[* 1]

ORIGINAL

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

RODEO FAMILY ENTERPRISES, LLC, in its individual capacity, and derivatively on behalf of OYSTER BAY GROUP LLC, and SAMIR M. SHAH,

Plaintiffs,

-against-

SCOTT MATTE, NEIL MATTE, NMY CORP., S&CM ENTERPRISES, LLC, OYSTER BAY GROUP LLC, and HERTZ, HERSON & CO., LLP,

Defendants.

INDEX NO.: 600378/2010
MOTION DATE: 2/14/11
SEQUENCE NO.: 09, 10, 11,12, 14 & 15

The following papers were read on this matter:

Motion to Dismiss Amended Counterclaims of Matte Defendants (09) ... 1
Memorandum of Law in Support of Motion 2
Motion to Strike Affirmative Defenses of Matte Defendants (10) 3
Memorandum of Law in Support of Motion to Strike Affirmative Defenses 4
Motion to Dismiss Counterclaims of Oyster Bay Group LLC (11) 5
Memorandum of Law in Support of Motion to Dismiss OBG Counterclaims 6
Motion to Strike Affirmative Defenses of Oyster Bay Group LLC (12) .. 7
Memorandum of Law in Support of Motion to Strike OBG Aff. Defenses 8
Affirmation of Oyster Bay Group in Opposition to Motion to Strike 9
Cross-motion of Matte Defendants to Amend Amended Answer and to Replead Counterclaims and/or Affirmative Defenses 10
Memorandum of Matte Defendants in Opposition to Motion to Dismiss Amended Counterclaims and for leave to Replead 11
Reply Memorandum of Law in Further Support of Motion to Dismiss Amended Affirmative Defenses of Matte Defendants 12

PRELIMINARY STATEMENT

The plaintiffs have moved under two motions (seq. nos. 9 and 10) to dismiss the counterclaims and strike the affirmative defenses of defendants Scott Matte, Neil Matte, NMY Corp., and S&CM Enterprises, LLC (collectively "the Matte defendants"). The plaintiffs have also moved under two additional motions (seq. nos. 11 and 12) to dismiss the counterclaims and strike the affirmative defenses of Oyster Bay Group, LLC ("OBG). The Matte defendants, in turn, have cross-moved for leave to amend their Answer, add two new counterclaims, and replead any counterclaims or affirmative defenses which are deemed legally insufficient. OBG has similarly cross-moved for leave to amend its Answer, add two new counterclaims, and replead any counterclaims or affirmative defenses which are deemed legally insufficient.

This cases arises from a dispute regarding the calculation of the membership interest of plaintiff Rodeo Family Enterprises ("Rodeo"), the holding company through which plaintiff Samir M. Shah ("Shah") holds a 25% interest in Oyster Bay Group ("OBG"). OBG, through its wholly-owned subsidiaries or "business units," acquires large pools of non-performing consumer debt at a small fraction of the total receivables represented by such consumer debt, and its revenues are comprised of any collections it obtains from these portfolios or large pools of consumer debt.

The Buy Out formula contained in the 2004 Buy/Sell Agreement, which is at the center of this dispute, calls for determining the total value of "membership interests" (presumably equity stakes) in OBG, by aggregating either the "net liquidation value" or the "GAAP-basis equity" of three wholly-owned subsidiaries, RJM Acquisitions, Island National Group, and LTR Support Services. Specifically, the Agreements appears to call for determining the "net liquidation value of that Business Unit [RJM Acquisitions]" (Katz Aff., Ex. 3 at p. 8) in *entirety*, by considering only a *portion* of RJM's total asset balance as might be reflected in its financial statements. Namely, it calls for valuing the "net liquidation value *of that Business Unit*" (*id*, p. 8) on the one hand, and on the other

hand, the Agreement references, for that calculation, only the "net liquidation value *of the purchased portfolios of consumer debt*... owned by RJM" (*id.* at p.5), to the exclusion of other entries to RJM's asset balance in its financial statements,[1] such as any deductions to RJM's total asset balance due to any cash expenses related to acquiring RJM's portfolios of consumer debt, or the cost of goods sold ("COGS"). Similarly, the Agreement calculates the value of OBG's membership interest in Island National Group according only to Island National's revenues, that is, "the annual fees earned by that Business Unit" (*id.* at 8), without accounting for any liabilities (such as accounts payable and debts owed) or for any cash asset deductions. In contrast, the Agreement calculates the value of the membership interests in LTR Support Services according to its "GAAP-basis equity" as reflected fully in its financial statements.

