDERED that that branch of defendants' motion to dismiss the complaint against Evonik Degussa Corporation is granted, and the complaint is dismissed against it; and it is further

ORDERED that that branch of defendants' motion to dismiss the second, third, fourth, sixth, and seventh causes of action is granted, and they are dismissed; and it is further

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ORDERED that that branch of defendants' motion to dismiss the first and fifth causes of action is denied; and it is further

ORDERED that defendant Evonik Goldschmidt Corporation serve and file an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that upon service of the answer counsel are directed to telephone Part 48 at 646-386-6532 to schedule a preliminary conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/31/12



HON. JEFFREY K. OING, J.S.C.