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Arbitration; arbitrability; mandatory versus permissive language; timeliness of demand; authority of arbitrator; advisory decision. The plaintiff, a soccer coach, served a demand for arbitration. The plaintiff had been terminated by the defendant, an APL soccer team, on the grounds that he had acted in a way harmful to the team's image, a breach of the employment agreement. The defendant had raised an issue as to the timeliness of the demand, but the parties had gone to arbitration. There, they had agreed to bifurcate the proceeding and to resolve the timeliness issue before focusing on the merits of the plaintiff's termination and the remedy due him if the defendant were found to have breached the parties' agreement. The arbitrator had dismissed the arbitration demand in its entirety on the grounds that it was untimely. The plaintiff brought this suit seeking declaratory relief and damages for breach of contract, and the defendant moved for dismissal or a permanent stay. A provision in the plaintiff's employment agreement stating that disputes "are subject to arbitration" was sufficiently mandatory in the context of the agreement to make arbitration the exclusive remedy under the contract, the court found. The provision also stated that a decision of the arbitrators "shall be a condition precedent to any right of legal action." Regarding the arbitration provision, the court found that even if it were explicitly "permissive" – if the language used were "*may be* subject to arbitration" instead of "are subject" – the choice offered would still not be between arbitration and litigation, but between arbitration and abandoning the claim. The court cited several rulings. One concerned a statute rather than an arbitration agreement, but the same reasoning was applicable here; whether an agreement was framed in mandatory language was not necessarily paramount in determining whether it was in fact mandatory or permissive: to fail to construe "may" in the context of the agreement as a whole would render the arbitration agreement an empty gesture. Apart from this, the plaintiff had waived any objection to the arbitrability of the dispute by submitting the matter to the arbitrator, even though he had indicated that the submission was without prejudice. Finally, the arbitrator had not been limited to a merely advisory decision because no such limitation was set forth in the agreement. Even if it had been, it would have been waived by the parties' submission of the dispute to the arbitrator to craft a resolution to it. Case dismissed. Ercoli v. Empire Professional Soccer, LLC, Index No. 06089/2005, 9/30/05 (Fisher, J.). **

Attachment; vacatur; Delaware law; fiduciary duty of sellers of partnership assets; **sale price; investigation of value; probability of success. Partnerships; agreements; powers of general partner; claimed restrictions on "like kind exchange". Corporations; piercing the corporate veil. Grounds for attachment (CPLR 6201(3)); fraud; unavailability of assets. Oppressiveness of attachment. Preliminary injunction; irreparable harm; likelihood of success. Sale of West Side rail yards.** Action by prominent real estate developer Donald Trump regarding the sale price of, and use of sale proceeds from, the Penn Central rail yards. Plaintiff moved to confirm an order of attachment and cross-moved for a preliminary injunction enjoining defendants from selling their interests or plaintiff's in the properties. Defendants moved to vacate the attachment order. The court held that Delaware law applied to plaintiff's breach of fiduciary duty claims as the case involved Delaware corporations and limited partnerships. Under that law, the court stated, viewed in the context of application of the business judgment rule, fiduciaries selling a major partnership asset have a duty to maximize the value thereof. The court rejected plaintiff's assertions that defendants had failed to conduct a sufficient investigation into the value of the property, sold at an undervalued price, etc. The court found plaintiff's statements in support of his claims conclusory. Further, the court agreed with defendants that plaintiff overstated the situation when referring to competing offers since they in fact were only expressions of interest. The court also was persuaded that the amount received was realistic and fair after an investigation of the properties. The properties were subject to many restrictions and a person who offered a price prior to investigation of these restrictions would reduce the offer once the investigation was made. Defendants pointed out that they had had the properties appraised by experts in complex real estate and had considered five real offers, which confirmed their analysis of the value of the property. The court concluded that plaintiff had failed to show a probability of success on the merits on the fiduciary duty and related claims. Plaintiff also contended that defendants had breached the relevant agreements by pursuing a "like kind exchange" rather than development. The agreements, the court found, gave the general partners broad authority. They permitted the kind of exchange the defendants sought to do and contained no contractual or fiduciary duty to dissolve the limited partnerships or distribute sale proceeds as sought by plaintiff. There, too, the court held, plaintiff had failed to show a probability of success. The court further ruled that plaintiff had failed to show abuse of the corporate veil to attach interests of the individual defendants or defendant limited partnerships. Thus, plaintiff was not entitled to an attachment. As for a ground for attachment (CPLR 6201(3)), the court determined that plaintiff had failed to show that a like kind exchange would be fraudulent or that the assets of the limited partnerships would be unavailable to enforce a judgment if the exchange occurred. Plaintiff only raised suspicions of fraud, which are not sufficient. The court found that it would be oppressive were the attachment order to remain in effect since it would prevent the limited partnerships from reinvesting the proceeds from the sale in a like kind exchange, producing large tax liabilities. The court was satisfied that proceeds from the exchange would be left with the partnerships and available should plaintiff prevail. Attachment vacated. On plaintiff's request for a preliminary injunction, the court found that plaintiff's claims involved cash and that he could be made whole from the sale proceeds or from real estate, far in excess of the value of plaintiff's interest. Thus, there was no irreparable harm. And, for the reasons stated, plaintiff could not establish a likelihood of success. Injunction denied. Trump v. Cheng, Index No. 602877/2005, 9/14/05 (Lowe, J.).