The defendants contend that the total acquisition cost of the portfolios of non-performing consumer debt must be subtracted from the "net liquidation value" of RJM. In the normal course of accounting, any acquisition cost of these large pools of debt would have been presumably accounted for, as either cash asset deductions or as increases in liabilities (depending on whether the pools of consumer debt were purchased with cash or additional debt) and some corresponding adjustment to equity to reflect the "net worth" of the asset or net income. If the value of OBG's membership interest in RJM were determined only by the value of total equity reflected in the accounting statements or the company's "net worth"—according to the excess of total assets over liabilities (West's Encyclopedia of American Law, 1998)—, the acquisition costs would

---

[1] This incomplete picture of RJM's total assets is presumably what accounting firm Holtz Rubenstein Reminick was referencing when it stated that "the net liquidation value of the purchased portfolios of consumer paper... is not considered a basic financial statement but instead would be considered a schedule" (Gionis Aff., Ex. 7); that is, a schedule detailing only *one* of various additions and deductions reflected in the asset balance of RJM's financial statements. That this is an incomplete picture of RJM's total assets (or what might be its *actual* "net liquidation value"), is also supported by plaintiff's own expert affidavit, which seeks to establish that a *partial* presentation, that is, "a presentation of prospective financial information that excludes one or more of the items required for prospective financial statements...," is not incompatible with the attestation standards for certified public accountants. (Shulman Aff. ¶¶ 18-20).

thus be entirely accounted for. However, the Agreement uses the term "net liquidation value" to assess the value of OBG's membership interest in RJM according to its assets. The "liquidation value" of an asset is normally the "cash price or other consideration that can be received in a forced-sale of an asset." (Barron's Dictionary of Accounting Terms, 2005). In the context of corporate securities, the "liquidation value [per share]" is the "value per share that will be paid to preferred stockholders upon the liquidation of the corporation" and "net liquidation value" is "the amount, after expenses and taxes, that can be realized for listed and readily marketable securities held by a corporation." (Guy Wanjialin, *An International Dictionary of Accounting & Taxation*, 2004).

BACKGROUND

Rodeo, NMY, and S&CM are the three members or holding companies of Oyster Bay Group LLC ("OBG"), which is a New York limited liability company. Mr. Shah is the principal of Rodeo. Neil Matte is the principal of NMY. Scott Matte is the principal of S&CM. Until Mr. Shah resigned in August 2009, the Mattes and he were the three managers of OBG and RJM. OBG is a holding company formed in 2004. OBG owns 100% interest in three New York limited liability companies, RJM Acquisitions LLC ("RJM"), Island National Group LLC ("Island") and LTR Support Services, LLC (LTR).

RJM is OBG's wholly owned subsidiary and is using a $60,000,000 line of revolving credit. RJM is involved in acquiring large pools of non-performing consumer debt, primarily involving small-balance unsecured credit cards, overdrawn consumer accounts and other forms of small balance consumer debt. The complaint alleges that since 2001, RJM has invested $162 million to acquire 30 million accounts with $21.6 billion in receivables, and, through the end of June 2009, had collected over $360 million. Island is another OBG subsidiary, which sets out to collect as much of the indebtedness as possible. RJM is engaged in the purchase of consumer debt (portfolios) and uses Island to collect that debt.

