Real Estate Mtge. Network, Inc. v Carnegie Mtge., LLC
2013 NY Slip Op 32849(U)
February 5, 2013
Supreme Court, New York County
Docket Number: 651842/2012
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

REAL ESTATE MORTGAGE NETWORK, INC.

-v-

CARNEGIE MORTGAGE, LLC et al

INDEX NO. 651842/2012

MOTION DATE

MOTION SEQ. NO. 001

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 by defendants to dismiss the complaint is GRANTED per the attached Decision and Order.

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

Dated: February 5, 2013

MELVIN L. SCHWEITZER 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 : IAS PART 45

REAL ESTATE MORTGAGE NETWORK, INC.,	:	
Plaintiff,	:	Index No. 651842/2012
-against-	:	DECISION AND ORDER
CARNEGIE MORTGAGE, LLC, and GRAND BANK, N.A.,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

In this fraudulent inducement action, defendants Carnegie Mortgage, LLC (Carnegie) and Grand Bank, N.A. (Grand Bank) move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint in its entirety.

Plaintiff Real Estate Mortgage Network, Inc. (REMN) is in the business of mortgage lending. Carnegie operates a wholesale mortgage lending business under the name Icon Residential Lenders (IRL), and is a wholly owned subsidiary of Grand Bank, a national banking association.

In the complaint, REMN alleges that defendants fraudulently induced it to enter into two written agreements in connection with its possible purchase of certain assets and liabilities belonging to defendants. On February 10, 2012, defendants retained nonparty Milestone Advisors, LLC (Milestone), an investment banking firm, in connection with the potential sale. On February 13, 2012, REMN and Milestone, as defendants' agent,[1] entered into a

[1] The Milestone letter incorrectly identifies Milestone's principal as REMN. However, REMN alleges that Milestone was retained by both defendants, and acted at all times as the representative of both defendants (*see e.g.* Complaint, ¶ 11). Therefore, for purposes of this motion, this court will assume that the Milestone letter binds both defendants.

confidentiality agreement (Milestone letter), affording REMN exclusive early access to certain financial evaluation material belonging to defendants. On March 21, 2012, REMN, Grand Bank, and Carnegie entered into a letter of intent (LOI) regarding the proposed transaction.

REMN alleges that, on April 11, 2012, it learned for the first time that a fraudulent transfer litigation (FTL) had been filed in federal bankruptcy court against defendants more than a year earlier, on February 22, 2011 (*see Bond, Liquidating Trustee v Grand Bank, N.A., Carnegie Mtge., LLC, Icon Residential Lenders, LLC, et al.*, US Bankr Ct, D NJ, Adv. Pro. No. 11-01853-RG [FTL]). In the FTL, the liquidating trustee seeks to recover the transfer of the same assets that were the subject of the proposed transaction with REMN, on the ground that the bankrupts, U.S. Mortgage Corp. and CU National Mortgage, LLC, had fraudulently transferred them to Grand Bank and Carnegie (*see* FTL Amended Complaint, ¶¶ 64, 77, 99, 124, 138, 142).

REMN further alleges that the FTL "was a matter that a reasonable prospective seller should have and would have disclosed to a prospective buyer at the outset of discussions" (Complaint, ¶ 31), and that it would not have entered into the Milestone letter or the LOI, had it known of the pendency of the FTL (*id.*, ¶ 47).

After learning of the FTL's existence, REMN continued to negotiate with defendants. REMN alleges that Milestone, at defendants' request, proposed a new transaction structure that would include substantial protections for REMN. REMN also alleges that it developed a draft agreement that would permit the transaction to close, while providing adequate protection for REMN.

However, the parties were unable to agree on the terms of an asset purchase agreement by April 23, 2012, the closing date of the proposed transaction. On May 4, 2012, defendants informed REMN that they were terminating the negotiations.

On May 26, 2012, REMN commenced this action on allegations that defendants intentionally failed to disclose to REMN and Milestone the pendency of the FTL, and retained Milestone, a reputable investment banking firm, in order to fraudulently induce REMN to enter into the Milestone letter and the LOI. REMN also alleges that defendants made a misrepresentation of material fact when they represented in paragraph two of the LOI that, "subject to the conditions to Closing set forth in the [LOI], to transfer the Acquired Assets free and clear of all liens and encumbrances to [REMN] at the Closing," because the FTL was pending at the time that the warranty was made. *See* Complaint, ¶¶ 19-21.