Class actions; certification; GBL 349; unjust enrichment; advertizing of mouth wash; commonality; typicality; representative status; superiority. Motion to certify class in action alleging violations of GBL 349 and unjust enrichment in connection with alleged false statements made in ad by defendant about Listerine and its effectiveness. Plaintiff claimed that defendant had engaged in a general pattern of fraudulent conduct. The court found that questions as to class members' exposure to ads predominated. Plaintiff did not show that a specific ad had been seen by all class members. In fact, she admitted she could not recall having seen any of defendant's alleged deceptive ads. The court noted further that, though GBL 349 does not require proof of justifiable reliance, a plaintiff must show actual harm. The court held that here each claim would require individualized proof of liability and damages. Plaintiff had failed to show how defendant's ads had caused her harm. Plaintiff had not seen the ads and was still using the product. In addition, separate hearings would in any case be required as to extent of any harm and the correct measure of damages. Some plaintiffs would have used the product, discontinued flossing and suffered harm, whereas others would never have used floss or flossed improperly, and the two would have to be distinguished. Some plaintiffs probably would only have been harmed by purchasing after exposure to the ads. Proof of purchase would be difficult. Thus, plaintiff had failed to show commonality as to the GBL claim. On the unjust enrichment claim, plaintiff failed to explain the damages being sought and what unjust enrichment defendant had obtained. Plaintiff conceded that she had no proof of price increases. As noted, plaintiff continued to use the product. Plaintiff could not pursue this claim. Plaintiff had also not shown commonality. Individual inquiry would have to be made as to whether or not there was enrichment and whether class members continued to use the product despite knowledge of the representations. The court ruled that plaintiff's claims were not typical since she had not seen the adds. The court considered plaintiff's status as representative. The court found that here, unlike a complex commercial case, plaintiff could reasonably be expected to have detailed knowledge of defendant's misrepresentation and the injury caused. But plaintiff had not seen the ads, had not shown that she had suffered actual injury, continued to use the product and did not even purport to speak for the class. Plaintiff in her deposition was unaware of important issues. Plaintiff failed on this score, too. Finally, the court found that it would be difficult to manage the litigation where there would have to be extensive inquiry into individual facts regarding injury and damages. Thus, a class action would not be superior. Motion denied. Whalen v. Pfizer, Inc., Index No. 600125/05, 9/22/05 (Lowe, J.).

Contracts; agency; undisclosed principal; ratification. Corporations; de facto merger. Punitive damages. Summary judgment. Plaintiff had sued defendants for punitive damages and for amounts allegedly due under a seven-year employment agreement. Prior to entering into the contract, plaintiff had consulted with his accountant, who also worked for defendants. The accountant had advised plaintiff that defendants' business was fiscally stable and could meet its contractual obligations with plaintiff. Based on those representations, plaintiff had entered into the contract. Subsequently, defendants had suffered severe financial problems and entered into a stock purchase agreement. When the business deteriorated further, defendants had entered into a rescission agreement whereby one defendant had transferred his shares in the business to his partner in consideration for two separate promissory notes. Defendants had then closed the business and one defendant had gone to work for another company. For some months, the other company had sent checks to plaintiff. Plaintiff alleged in his complaint that both defendants had been undisclosed principals of the business and as such were liable for the contract entered into by the agent, the business. Plaintiff moved to reargue the court's prior decision, which had granted summary judgment to defendants on plaintiff's causes of action for damages and punitive damages. The court determined that its previous grant of summary judgment on the damages claim was proper, and explained that plaintiff had failed to show any evidence of an oral or written record which established the existence of an agency relationship between defendants as undisclosed principals or any evidence showing agency by conduct. The court indicated that the stock purchase and rescission agreements were not relevant to whether an agency relationship existed since those transactions had occurred nearly two years after plaintiff and defendants had entered into their contract. The court found unpersuasive plaintiff's assertion that the payments to him by checks drawn on defendants' new company constituted ratification of the contract since this was an improper attempt to make new arguments and no such claim had been pleaded. Plaintiff failed to present proof that the accounting firm, with gross or wanton disregard of his rights and the truth, had misrepresented to him the facts surrounding the company's financial viability. The court ruled that plaintiff's claim for punitive damages against defendant accounting firm was speculative and denied plaintiff's motion to reargue. The court denied defendants' motion to reargue the prior finding that termination of defendant business and formation of the new company did not qualify as a de facto merger as a matter of law, as defendant had not shown continuity of ownership (which is a factor to be considered) and that the business transaction between the two companies was not an asset purchase. The court denied a motion to reargue by the defendant accounting firm, explaining that the court's dismissal of the punitive damages claim did not mandate dismissal of the fraud claim against it. The fraud alleged here had not been aimed at the public; the relationship and transaction had been private. The court found that plaintiff's allegation that defendants had departed from generally accepted accounting practices was sustainable. Finally, the court addressed defendant's attempt to limit the amount of plaintiff's damages and determined that plaintiff's ability to recover net profit from the defunct business would be limited to what he could prove. Lilienthal v. New Dimensions in Staffing, Inc., Index No. 4357/2000, 9/28/05 (Austin, J.). **

Contracts; construction; breach; constructive trust. Alter ego doctrine; fraud; wrong. Procedure; CPLR 3025 (a) and CPLR 3211(f). The suit centered around glass work for a casino valued at approximately $7 million. The dispute concerned who was entitled to sums paid to one sub-contractor, a defendant, for work performed by its own sub-contractor, the plaintiff. The plaintiff had performed exactly the glasswork required under the defendant's sub-contract with the general contractor. The plaintiff's payment requisitions had gone to the defendant, then to the contractor, and finally to the Oneida Nation, with payment traveling in reverse; but the plaintiff alleged that the defendant had kept at least 8% of payments made by the contractor to fulfill the plaintiff's requisitions and that the defendant owed it $2.5 million plus interest. The defendant asserted that it had earned any money in its possession in accordance with the project's preference program, which allowed a 10% bidding preference to businesses owned by Nation members. The court noted that the pre-answer motion to dismiss certain claims made by the sub-contractor and its owner, an individual defendant, extended their time to answer the complaint, which extended the plaintiff's time to amend its complaint. The court found that the amended complaint sufficiently pled the elements of a constructive trust, which the plaintiff sought to impose against the sub-contractor, to survive the motion to dismiss. The plaintiff alleged that the contract between it and the defendant sub-contractor had established a fiduciary relationship, that the defendant had promised payment, that the plaintiff had done work in reliance on the promise, and that the defendant, not providing service or consideration in return for money it had received on behalf of the plaintiff and retained, had been unjustly enriched. The defendants argued that a cause of action based on the alter ego doctrine should be dismissed for failure to allege actual fraud. However, New York law allows the corporate veil to be pierced when, as the plaintiff alleged, a corporation has been so dominated by an individual that it has mostly done the dominator's business, not its own, and the domination has been used to commit either a fraud or a wrong. Here the plaintiff alleged that the individual, the sub-contractor's sole shareholder, had run the defendant business without regard to corporate formalities - - in itself grounds for piercing the corporate veil - - and had committed an additional wrong against the plaintiff: diverting and using for his own benefit sums due it for its work. Further, the plaintiff alleged that the defendant sub-contractor was undercapitalized - - again grounds for piercing the corporate veil - - and could not pay its corporate debts. The plaintiff did not have to produce evidentiary facts on a motion to dismiss and because discovery had not taken place, the amended complaint survived the motion to dismiss. The plaintiff's cross-motion for summary judgment on a claim for the $2.5 million failed, without the court needing to consider its merits, because the defendant had not yet served an answer. Ajay Glass and Mirror v. AASHA GC., Inc., Index No. 02962/2005,10/28/05 (Fisher, J.). **