Interest in OBG and Resignation by Rodeo and Shah

Shah, named as CFO of OBG, was given an equity interest in OBG (through Rodeo), but contributed no capital. The Mattes contributed their entity, RJM, and $1,000,000.00 each to OBG. Thus, RJM was one of the three subsidiaries owned by OBG. Shah obtained the Credit Facility for OBG (now in the amount of $35,000,000) and gave his personal guaranty. The Mattes provided him with an Indemnity Agreement, made on July 1, 2001 among Neil and Scott Matte and Samir Shah, absorbing all of the risk of this massive loan themselves. :

Shah also received salary, bonuses, and benefits. Originally, he was a 5% equity owner, but it subsequently changed to a 25% membership interest in OBG. Shah received $4,000,000 distribution in 2005 when OBG sold a substantial portion of its asset portfolio, and a total of over $11,000,000 to date.

The Matte defendants, founding members and managers of RJM, and Shanti Holdings, the predecessor of Rodeo, entered into a Cross Purchase Agreement in 2001. In 2004, plaintiffs, the Matte defendants, and OBG entered into revised Cross Purchase Agreement in relation to the purchase of Rodeo's membership interest in OBG by OBG in the event that Mr. Shah ceased being a manager of RJM. Such agreement adopted the same language as was contained on 2001 Agreement. The valuation in the Agreement was dependent upon a formula, known as the "Curve" (see calculation below).

Defendants contend that Shah offered to "tear up" the indemnity agreement from the Mattes, and to formally change the accounting methodology known as the "Curve" to a more appropriate and accurate curve if, and only if, he was given an equal percentage ownership interest with the Matte Brothers. When the Mattes agreed to formally change the "Curve," Shah refused to do so.

Subsequently, Shah tendered his resignation and has demanded a payout of the value of his (Rodeo's) ownership interest in OBG. Plaintiffs contend that defendants

seek to change the methodology by which the value of RJM is calculated, including the use of DDA Curve and the treatment of indebtedness of RJM as an expense reducing the amount against which Shah's percentage is to be multiplied. Plaintiffs allege that neither of these methodologies has been used for any purpose during the existence of RJM and OBJ.

Buy-Out Formula in Cross Purchase Agreement

The Formula, described in the Cross Purchase Agreement, arguably controls the buyout of Rodeo's interest as triggered by Shah's resignation. This Buy Out Formula was negotiated, interpreted, and applied the same way by all parties for almost ten years as urged by Plaintiffs in their First Amended Complaint. The dispute arose out of calculation of one of the four parts of the Formula.

Historically, the valuation of the portfolio of debts owned by RJM utilized the "curve" which was developed by Shah and James Pellen, an accountant with defendant Hertz, Herson & Co., LLP to estimate the value of the pools of indebtedness which RJM had in its inventory.

- **Section 2(b) of Cross purchase agreement** indicates how the "Net Liquidation Value" of RJM's portfolios of consumer debt should be determined and provides description of buy out formula calculation:
    - Net Liquidation Value= (projected collections over the remaining life - costs of collection from the projected collections)*0.25
    - Section 2(b) of Cross purchase agreement specifically indicates:

      i)the accounting "Curve," (i.e. the methodology utilized to estimate the projected collections over the remaining life of each pool of consumer debt that is acquired by RJM based on the actual collection performance), and

ii) determining the costs of collection of these pools of consumer debt and RJM's operating expenses **without including RJM's debt or cost of goods sold or costs of acquisitions, and**

iii) subtracting the costs of collection from the projected collections, and multiplying the result – the Net Liquidation Value of RJM - by Rodeo's membership interest percentage of 25%, Rodeo's share of the Net Liquidation Value of RJM

- In order to make this calculation, the following prospective and historical financial information must be known and calculated:

  Prospective information:

  - Projected collections over the remaining life of the Portfolio;
  - Appropriate "projected expenses" in addition to projected operating and collection expenses if deemed appropriate related to each such Portfolio

  - Historical information:
    - RJM's average cost of Capital for the last 3 years
    - Historical operating and collection expenses for the prior three years but not including any compensation and compensation of the controlling person being bought out related to each such Portfolio
    - Historical "actual collections" for the prior three years

- Once this information is determined, it can be attested to by the accountants, and the NLV can be calculated using simple math.