In the complaint, REMN asserts causes of action for fraudulent inducement to enter into the Milestone letter and the LOI, rescission of both contracts as fraudulent and, therefore, void *ab initio*, and negligent misrepresentation. REMN also seeks to recover compensatory damages in excess of $500,000, allegedly incurred during the due diligence process.

Subsequently, on July 20, 2012, Carnegie commenced an action in California against REMN for breach of the Milestone letter (*see Carnegie Mtge. LLC, dba Icon Residential Lenders v Real Estate Mtge. Network, Inc.*, Superior Ct, Orange County Calif, Case No. 30-2012-00585254).

Defendants now seek to dismiss the complaint in its entirety, contending that the fraud claims are, at bottom, breach of contract claims, and, therefore, fatally defective.

In opposition, REMN contends that the fraud claims are legally cognizable.

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true, and liberally construe the allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Joel v Weber*, 166 AD2d 130, 135-136 [1st Dept 1991]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88). However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,' are not presumed to be true and [are not] accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000], quoting *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]; *see* CPLR 3211 [a] [1]). However, a cause of action will be dismissed where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998] [internal quotation marks and citation omitted]).

Each fraud claim, as alleged, is fatally defective on its face, as a matter of law. "While . . . the same acts which give rise to a cause of action for fraud may also form the basis for a breach of contract claim, a cause of action for fraud will not arise if the alleged fraud merely relates to the breach of contract" (*MBW Adv. Network, Inc. v Century Bus. Credit Corp.*, 173 AD2d 306, 306 [1st Dept 1991] [internal citations omitted]). "It is well settled that a cause of action for fraud does not arise where . . . the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation" (*Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994]; *Stangel v Chen*, 74 AD3d 1050, 1052 [2d Dept 2010]).

In the complaint, REMN bases all three fraud claims on allegations that defendants fraudulently induced it to enter into the LOI on the terms of the LOI itself. REMN, a New Jersey corporation, relies on the LOI as the basis for this court's jurisdiction and the applicability of New York law as the governing law (*see* Complaint, ¶ 10). REMN also cites to the LOI as the vehicle by which defendants made their alleged misrepresentation of fact, and agreed to deliver the identified assets at closing "free and clear of any liens or encumbrances" (*id.*, ¶ 2; LOI, ¶ 2), although defendants knew that the FTL would render their compliance impossible (*see* Complaint, ¶ 21).

Contrary to REMN's contention, defendants' failure to advise them of the existence of the FTL does not constitute a fraudulent omission of a fact collateral to the LOI. "[A] misrepresentation of present fact . . . is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). In the LOI, defendants warrant that they will transfer clear title at closing. At the time that the parties entered into the Milestone letter and LOI, the closing had not yet occurred, and the FTL had not been resolved in favor of any party.

Further, it has long been established that a contingent liability or pending lawsuit, by itself, is neither a lien nor an encumbrance. "A pending action brought to establish title to, or a lien upon, . . . does not of itself . . . make the title defective or create a lien" (*Simon v Vanderveer*, 155 NY 377, 382 [1898] [internal citation omitted]; *In re Arred Elec. Contr. Corp.*, 106 BR 353, 357 [Bankr SD NY 1989]; *Colombo v Caiati*, 129 Misc 2d 338, 340 [Sup Ct, Rockland County 1985], *affd* 131 AD2d 532 [2d Dept 1987]). A party must look to the

complaint in the pending action to determine whether, if the allegations were true, a pending action will affect the property (*Simon v Vanderveer*, 155 NY at 382). In the FTL, the liquidating trustee seeks avoidance of monetary preferential transfers, and to recover monetary damages consisting of indemnification and damages under a service agreement, together with interest, attorneys' fees, and costs of collection, and does not seek to recover real or personal property (*see* FTL Amended Complaint, Wherefore Clauses).

The terms of the Milestone letter also encompass the circumstances of the alleged fraud, and, therefore, render the fraud claims fatally defective. In the complaint, REMN alleges that it was fraudulently induced to enter into the Milestone letter by defendants' failure to disclose the pendency of the FTL to Milestone (*see* Complaint, ¶¶ 16-20).