Contracts; employment; termination without cause; applicability of second agreement the effective date of which had not arrived as of termination; interpretation; lack of ambiguity; condition precedent. Plaintiffs, providers of insurance on municipal bonds and asset manager and investor in the market for collateralized debt obligations, sued for a declaratory judgment regarding obligations to plaintiffs' former COO, now terminated. Employment agreements had been signed with defendant in 2001 and in 2004. Defendant had later been terminated without cause. The 2004 agreement had an effective date subsequent to the termination date and plaintiffs argued that it had never gone into effect. The court held that the 2004 agreement was unambiguous and became a binding agreement upon execution, whereby plaintiffs promised to employ defendant as of the effective date. Plaintiffs were empowered to terminate defendant prior to the effective date, but only in accordance with the termination clause thereof. By terminating defendant without cause and asserting that the 2004 agreement did not exist, the court ruled, defendant had repudiated the agreement and given defendant a claim for damages for total breach. Plaintiffs owed defendant all of the severance and other benefits provided in the termination clause of the 2004 agreement. Plaintiffs cited a clause of the 2004 agreement and urged that it prohibited enforcement of the termination provisions, but the court disagreed. It did not bar enforcement of the termination provisions of the 2004 agreement in the event that employment was terminated prior to the effective date. Had that been intended, it should have been expressly so provided. Defendant's continued employment had not been stated as a condition precedent to the existence of the 2004 agreement. The court found that defendant was entitled to some $3.3 million, plus interest and attorney's fees. American Capital Access Service Corp. v. Muessel, Index No. 602706 (2004, 10/18/05 (Lowe, J.).

Contracts; interpretation; brokerage agreement; commissions. Plaintiff sued to recover commissions it claimed were due it under a brokerage agreement. The agreement had provided that plaintiff as sole broker would receive commissions in connection with a license between defendant and its licensee. Plaintiff alleged that defendant had failed to pay commissions for licensing additional space, and for an increase in the licensee's additional rent from an extension of the rental term. Plaintiff further maintained that defendant's failure to pay constituted a default under the agreement that triggered accelerated payments. Both sides moved for summary judgment. The court granted partial summary judgment to plaintiff. The court first determined that the meaning of "additional space" in the brokerage agreement was plain and unambiguous, referring to any space in the building, and thus defendant could not introduce extraneous evidence to show the parties' probable intent. Defendant argued that another entity was the named licensor and building owner and that "additional space" should be interpreted narrowly to signify particular floors leased by defendant where defendant was the named licensor. The court further determined that because defendant licensed additional floors in the building, it was therefore liable for additional commissions relating to the second license. The court next found that defendant did owe plaintiff commissions relating to the summer months because defendant's licensee had been allowed to utilize some office space and the annual rent reflected the minimal occupancy during the summer months, and an amendment that rendered the summer- months reversion null and void did not "extend" the term. The court granted defendant's cross-motion with respect to a term extension. The court examined the brokerage agreement's extension provision, which required plaintiff to represent the licensee, and determined that it applied to the amendment here. Plaintiff was not entitled to commissions for the three-month extension since defendant and the licensee had negotiated the amendment without plaintiff's participation. Finally, having determined that defendant owed, but had not paid, commissions relating to the licensing of additional space and annual rent increase through the original license term, the court found that defendant was also liable for amounts owed under the brokerage agreement's default provision. Newmark & Co. Real Estate, Inc. v. New Yorker Hotel Mgt. Co., Index No. 601403/2005, 10/12/05 (Freedman, J.).

Contracts; interpretation; indemnification clause; intent to indemnify; parol evidence; warranty that goods were "marketable"; warranty as to "substantially" all inventories. Action arising out of sale of corporation for $308 million. Sellers sought a declaratory judgment. A product manufactured by the corporation had proved to be unpopular and credits for returns were given. Buyers claimed that sellers had to indemnify them for these losses. Buyers relied upon a particular clause and construed it, the court stated, as a post-closing sales guarantee. Indeed, the buyers contended that, under this clause, the sellers would have to indemnify them for "losses" even if not incurred from any breach of duty (e.g., a disaster that adversely affected the market for the products). The court noted that indemnification clauses must be subjected to a heightened degree of scrutiny; there must be "unmistakable intent" to indemnify. The court held that the clause here did not meet this standard. Further, assuming that parol evidence could be used to establish such intent, that evidence was insufficient. It showed no intention of addressing returned products. The court found buyers' position further undermined by the fact that the language in question came from a form and had not been drafted by the buyers. What is more, the court stated, the commentary of the editors of the forms contradicted buyers' position. Basic principles of contract construction were to the same effect. Absent a breach of some duty, a party may not recover "damages." By using the word "damages" to represent items subject to the buyers' right to indemnification, the parties had indicated an intent that the scope of the clause be restricted to loss resulting from a breach of some duty. Thus, the clause did not express the required "unmistakable intent." The decline in popularity of the product here, the court determined, had not been breach of any obligation, warranty or representation. Thus, if the buyers had experienced a loss or diminution in value, that would be outside the scope of the indemnification clause. An uneven allocation of responsibility compared with control - - the sellers had no control over buyers' marketing or management and yet, under buyers' construction, agreed to indemnify buyers for any loss or diminution of value regardless of cause as to any products - - was not a reasonable construction, the court stated. In view of the parties' sophistication and the detail spelled out in the 50-page agreement, a reasonable sophisticated buyer would have sought an express guaranty regarding product returns and decreased sales. Buyers also complained that sellers had breached a warranty that inventories were good and "marketable". The court stated that "marketable," not defined in the agreement, was a term similar to "merchantable" in the UCC (§ 2-314) and was commonly used in regard to real estate titles, and found that under neither interpretation could there be a basis for construing it as a warranty that the public would want to buy the products in question. The claimed relevant warranty referred to "substantially" all inventories and the court rejected as falling short thereof certain alleged defective materials since they amounted to only 2.77% of the inventories. The court also dismissed portions of counterclaims relating to a warehouse. Partial summary judgment for plaintiffs. Hartz Consumer Group, Inc. v. JWC Hartz Holdings, Inc., Index No. 600610/2003, 10/27/05 (Gammerman, JHO).