Buy Out Agreement:

- Paragraph 2 (a) 'Procedures to follow for the Sale and Purchase, or Redemption, of Membership Interest' of Buy Sell Agreement provides, "Upon the death or

permanent disability of Shah, the members of OBG other than Shanti shall purchase, and Shanti shall sell, Shanti's membership interest in OBG in accordance with the provisions of that certain Cross Purchase Agreement dated the date hereof among OBG and All of the Class A Members of OBG."

- This Agreement requires an "Audited Special Purpose Report" to value Rodeo's membership interest in OBG to be prepared by OBG's accountant. Paragraph 2 (b) 'Purchase Price' states, " The Company shall retain its accounting firm to prepare an audited Special Report to determine the net liquidation value of the purchased portfolios of consumer debt owned by RJM and its wholly-owned subsidiary."
- It provides the method of calculation of the Net Liquidation Value of a portfolio. Paragraph 2 (b) 'Purchase Price' states, "Net Liquidation Value of a portfolio shall equal (x) the projected collections over the remaining life of such Portfolio, calculated using the accounting methodology reflected in the notes to the applicable RJM audited financial statements, discounted to present value using the Unit's average cost of capital over the prior three years as of the date of determination, less (y) the projected expenses related to each such Portfolio over such remaining life. The projected expenses related to each such Portfolio shall include, but are not limited to (A) collection fees and expenses projected to be paid to any third-party collection agency used by that Unit, and (B) without duplication of clause (A) above, projected operating and collection expenses of that Unit over the remaining life, which are defined as a percentage of the projected collections and which are determined by computing the average of the portfolio's (3) three years' actual operating and collection expenses as a percentage of those same three years' actual collections."

Preparation of "Audited Special Report"

Hertz Herson was formally engaged by OBG to perform an "Audited Special Purpose Report" but resigned as OBG's accountant after plaintiffs interposed a malpractice claim against it. Thus, no "Audited Special Purpose Report" was prepared. Based on this, defendants contend that the Buy-Out could not, and cannot be accomplished. Further, OBG's accountant, now Holtz Rubenstein Reminick LLP, issued a Memorandum after completing the 2009 audited financial statements on December 23, 2010. In such a Memorandum, Holtz Rubenstein Reminick LLP determined that the attestation standards for certified public accounts did not permit it to prepare an Audited Special Purpose Report that calculated the "net liquidated value" of RJM only according to calculation provided in the 2004 Buy/Sell Agreement, without subtracting the acquisition costs of the portfolios of consumer debt.

For the reasons mentioned above, defendants contend that the formula in the Cross-Purchase Agreement cannot be applied. Defendants further contend that if Shah's 25% interest is valued at $16,000,000 as demanded, OBG would have to be worth at least $64,000,000. According to the defendants, OBG is worth nowhere near this amount.

Defendants state that even if formula could be applied, Shah refused to recognize that expenses are to be deducted form revenues when calculating the Net Liquidation Value of RJM. The cost of goods sold ("COGS") is an expense that must be taken into consideration, according to a Client's Audit Questionnaire for 2008.

Subordination Agreement

Defendants further contend that Buy-Out Formula should not be enforced because of the Subordination Agreement with the RJM Credit Facility. This agreement provides:

> The Junior Creditors and the Guarantor each agree that the Administrative Agent and the lenders shall first be entitled to receive indefeasible payment in full in cash of all Senior indebtedness before the junior Creditor shall be entitled to receive or retain of all Senior Indebtedness …

Stipulation

Plaintiffs contend that the Matte defendants' affirmative defenses violate a stipulation entered among Plaintiffs, the Matte Defendants, and OBG (Katz Affirm. Exh. 3). Further, Plaintiffs state that the Court should enforce the Stipulation by striking those defenses that are simply restating the withdrawn counterclaims. The Stipulation was entered into at the encouragement of the Court at the September 2010 compliance conference in order to narrow the scope of discovery disputes between the parties. Stipulation's provisions include the following:

This Action

- Plaintiffs are seeking a summary judgment and declaratory judgment on the issue of interpretation of Formula. Plaintiffs contend that:
    - The Matte Defendants and OBG seek to undermine the agreed-upon methodology for evaluating Rodeo's membership interest in OBG in connection with a buy out. Defendants Mattes reduce the value of the assets of OBG by claiming indebtedness as an expense and changing the curve by which the value of the portfolio of debts owned by RJM is measured. The Matte Defendants do not take issue with the meaning of the Formula and attempt to avoid its enforcement
    - The Matte defendants have asserted defenses that do not take issue with the Plaintiffs' interpretation of the Buy Out Formula. Plaintiffs contend that defendants' position as to the rescission or reformation of Buy Out Formula fail as a matter of law and must be dismissed and stricken.

DISCUSSION

I. Motion (Seq. 9) to Dismiss Matte Defendants' Counterclaims

Motion Sequence No. 9 requests dismissal of the amended counterclaims of the Mattes, NMY Corp. and S & CM Enterprises, LLC ("Matte Defendants") pursuant to CPLR § 3211 (a)(1), (a)(3) and (a)(7) and CPLR 3016 (b).

CPLR § 3211 (a)(1) provides as follows:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, " . . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim". (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP,* 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine,* 2010 WL 3583424 (N.Y.A.D. 2d Dept.]).

CPLR § 3211 (a)(3) provides for a motion in which a party asserts that "the party asserting the cause of action has not legal capacity to sue.

When determining a motion to dismiss for failure to state cause of action pursuant to CPLR § 3211 (a)(7), the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass',. Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]).

The following is a summary of the Matte Defendants' counterclaims and the basis upon which plaintiffs seek their dismissal.

COUNTERCLAIMS	BASIS FOR OBJECTION
First: Rodeo breached 2004 Buy Sell Agreement by not selling its membership interest in OBG to OBG pursuant to provisions of agreement, damaging Matte defendants in amount of $35,000,000	Failure to cite provisions of contract allegedly breached. Failure to allege how failure to sell interest damaged Matte defendants. OBG and Matte defendants have prevented sale and have benefitted from lack of sale.
Second: Breach of Covenant Not to Sue. Matte Defendants and S&CM and NMY are beneficiaries of the Subordination Agreement. Rodeo/Shah are fiduciaries of Matte Defendants and OBG, NMY and S&CM and have breached fiduciary duties.	Rodeo owes no fiduciary duty to OBG because OBG is a Manager-managed, and not a member-managed LLC. The latter owe fiduciary duties to members. OBG Operating Agreement indicates Rodeo never a Managing Member or delegated management authority. No fiduciary duty of Rodeo. Duplicative of Breach of Contract Claims
Third: Breach of Covenant of Good Faith and Fair Dealing. Shah was CFO of OBG and a sophisticated financier and attorney. Shah/Rodeo failed to draft OBG documents in a fair and even-handed manner, acted disloyally by working for potential competitor, absconded with OBG's personal property and proprietary/confidential information, had improper communications with Credit Facility, caused OBG's accountant to resign, failed to utilize proper accounting "curve" in connection with OBG's financial statements.	Plain language of Subordination Agreement indicates OBG does not have standing to sue. Only Key Bank has standing. Covenant is a promise by S&CM and Shanti in favor of Key Bank not to sue OBG. Intention was to subordinate buy out obligations to OBG's obligations as guarantor of RJM's debt to Key Bank. 2(g) of Subordination Agreement distinguishes between Senior and Junior creates only one promisee, Key Bank and multiple promisors. Shah not party to Subordination Agreement and cannot be sued for a breach. No Money damages for breach of covenant not to sue. OBG barred by laches.