The Milestone letter requires defendants to produce evaluation material, defined in the letter as, including relevant information about the subject assets made available to REMN by defendants, and excluding "information which is or becomes generally available to the public other than as a result of a disclosure by [REMN] or [its] representatives" and non-confidential information obtained by REMN from sources other than defendants (Milestone Letter, at 1). The Milestone letter also provides that defendants:

> will endeavor to include in the Evaluation Material information [they] believe[] to be relevant for the purpose of [REMN's] investigation, and [defendants] believe[] all information included therein is accurate, [REMN] acknowledge[s] that neither [defendants] nor any representative of [theirs] is making or is authorized to make any representation or warranty as to the accuracy of completeness of the Evaluation Material

(*id.*, ¶ 5).

The Milestone letter also sets forth a release by REMN in favor of Milestone and defendants for any liability arising out of the disclosure or failure to disclose information as part of the evaluation material. The release provides, in relevant part, as follows:

> [REMN] agree[s] that neither the [defendants] nor any representative of the [defendants'] will have any liability to [REMN] . . . resulting from the use of the Evaluation Material by [REMN] or based upon or arising out of (i) any statement in or omission from the Evaluation Material or (ii) representations or warranties, express or implied, contained in or **omitted from** the Evaluation Material, excepting only those particular representations and warranties which may be made to [REMN] in a definitive agreement when, as and if one is executed, and subject to such limitations and restrictions as may be specified in such agreement.

(*id.*, ¶ 5 [emphasis added]).

The Milestone letter also imposes continuing obligations on REMN in consideration for access to defendants' confidential evaluation material, including promises not to disclose the evaluation material to third parties, and not to solicit defendants' employees for a period of two years from the date of the agreement, without defendants' prior written consent (*see id.*, ¶¶ 2, 7).

With regard to REMN's access to defendants' evaluation material, the LOI affords REMN an exclusive period of time within which to engage in due diligence regarding the proposed transaction through April 6, 2012, and the opportunity to close on an asset purchase agreement by April 16, 2012, should REMN wish to consummate the transaction (*see* LOI, ¶¶ 2, 6, 11). By letter agreement dated April 6, 2012, these deadlines were extended to April 15, 2012 for the due diligence and April 23, 2012 for the closing.

The LOI memorializes REMN's access to Carnegie's financial books and records, as follows:

> Due Diligence: [REMN's] obligation to enter into the [Asset Purchase] Agreement is subject to its completion of a due diligence investigation on or before the Closing, to its satisfaction, with respect to [Carnegie's] financial condition, Assets and the Business. In this connection, [Carnegie] hereby authorizes [REMN], such of its staff, consultants and professional advisors as [REMN] deems necessary or desirable to make reasonable visits to [Carnegie's] premises during normal business hours and, on such occasions, **to have full access to [Carnegie's] books and records and staff**. The due diligence investigation must be completed prior to the execution of the [Asset Purchase] Agreement

(LOI, ¶ 10 [emphasis added]).

These clear and unambiguous terms of both the Milestone letter and the LOI demonstrate that defendants afforded REMN essentially unlimited access to Carnegie's staff, books, and records, that could have included documents relating to the FTL.

In addition, and even if we are to assume that the fraud claims are not duplicative of contract claims, they are not legally cognizable. This is because the fraudulent inducement claim fails to plead the elements of the claim with sufficient particularity, and is thus fatally defective.

To state a legally viable claim of fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, deception and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]). A claim of fraudulent concealment must be predicated on an act of concealment of a material fact not readily available to the plaintiff and which the defendant was duty-bound to disclose, justifiable reliance, scienter, and injury (*Kaufman v Cohen*, 307 AD2d 113, 119-120 [1st Dept 2003]; *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 199 [3d Dept], *lv denied* 75 NY2d 702 [1989]).

"Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456, 456 [1st Dept], *lv denied* 15 NY3d 711 [2010]; *Foley v D'Agostino*, 21 AD2d 60, 63-64 [1st Dept 1964], citing CPLR 3013, 3016 [b]).