Contracts; privity; third-party beneficiary. Insurance; duty to name a party as an additional insured. Plaintiff sued defendant, insurance broker, for negligence and breach of contract. Plaintiff owned property which it had leased to a business. Under the terms of the lease, the lessee had to procure liability insurance which named plaintiff as an additional insured. Although the lessee had advised defendant to add plaintiff as an additional insured, defendant had not done so. Plaintiff claimed that as a result of not having been added to the policy, it had been forced to pay to settle a case. Defendant moved to dismiss for failure to state a cause of action, claiming lack of contractual privity between itself and plaintiff. Plaintiff argued that defendant had been negligent in its failure to have procured insurance coverage for it, that defendant had caused plaintiff detrimentally to rely on defendant's contract with the insurer, and that defendant had breached a contract with another that had been intended for plaintiff's benefit. The court determined that defendant's only duty flowed to its customer, here, the lessee, and not to an additional insured. The court further found no contractual relationship between plaintiff and defendant, nor any relationship resembling privity that would have supported a negligence claim. The court also held that plaintiff could not show that it had been the intended third-party beneficiary of an insurance contract between its lessee and defendant. Defendant's motion to dismiss granted. 401 Avenue U, LLC, v. Anthony Viscuso Brokerage, Inc., Index No. 601913/2005, 11/14/2005 (Freedman, J.).

Contracts; sale of interest in commercial real property; right of first refusal; specific performance; reformation; mutual mistake; fraud. Buyer of an interest in a shopping center sought specific performance of the contract of sale of that interest. The contract arose from the buyer's exercise of a right of first refusal which it had as partner with the seller in a limited liability company. The seller had offered the property at $5.4 million, which the buyer had agreed to pay. Thereafter, however, a claimed error in valuation had been asserted and the seller had stated that it could not proceed on the original terms, but that it would sell for $7.4 million. The buyer had refused to pay and sought specific performance. The seller sought reformation. The seller asserted that there was a condition precedent, approval by the shareholders of the seller's parent, which had not occurred. The court examined the documents and ruled that the term used by seller and cited by it on the motions ("as such amount [the price] may be adjusted in accordance with the Purchase Agreement"**)** referred to a portion of the agreement not having to do with approval by the parent. The buyer had not even had a copy of the agreement when it accepted and could not have accepted other terms not included in the offer. The court ruled that the seller was improperly attempting to incorporate in the offer additional terms beyond those specified and agreed to. Specific performance was proper. The court determined that the seller had not stated a valid claim for reformation (in its complaint in the companion case) since it had not alleged either mutual mistake or fraud. Whitestone - Triangle, L.P. v. Plaza II Manager Inc., Index No. 601708/2005; Triangle Plaza Manager Inc. v. Whitestone - Triangle, L.P., Index No.601659/2005, 10/28/05 (Fried, J.).