Fourth: Reformation. At time of Cross-Purchase Agreement parties intended the Formula to reflect what "Net Liquidation Value" generally means. Parties believed term was to be net of costs and expenses, including costs of goods sold/cost of acquisition. Formula does not reflect parties' intention as a result of mutual mistake. *Alternatively* Shah drafted or participated in drafting to insure his sole and unfair advantage. Shah intended the Agreement to produce a grossly inflated buy-out of Rodeo's interest. Formula as now advanced by Shah does not relate to term "Net Liquidation Value". Claims a Unilateral Mistake by Matte defendants caused by unfair advantage or dishonesty of Shah.	OBG does not satisfy pleading requirements for breach of implied covenant of good faith and fair dealing. Implicit in all contracts. Should be dismissed if redundant that party did not act in good faith in performing contract obligations. Counterclaim fails to allege facts that tend to show that plaintiffs sought to prevent performance of contract or withhold its benefits from defendants. No claim by Rodeo in connection with RJM Management Agreement because Rodeo not party. Neither is OBG or Shah.
Fifth: Rescission or Nullification. Cross Purchase Agreement and Formula should be rescinded and/or nullified to extent that it does not represent "Net Liquidation Value", either by mutual mistake or unilateral mistake caused by fraud of Shah.	Seeks to modify definition of "Net Liquidation Value" to include costs of goods sold or acquisition value. Must show mutual mistake. Heavy presumption that document reflects intention of the parties. Sophistication of parties to be considered. Bare allegation of unilateral mistake inadequate. Must support by legally sufficient allegation of fraud. Integration clause usually precludes reformation.
Sixth: Declaratory Relief as to Impossibility of Performance. Formula requires an Audited Special Purpose Report, which does not exist. In addition, term "Net Liquidation Value" fails to include costs and expenses normally utilized to compute Net Liquidation Value.	Available only when lacking a complete and adequate remedy at law. Purpose is to restore parties to their position before the contract, which is not what is requested. Integration clause and laches requires dismissal of counterlaim.

Seventh: Unjust Enrichment. Claim is that Shah/Rodeo received over-distribution of funds from OBG and received excessive amounts of bonus payments. Shah/Rodeo knew it was not entitled to the funds but refused to repay them.	Impossibility must come from outside source, not be something parties could have forseen and guarded against. Preparation of Audited Special Purpose Report not objectively impossible. OBG could have forseen and provided for non-performance or resignation by accountants. Defendants cannot both seek reformation or recission and still require Rodeo's interest in OBG be bought out. Cannot have Rodeo's interest without paying for it.

First Counterclaim

Plaintiffs assert that the Matte Defendants were not parties to the 2004 Buy Sell Agreement (Exh. 4 to Mot. Seq. 9), and therefore are without standing to allege a breach by Rodeo. The Agreement was between Oyster Bay Group and Shanti, the predecessor of Rodeo, and provided for the redemption of Shanti's shares in OBG in the event of the termination of the 2001 Manager Agreement between RJM and Shah,

The motion to strike the First Counterclaim is denied. Contemporaneously with the execution of the Buy Sell Agreement, Shanti, OBG, NMY Corp. and S & CM Enterprises executed a Cross-Purchase Agreement in the event of death or disability of a member of OBG. It is clear that the Matte defendants, personal guarantors of the Credit Facility, and indemnitors of Shah, have a fundamental interest in the Buy/Sell Agreement. Even though an agreement may not be signed by the party seeking its enforcement, where the agreement, read as a whole, and in conjunction with contemporaneously executed documents, intended to give non-signatories enforceable rights, they have standing to seek its enforcement. (*Diamond Castle Partners IV PRC, L.P., et al. v. IAC/InteractiveCorp.*, 2011 WL 722402 [N.Y.A.D.1 Dept.]). The nature of the claimed breach is adequately pleaded in the counterclaim. Simply stated, defendants contend that plaintiff was obligated to convey its interest in OBG in accordance with the Agreement, and failed to do so. The defendants need not plead specific damages; rather, the existence and amount of damages are left to the trial.

Second Counterclaim

Plaintiffs move to strike the second counterclaim, an alleged breach of a covenant not to sue, on the ground that Key Bank is the sole beneficiary of that covenant, the Matte defendants are without standing to sue, Shah is not a party to the Subordination Agreement in which the covenant is contained, and money damages are not recoverable for a breach of a covenant not to sue.