REMN's allegations, even when deemed true, do not demonstrate that REMN represented or fraudulently concealed a material fact (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 [1st Dept 2000]). The single misrepresentation pleaded is that defendants falsely represented in the LOI that they would deliver the relevant assets free and clear of all liens and encumbrances at the closing. As discussed above, REMN, at most, made a promise to deliver the assets unencumbered at a future time, the closing. The transaction did not close. A fraud claim "may not be based upon a statement of future intentions, promises or expectations which were speculative, or an expression of hope at the time when made, rather than a misrepresentation of fact" (*Tutak v Tutak*, 123 AD2d 758, 759 [2d Dept 1986]).

Pursuant to the express terms of the LOI, a condition precedent to any purchase or sale was, among other things, "the successful completion of [REMN's] due diligence investigation of [Carnegie]" (LOI, ¶ 11; *see also* LOI, ¶ 2). The LOI provides that "[REMN] will agree, subject to the conditions to Closing . . . and those conditions to be set forth in a definitive Asset Purchase Agreement to be negotiated among the parties . . . to acquire the Acquired Assets and Liabilities"

(LOI, ¶ 2; *see also* LOI, ¶¶ 9, 11), and that Carnegie "will agree, subject to the conditions to Closing set forth in the [Asset Purchase] Agreement, to transfer the Acquired Assets free and clear of all liens and encumbrances to REMN at the Closing" (LOI, ¶ 2). Inasmuch as an asset purchase agreement was never executed, the condition precedent to closing was not met, and defendants were not contractually obligated to transfer the assets. Therefore, defendants made no fraudulent representation, or omission, as to the present transferability of the assets.

On the facts, as pleaded, REMN cannot demonstrate that there existed a confidential or fiduciary relationship sufficient to give rise to an affirmative duty to disclose the existence of the FTL. In the absence of a confidential or fiduciary relationship between defendants and REMN imposing a duty to disclose, defendants' mere silence, without some act which deceived REMN, cannot constitute a concealment that is actionable as fraud (*see Mobil Oil Corp. v Joshi*, 202 AD2d 318, 318 [1st Dept 1994]). No confidential or fiduciary relationship exists between sellers and buyers of corporate stock when dealing at arms' length (*Barron Partners, LP v LAB123, Inc.*, 593 F Supp 2d 667, 671 [SD NY 2009] [applying New York law]; *Woods v 126 Riverside Dr. Corp.*, 64 AD3d 422, 423 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]; *Chan v Bay Ridge Park Hill Realty Co.*, 213 AD2d 467, 469 [2d Dept 1995] [holding that, even if a misrepresentation of full ownership were made by the defendant seller, where he failed to reveal a co-owner of the subject real property, a cause of action for fraud would not lie, inasmuch as ownership was a matter of public record]). There is no dispute that the Milestone letter and LOI were arms'-length transactions between sophisticated business persons. These agreements expressly provide that defendants were not making any representations regarding the accuracy or

completeness of any evaluation material. And, in any event, the pendency of the FTL was a matter of public record.

Contrary to REMN's contention, the special facts doctrine, which might create a duty to disclose, is not applicable here. Pursuant to the doctrine, "a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Swersky v Dreyer & Traub*, 219 AD2d 321, 327 [1st Dept 1996], *app withdrawn* 89 NY2d 983 [1997] [internal quotation marks and citation omitted]). There is no dispute that the pendency of the FTL was a matter of public record. Therefore, defendants' knowledge of the action cannot be held to render the Milestone letter or the LOI unfair.

For this reason as well, REMN cannot demonstrate reasonable reliance, as a matter of law. An essential element of a claim of fraud is an allegation that the plaintiff justifiably relied on the fraudulent statement or omission to his detriment (*Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]; *LoGalbo v Plishkin, Rubano & Baum*, 197 AD2d 675, 676 [2d Dept 1993]). Reasonable reliance "is a condition which cannot be met 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" (*Arfa v Zamir*, 76 AD3d 56, 59 [1st Dept 2010], *affd* 17 NY3d 737 [2011] [internal quotation marks and citations omitted]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 323 [1959]). "The 'adversarial' nature of the parties' relationship negates as a matter of law any inference that business people as sophisticated as [plaintiffs] were relying on [defendant] for an objective assessment" (*Arfa v Zamir*, 76 AD3d at 60 [internal quotation marks and citations omitted]; *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]). The alleged material misrepresentation and omission relate to a

matter of public record, the pending FTL, that is easily discoverable by means of ordinary intelligence and reasonable investigation. Moreover, the Milestone letter and the LOI obligate REMN to engage in due diligence. The court notes that it was during the course of its due diligence investigation that REMN discovered the existence of the FTL.