Corporations (Not-for-Profit); derivative actions; standing; direct harm; diminution in value of seats; lock-up provisions; breach of fiduciary duty; business judgment rule; allegations of dual loyalties; domination of Board members; fiduciary duty of due care; due diligence; fairness opinion; aiding and abetting breaches of fiduciary duty. Merger of New York Stock Exchange and electronic stock market. Dispute arising out of proposed merger between New York Stock Exchange and Archipelago, an electronic stock market. Plaintiffs, NYSE seat holders, contended that the proposed merger was inequitable in that it drastically undervalued the NYSE and overvalued Archipelago. Seat holders would receive, it was claimed, inadequate compensation and an insufficient share interest in return for their seats, and would be burdened by "lock-up" provisions. Plaintiffs also asserted conflicts of interest in the negotiations in that the NYSE CEO owned shares in Goldman, Sachs, which owned a stake in Archipelago, and that Goldman served as a "facilitator" of both sides of the transaction. Plaintiffs asserted that Goldman and the NYSE CEO had dominated the NYSE Board, members of which had ties to Goldman and other entities with stakes in Archipelago**.** Plaintiffs in this purported class action asserted claims against the CEO and the Board of breach of fiduciary duty and against Goldman and Archipelago for aiding and betting said breach. Plaintiffs demanded a halt to the merger and damages. On motions to dismiss various defendants asserted that plaintiffs lacked standing to bring a direct action and had failed to comply with the prerequisites for a derivative action (NFPC Law 623(a)). Defendants argued that a showing of "undifferentiated harm" was essential. The court found that the proper inquiry in distinguishing between a direct and a derivative claim is what is the nature of the harm and who is principally harmed, the corporation or individual shareholders. Plaintiffs argued that the alleged breach of fiduciary duty harmed plaintiffs' equity interests, but benefitted the NYSE and the merged corporation, so that the harm was one distinct to seat holders, who would have standing to assert direct claims. The court held that the alleged disparate allocation of equity, resulting in a disparate contribution of equity by the seat holders and shortchanging of seat holders, constituted harm separate and distinct from harm to the corporation that could be remedied by direct claims against the corporation and its shareholders. The court relied, inter alia, on the Tooley case (Del.) and Strougo (2d Cir.). The court also rejected defendant's position that claims based on the lock-up provisions involved an alleged reduction in the NYSE assets and thus would be derivative. The court found that plaintiffs were asserting wrongs personal to seat holders and distinct from harm to the NYSE. The court disagreed with defendants' position that Alpert v. NASD supported their analysis. The court stated that plaintiffs were losing their seats for an alleged unfair price, as a result of alleged breaches of fiduciary duty by the directors, in effect being "cashed out" at an unfairly low price. Further, Alpert applied Delaware law, whereas New York law controlled here. The transactions in the two cases were very different, the court stated. The court also distinguished Alpert on the ground that no allegations had been made that the defendant directors there had not been fully informed about the transaction at issue whereas here plaintiffs relied on an allegedly flawed fairness opinion by the Lazard firm. Defendants cited the business judgment rule and plaintiffs' failure to assert bad faith or fraud. Defendants also urged that Goldman's role had been approved by 11 directors, 10 of whom were independent. The burden was on defendants. The court found that plaintiffs had sufficiently alleged dual loyalties to NYSE and Goldman by the NYSE CEO, who had worked at Goldman for 11 years, been President thereof and owned millions of shares thereof, worth a vast sum. Goldman had ties to Archipelago, and a stake in it. The NYSE CEO had recused himself from the vote to retain Goldman as facilitator of the merger, but not from negotiations, deliberations or the vote regarding the merger. Plaintiffs also alleged that Goldman, though the NYSE CEO, had influenced and dominated the negotiations and deprived the Board of independence. The court found that plaintiffs had sufficiently alleged the CEO's interest in the merger, but held that the complaint failed to allege facts sufficient to show the CEO's coercive control of the Board. The fiduciary duty claim failed to the extent it alleged this domination, but leave to replead was granted. Plaintiffs who sought to establish that most of the "independent" Board members had extensive business and employment dealings with Goldman. The court distinguished Alpert and ruled that plaintiffs' demonstrations of relations with Goldman on the part of six directors, where plaintiffs had succeeded in casting doubt on Goldman's services to both parties to the transaction, were enough to withstand the motion. Plaintiffs also asserted that there had been a breach of the fiduciary duty of due care in that the Board had rubber-stamped the decision, relying on a flawed fairness opinion by Lazard. Plaintiffs claimed that the Board retained Lazard on the CEO's recommendation and without due diligence, which would have shown a conflict of interest. The opinion also contained omissions and errors, it was alleged. Plaintiffs further alleged a breach by virtue of the Board's approval of Goldman's role. The court concluded that plaintiffs had sufficiently stated allegations of breaches of the fiduciary duty of loyalty and due care by Board members to overcome the business judgment rule. On Goldman's motion to dismiss, the court stated the question as principally whether the pleadings were detailed enough to apprise defendant of the conduct on which the claim for aiding and abetting a breach of fiduciary duty rested. Goldman relied upon statements in the engagement letter, which, defendant argued, showed that it could not have had actual knowledge that a breach of fiduciary duty was committed by the NYSE defendants, but the court disagreed. The letter showed that Goldman was aware of conflicts and it was for a jury whether these were a breach of fiduciary duty. Plaintiffs had sufficiently alleged substantial assistance at the pleading stage. Defendant had been sufficiently informed of the conduct plaintiffs' claim was predicated on; detailed facts, much of which would be in defendant's control, were a matter for discovery. Motion denied except in part. Higgins v. New York Stock Exchange, Inc., Index No. 601646/2005, 9/2/05 (Ramos, J.).

CPLR 325(d); declaratory judgment; lease; summary judgment; RPAPL § 853; Rule 31 of The Rules of the Commercial Division. Plaintiff had leased space that it used as a restaurant. The original lease term was for six years. The lease provided that plaintiff could extend the term of the lease for one four-year period provided that plaintiff gave the landlord written notice at least 90 days prior to the expiration of the lease term. Plaintiff also utilized a basement on the premises which was not included in the lease. The subject premises had been sold to defendants in 2003. Shortly thereafter, defendants had informed plaintiff that they would be taking back a portion of the leased property, including the basement, for their own use. Defendants had done certain demolition and other work without necessary permits. Plaintiff alleged that those changes interfered with its quiet enjoyment of the premises and endangered its business, particularly one change that was a violation of sewer ordinances that placed plaintiff's business at risk for fines or closure. Plaintiff further alleged that when it had attempted to exercise its option to renew the lease by certified mail, defendants had refused to accept the letter. Plaintiff had then sent a second letter with a rent payment; that letter had similarly gone unacknowledged by defendants, although the rent check had been deposited. Moreover, plaintiff asserted that defendants had advised that plaintiff was not to perform any work on the premises without appropriate town permits and that any work performed without such permits would be regarded by defendants as a violation of plaintiff's lease. Plaintiff commenced the instant action, and moved for and obtained a Yellowstone injunction. Plaintiff also sought summary judgment and damages for breach of the covenant of quiet enjoyment; declaratory judgment determining its rights under the terms of the lease to utilize the portions of the property which defendants had allegedly attempted to usurp; and a declaration that plaintiff had properly exercised its option to extend the lease. The court ruled that plaintiff had failed to make a prima facie showing that it was entitled to damages for breach of the covenant of quiet enjoyment or treble damages under RPAPL § 853 and denied summary judgment on those claims. The court granted plaintiff's motion to the extent of holding that plaintiff had given proper and timely notice to defendants of its intent to exercise the option to extend the lease, and declared that the lease has been validly extended for the additional four-year period. The court found that the basement areas which plaintiff had used prior to sale of the subject property to defendants were appurtenant to the lease. The court denied defendants' cross-motion to have the action transferred to District Court pursuant to CPLR 325(d), finding that that Court would not have had jurisdiction over plaintiff's declaratory judgment claims. Finally, the court denied defendant's request to waive Rule 31 of the Commercial Division regarding the submission of a pre-trial exhibit book and memorandum of law, pointing out that the rules of the Commercial Division are designed to streamline procedures at trial. Riccardo's Lounge Inc. v. Maggio, Index No. 3428/2004, 9/19/2005 (Austin, J.). **