For the foregoing reasons, the branch of defendants' motion to dismiss the first cause of action for fraudulent inducement is granted, and that claim is dismissed.

That branch of defendants' motion to dismiss the second cause of action for rescission of the Milestone letter and the LOI is also granted, and that claim is dismissed. To obtain rescission, a plaintiff must demonstrate the elements of fraud (*Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d at 403; *Almap Holdings v Bank Leumi Trust Co. of N.Y.*, 196 AD2d 518, 518 [2d Dept 1993], *lv denied* 83 NY2d 754 [1994]). The equitable remedy of rescission is "to be invoked only when there is lacking complete and adequate remedy at law and where the *status quo* may be substantially restored" (*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 71 [1st Dept 2002]). "A party will not be relieved of the consequences of his own failure to proceed with diligence or to exercise caution with respect to a business transaction, even where rescission is sought on the ground of fraudulent inducement" (*Cantor Fitzgerald Inc. v Cantor Fitzgerald Sec.*, 268 AD2d 324, 326 [1st Dept], *affd* 95 NY2d 919 [2000] [internal quotation marks and citations omitted]). As held above, REMN has wholly failed to allege facts sufficient to support a legally viable claim for fraud.

Contrary to REMN's contentions, the doctrines of lack of consideration, mutual mistake, and unilateral mistake do not form bases for rescission of the Milestone letter or the LOI.

Rescission is appropriate where a "mistake produces a practical inability to perform a contract," and such non-performance "is so substantial and fundamental as to defeat the parties' object in contracting; and . . . damages cannot be ascertained with reasonable certainty" (*U.S. Postal Serv. v Phelps Dodge Refining Corp.*, 950 F Supp 504, 516 [ED NY 1997]). As held above, defendants' contractual agreement to transfer the assets free and clear of all liens and encumbrances on the date of closing was not an actionable representation at the time that it was made. Similarly, as held above, defendants' failure to actively advise REMN of the pendency of the FTL is not actionable. In addition, REMN has specifically identified the amount of monetary damages required to make it whole.

Last, defendants contend that the negligent misrepresentation claim is fatally defective.

In opposition, REMN contends that defendants were in a unique position to be aware of the circumstances and validity of their claim of ownership of the assets, and REMN signed the contracts based on defendants misrepresentations and selection of Milestone as their representative.

"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" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

Here, again, REMN has failed to plead facts sufficient to establish the existence of a special relationship giving rise to a duty to disclose. As discussed above, the LOI memorializes the parties' arms' length relationship as buyer and sellers, and the parties' intent that the LOI not create any legally binding obligation on the part of any party, except with regard to certain

specified items, including defendants' obligation to release the evaluation material, REMN's duty to maintain the confidentiality of that material, REMN's due diligence obligation, and certain post-closing obligations not relevant here (*see* LOI, ¶¶ 2, 6, 10, 12-17).

For the foregoing reasons, that branch of defendants' motion to dismiss the third cause of action for fraudulent misrepresentation is granted, and that claim is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the first, second, and third causes of action are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Carnegie Mortgage, LLC and Grand Bank, N.A. and against plaintiff Real Estate Mortgage Network, Inc., together with costs and disbursement to defendants, as taxed by the Clerk upon presentation of an appropriate bill of costs.

Dated: February 5, 2013

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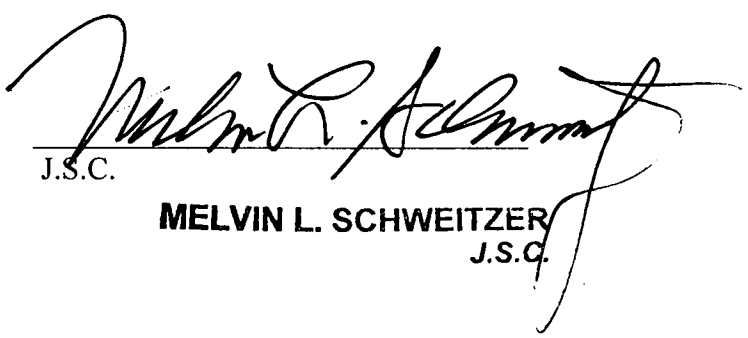

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.