Discovery; preclusion as penalty for noncompliance. Contracts; alleged written agreement; modification of theory of the case; alleged oral agreement; Statute of frauds (GOL 5-701(a) (10)); part performance. The plaintiff claimed that he was owed a 2% commission on an $8 million investment he had procured. The individual defendants moved for an order of preclusion and summary judgment. The court found that the willful and contumacious conduct required to invoke the preclusion remedy could be inferred from the plaintiff's eluding of attempts to depose him, which he and his counsel said were due to his wife's grave illness and need to care for her. The evasions included not responding to repeated requests for available dates and participating in settlement negotiations contingent on his promise to appear the next day for his deposition, which was then cancelled. The defendants had finally raised whether the wife was ill or dead and the court found that the plaintiff had misled the court or his attorney about her health. The plaintiff claimed that he could not be deposed because of a one-year mourning period in Judaism, but proof showed that mourners were only prohibited from working during the seven days of *shiva.* The court indicated sympathy for the plaintiff's loss, but noted that once the plaintiff had chosen to bring his claim during his wife's illness he was responsible to prosecute it. And, the plaintiff's contentions of grief did not really jibe with his having both taken part in settlement negotiations and boasted in them of his business exploits. The plaintiff's affidavit was precluded, but in the First Department the order was not an automatic basis for the summary judgment the defendants sought. Here, not having the plaintiff's deposition put the defendants at a disadvantage. The precluded affidavit sought to change the plaintiff's theory of the case from breach of contract to claims for unwritten modification of a written agreement or quantum meruit. Applying the summary judgment standard under CPLR 3212 also led to dismissal since the complaint alleged a written agreement providing that the plaintiff would get a commission on investments procured, but the one agreement submitted did not support the claim. The plaintiff claimed that the agreement had been amended by the parties' actions and conduct, unequivocally referable to the agreement. But the plaintiff offered no proof that an $8 million investment had actually been made or made because of his efforts. He could not defeat summary judgment with causes of action not alleged in his complaint when the defendants had shown that the complaint was without merit. To allow the plaintiff to amend now - - leave the plaintiff had not even requested - - would only perpetuate a stalled action, the court stated. In any case the plaintiff's two new-minted claims would be barred by the Statute of Frauds under which finder's fees agreements must be in writing. The narrow exception concerning part performance would not avail the plaintiff as it required that the actions "unequivocally referable" to the agreement must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement, and the plaintiff's allegations did not meet this standard. The action continued as against the corporate defendant. Kohn v. Grigoli, Index No. 603394/2002, 10/05/05 (Ramos, J.).

Insurance; duty of excess lines of brokers; unauthorized insurer (Ins. Law 2118); disclosure obligations; exceptions; renewals; private right of action; negligence per se; common law negligence; special

relationship; ratification; proximate cause. Procedure; statute of limitations; accrual. Contracts; oral; meeting of the minds. Action by 20 affiliated nightclubs operating in New York and various other states. The clubs had needed new insurance coverage and defendant insurance brokers had been retained for this purpose. Plaintiffs had obtained coverage from Legion, a non-admitted, excess lines carrier, which was not regulated by the NY Insurance Department and the policies of which were not protected by the NYS guaranty fund. Legion became insolvent and plaintiffs sued. In NY, licensed excess lines brokers have a statutorily-imposed duty to use due care in selecting an unauthorized insurer. Ins. Law 2118. Plaintiffs claimed that defendants had violated disclosure requirements by failing to advise plaintiffs of Legion's status. The court found that a notice sent by the broker was a binder, but the court could not determine from the photocopy supplied whether the notice complied with the disclosure requirements. A co-defendant, successor broker, relied upon a notice to plaintiffs in a renewal declarations page from the prior policy with a different carrier, but the court held that it was insufficient to meet the NY disclosure requirements. Both brokers had to comply with these obligations irrespective of the signature of plaintiffs' agent on the binder and plaintiffs' alleged knowledge of excess lines coverage due to the prior coverage. The court stated that the statute contained no exceptions to the disclosure requirements. The court held that the statute applied to renewals as well. The court stated that the statute did not expressly confer a private right of action, nor had any court yet recognized one. In order to show negligence per se, then, the court found, plaintiffs would have to establish that a private cause of action arose by implication from the statutory scheme. The court ruled that plaintiffs failed in this in view of the broad regulatory authority of the Insurance Department over excess line brokers, and the existence of penalties for non-compliance. The court concluded, then, that non-compliance would not constitute negligence per se, but would be evidence of some negligence. Plaintiffs thus would have to establish common law negligence. Plaintiffs contended that one defendant had breached a heightened duty that existed based on a special relationship. The court determined, however, that plaintiffs had failed to allege facts sufficient to create a triable issue of fact on this point. The court found that the elements of such a relationship did not exist. Further, the court held that plaintiffs had ratified the policy. Plaintiffs' agent had been advised of the insurer's unauthorized status, but had not objected, and plaintiffs had renewed the policy the next year after receiving notice of the status. The court also determined that plaintiffs could not prove proximate cause in that they did not show that authorized coverage would have been procured but for defendants' actions. Moreover, the court held, plaintiffs' claims were time-barred because the claim had accrued at the time of the alleged failure to comply with statutory notice requirements and negligent selection of an unauthorized carrier, but that had occurred more than three years before the action had been commenced (CPLR 214(4)). As to alleged breach of an oral contract, the court concluded that the parties had reached no meeting of the minds as no details of the desired coverage had been communicated. Summary judgment for defendants. Polly Esther's South, Inc. v. Bogdanoff, Index No. 603948/2002, 9/20/05 (Ramos, J.).

Misrepresentation; aiding and abetting; CPLR 3016(b). Banks. Fiduciary duty; breach; aiding and abetting. Conversion; aiding and abetting. Power of attorney. Jurisdiction; long arm. Corporations; corporate veil. Investment Advisors Act. The plaintiff, a corporation with the sole asset of an account at a private Swiss bank in New York, alleged that the bank and several officers had committed fraud, and, with other defendants, other wrongs in connection with misappropriating the account's assets. Many of the defendants moved to dismiss. The fraud claims, with one exception, were dismissed because they were not alleged with requisite particularity. According to the complaint, the life savings of the plaintiff's beneficial owners had been systematically looted. The plaintiff's was one of a number of accounts that had been opened at the bank by wealthy individuals under the guidance of a certain financial advisor. He would set up a Panamanian or British Virgin Islands corporation to be the account's owner of record, and the wealthy individual would be the corporation's beneficial owner. The advisor would engage in high-risk currency trading strategies on his client's behalf, and, where he had a general power of attorney, would himself receive the account's statements and in turn issue statements to the owners. The plaintiff's beneficial owners contended that they had signed a Management Authorization specifically denying the advisor the right to transfer their account's assets. However, the advisor had gained control of the account through officers supplied by a Panamanian law firm which allegedly had, at the bank's request, generated to him broad power of attorney. Eventually, market reversals had brought disaster for his clients. The advisor had issued false monthly statements to them and intricately routed unauthorized transfers among their accounts to conceal his fraud. He had also made cash disbursements to his financial advising company's account from the plaintiff's account, mostly in amounts under $10,000 to avoid reporting requirements. He and the bank's officers, who had allegedly enjoyed close relationships, had signed an unauthorized pledge that allowed the bank to use assets in the plaintiff's account to secure loans to the advisor's company. The bank had also permitted transfers to other defendants' companies that owed the bank money. One vice president had allegedly effected a circuitous $400,000 transfer from the plaintiff's account, facilitated other improper transfers, and had routinely disguised the ultimate destination of funds. The advisor had pleaded guilty to criminal charges. Subsequently, forensic accountants had determined that funds had been improperly transferred from the plaintiff's account. The court dismissed for lack of jurisdiction some claims against some defendants who were not citizens and did not do business in New York. One was half-owner of one of the advisor's financial advising companies, which might have acted tortiously in NY State, but she was shielded by two corporate structures.

Conversion and other claims against another were based solely on hearsay. However, long-arm jurisdiction might apply to two wealthy Israeli businessmen brothers. The first brother allegedly was the advisor's partner in one financial advising company; his businesses - - like the second brother's - - had allegedly received loans from the bank, transferred from the plaintiff's account, in massive amounts that he must have known his own account could not secure. But the court dismissed a fraud claim against him as there was no basis for alleging that he had known where the funds had come from, and no evidence of reliance by the plaintiff. A breach of fiduciary duty claim also failed, because even if he had been a controlling officer of the company, neither he nor the company had received documents, nor had it been shown that he had had a fiduciary duty to the plaintiff. However, aiding and abetting claims survived. In the context of fiduciary duty, the claim requires substantial assistance, but it might emerge that the brother's actions had represented such. Because the plaintiff alleged that its moneys had gone to the brother and two corporations he controlled, claims of unjust enrichment and money had and received survived against him and against the entities. A conversion claim also stood since the plaintiff alleged that the brother had permitted the funds' transfer. The plaintiff would still have to show that the corporate veils should be pierced, and, the court noted, statutes of limitations applied. Regarding the second brother, the possibility of tortious behavior affecting New York domiciliaries was established in that he had admittedly had direct contacts with the bank, and owned a company that had been a conduit for moneys misappropriated from other accounts. Besides claiming that its assets had been used to collateralize loans to this brother's ventures, the plaintiff alleged that some of its funds had furnished a down payment on his apartment in Israel. The possible conversion seemed to have been through the brother's business's account, but if he had exercised complete dominion over it the corporate veil could be pierced. Intent is not a necessary element of a conversion claim, the court noted. Claims of unjust enrichment and moneys had and received also survived against him, for, although it was not clear whether the brother had benefitted by the unauthorized transfers, the court found that any benefit he had received might be sufficient. A fraud claim against him failed, and the aiding and abetting claim, based on the advisor's having had power of attorney and collateralization of the brother's loans with the plaintiff's funds, lacked allegations of scienter and reliance. Three other defendants were an Israeli resident and his two corporations allegedly set up to invest funds with the advisor. The individual was alleged to have exercised complete control over his corporations, the account of one of which had received the $400,000 routed from the plaintiff's account. Except as to that defendant, the account's corporate owner, the court dismissed the charges for lack of jurisdiction. The bank and some of its officers contended that a Public Deed that had appointed the advisor as its attorney-in-fact trumped the Management Authorization agreement limiting the advisor's powers over the plaintiff. Moreover, they contended, the Authorization had released the bank in advance from liability for the advisor's acts. They averred that if the plaintiff's beneficial owners had requested copies of monthly statements they would have gotten them and discovered the advisor's fraud. They pointed to UCC requirements that customers object promptly to questionable transactions on their statements. Finally, they claimed that the plaintiff had been complicit in the fraud by incorporating in Panama and by, they in essence contended, taking an active hand in what had flowed from that, beginning with giving power to the Panamanian attorneys. Only the Panamanian directors and the financial advisor were culpable, they asserted, and the pari delicto doctrine barred the instant action. The plaintiff countered that the unauthorized pledge signed by the advisor and the bank violated the specific limits of the Management Authorization, and that in order for transfers to be subject to proper objections within the UCC time-frames they had to be reasonably identified. The defendants' arguments that culpability lay elsewhere did not persuade the court. And for the pari delicto doctrine to succeed, the claimant's wrong must be equal to that of the defendant's. The bank vice president who had altered wire transfer forms was one of the individual defendants unsuccessfully charged with fraud. The court allowed aiding and abetting of fraud and of fiduciary duty claims, however, for, while the requisite scienter was not set forth, plaintiffs alleged that her special "processing" of the forms was circumstantial evidence of knowledge of impropriety. An aiding and abetting of conversion claim also remained against her and all the other bank defendants, it being the same here as a conversion claim, the court stated, as the defendants were charged with allowing the conversion. The statute of limitations applied. The one successful cause of action for fraud relied on a letter: two bank officers had signed it and it had been sent to the plaintiff's beneficial owner when he was terminally ill, conveying to him the bank's false assurances that the plaintiff's funds were safe, segregated for it exclusively and not usable as collateral by the bank. Based on this, claims for fraud and misrepresentation survived against the officers and by imputation the bank. The court noted that the fraud claims were governed by the six-year statute of limitations and also subject to a discovery rule. Aiding and abetting of fraud and fiduciary breach also remained against the three, the court finding that the unauthorized pledge agreement by which the bank used the plaintiff's assets to secure the advisor's obligations due the bank might well have been a breach of the bank's fiduciary duty to the plaintiff. The court also let stand "somewhat remote" unjust enrichment and moneys had and received claims against the bank that were based on its having approved transfers to the accounts of other defendants that had owed it money. An aiding and abetting conversion claim, requiring knowledge and actual participation, might be attributed to some bank employees although it was unclear which ones, and it remained with leave to renew. Claims of fraudulent conveyance against all the defendants were dismissed because the transfers from the plaintiff's account had not been intended to render individual debtors - - the plaintiff's debtors - - insolvent or to defraud future creditors, but rather to cover losses incurred by the advisor's investors. Some other claims survived and statutes of limitations applied. Skilled Investors, Inc. v. Bank Julius Baer Co. Ltd., Index No. 603818/2003, 9/1/05 (Freedman, J.).

Procedure; discovery (CPLR 3211(d)) regarding two unproduced trust instruments and related issues. Conversion. Unjust enrichment. Misrepresentation; representations to a third party; reliance. Constructive trust; fiduciary relationship; prior property interest. Conspiracy. Prima facie tort. Plaintiff alleged that defendants had misappropriated assets held by three off-shore trusts. Defendants moved to dismiss for failure to state a claim, failure to plead with particularity, and failure to join necessary parties. The court noted that copies of two of the alleged trusts had not been submitted on defendants' motion and denied the defendants' motion in part pending further discovery (CPLR 3211(d)) as to any additional trust instruments defendants might have. The court explained that full resolution of various claims and the issues regarding joinder was dependent upon further discovery of all trust agreements and the identity of the trustees and beneficiaries. The court further discussed that survival of plaintiff's conversion and unjust enrichment claims was dependent upon the terms of any additional governing trusts. A beneficiary could recover on these theories where assets of a trust are transferred in violation of the trustee's duties. The court further noted that although it did not appear plaintiff would have any recourse under the broad terms of the one trust which had been identified to the court, plaintiff had shown that she might be a beneficiary under some other trust instrument. The court granted defendants' motion to dismiss plaintiff's claim for fraud, finding that plaintiff had not alleged that she had reasonably relied on defendants' alleged misrepresentations to induce her to transfer assets to the trusts. Alleged misrepresentations had been made to the settlor, but plaintiff did not assert that the settlor had reasonably relied thereon. The court next dismissed a claim for constructive trust, finding that plaintiff had not pled facts (other than a family relationship) to establish a fiduciary relationship between her and the defendants, nor had she asserted a prior property interest in the settlor's assets. The court dismissed plaintiff's conspiracy claim as redundant, explaining, first, that New York does not recognize a separate tort of conspiracy, and, further, to the extent that defendants might be directly implicated in acts of conversion, the conspiracy claim was unnecessary. The court dismissed the claim for prima facie tort, because plaintiff had failed to allege facts indicating that she had suffered special damages or that defendants had acted with requisite disinterested malevolence. Finally, the court granted plaintiff leave to amend the complaint upon the completion of discovery, which would be limited to any additional written trust documents, and information which might reasonably be found to reveal their existence. Peters v. Peters, Index No. 600456/2004, 9/14/05 (Freedman, J.).

Procedure; summary judgment; opposition; speculation and conjecture. Tortious interference; injurious falsehood; prima facie tort; causation. Plaintiff and defendant were shareholders of a corporation until its dissolution. Plaintiff sued defendant claiming that defendant had disparaged plaintiff and caused him to be terminated from other employment. The plaintiff claimed that documents and information had been supplied on several occasions to plaintiff's employer and that these acts had caused the termination. Plaintiff asserted tortious interference and other claims. Defendant moved for summary judgment. Plaintiff was obliged to demonstrate by admissible evidence the existence of a triable issue of fact. Plaintiff offered circumstantial evidence that defendant was the only one who could have disseminated the information and that defendant had had the motive to do so. The court held, however, that plaintiff had failed to present probative evidence and that plaintiff was relying upon speculation, conclusory opinions and hearsay. Further, plaintiff had admitted at his deposition that the termination had occurred after the employer had conducted an independent investigation, not due to the information supplied. Claims for prima facie tort and injurious falsehood failed due to the speculative nature of plaintiff's allegations and lack of causation. Summary judgment for defendant. Dicosomo v. Getzoff, Index No. 13219/2003, 9/20/05 (Rudolph, J.). **

UCC 9-610; commercial reasonableness as to disposition of collateral; creditor's duty to liquidate or manage assets. Motion by defendant secured creditor to dismiss cause of action and demands for punitive damages. Defendant was creditor in possession of assets of plaintiffs due to foreclosure in connection with a 16 million loan. Here, plaintiffs asserted that defendant had had no right to retain the collateral indefinitely and that defendant's duty to act in a commercially reasonable manner had required defendant to proceed to dispose of the assets. Defendant claimed that it could dispose of the collateral at any time and in any way it saw fit. The court disagreed. Creditor and debtor possess rights in the collateral, even after default and lawful seizure. The creditor must act in a commercially reasonable manner as to every aspect of the disposition of collateral (UCC 9-610). Even if the creditor is vested with title post-seizure by the loan or security agreement, the debtor retained protections. Thus, defendant could not dispose of the collateral at any time and in any way it saw fit. Defendant had been in possession for two years. The court ruled that defendant had to proceed to liquidate or manage the assets in a reasonable time. The delay was an issue of fact, but at the pleading stage the issue could not be disposed of. Motion denied, except as to demands for punitive damages. Teevee Toons, Inc. v. Prudential Securities Credit Corp., Index No. 603116/2002, 9/14/05 (Cahn, J.).

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