S & CM Enterprises, NMY Corp. and Shanti Holding Corp., as Junior Creditors, Keybank National Association, as Administrative Agent for lenders, and Oyster Bay Group, as Guarantor entered into a Subordination Agreement (Exh. 5 to Motion Seq. 9) The Agreement referenced a Credit Agreement among RJM Acquisitions LLC (the Borrower) the Lenders, and the Administrative Agent, under the terms of which Lenders advance the funds for RJM to acquire pools of consumer indebtedness. The Agreement refers in ¶ IV to the Cross-Purchase Agreement and the Shanti Buy-Sell Agreement by which Guarantor (OBG) agreed to purchase the Shanti Membership interest.

Pursuant to ¶ 2 (b), the Junior Creditors and the Guarantor agreed as follows:

> that until all Senior Indebtedness is indefeasibly paid in full in cash, no Junior Creditor shall: (i) exercise any rights or remedies (including but not limited to, setoff rights) with respect to the Junior Obligations, (ii) assert any claims with respect to or against the Guarantor or (iii) take any action or institute any proceedings, directly or indirectly (including, but not limited to, commencing or joining with any other crediror or creditors in commencing any Insolvency Case against the Guarantor or the Borrower or filing any motion for relief from stay or motion for adequate protection in any Insolvency Case.

As previously noted in the discussion with respect to the First Counterclaim, the Mattes and Shah have personally guaranteed the approximately $35,000,000, but Shah has the benefit of indemnification from his fellow Junior Creditors. The purpose of the covenant not to sue is obviously designed to avoid an interruption in the flow of income to OBG such as would inhibit the ability of the Lenders to receive repayment. Failure to repay may well expose the defendants to personal liability, which may be very substantial. To this extent they have a significant

interest in enforcing the covenant not to sue. The motion to dismiss the second counterclaim is denied.

Third Counterclaim

Defendants allege a breach of the implied covenant of good faith and fair dealing in connection with participation in various agreements, including the RJM Management Agreement, the Buy-Sell Agreement and Cross Purchase Agreement. As a matter of law, every contract imposes upon each party to the contract a duty of good faith and fair dealing in its performance and enforcement. It is as much a part of the contract as if it were expressly stated in the agreement. Good faith requires that neither party will act in such a way so as to prevent the other party from carrying out the agreement on their part.

The language of the Third Counterclaim asserts that Shah/Rodeo failed to act in an even-handed manner in his drafting of documents to his own benefit, performed services for potential competitors, absconded with Oyster Bay's personal property and confidential information, had improper communications with the Credit Facility, caused OBG's accountants to resign and failed to utilize the proper accounting "curve" in connection with OBG's financial statements.

In the most liberal of interpretations, it may be fair to say that plaintiffs' bringing suit against the accountants for OBG, thereby forcing their resignation, coupled with the purported inability of any other accountant to produce the Special Purpose Report, a necessary predicate to calculating the value of Rodeo's membership share, and the claimed reliance upon an accounting "curve" which allegedly frustrated the viability of the Buy-Out Agreement, constituted conduct which was designed to deprive the defendants of the fruits of the contract. (*Dalton v. Educational Testing Serv.*, 87 N.Y. 384, 389 [1995]).

The covenant of good faith and fair dealing provides limited recovery when no other contractual remedy is available. In (*Rowe v. Great Atl. & Pac. Tea Co.* (46 N.Y.2d 62, 69 [1978]), the Court of Appeals reversed and reinstated the determination of the trial court that there was no implied covenant of good faith and fair dealing so as to preclude A & P from assigning its lease to the operator of Gristedes supermarkets. The decision noted that courts should be extremely reluctant to interpret an agreement as impliedly stating something which sophisticated parties neglected to specifically include. Lack of foresight does not create rights or

obligations. (*Mutual Life Ins. Co. Of N.Y. v. Tailored Woman,* 309 N.Y. 248, 253).

More pointedly, however, it has long been so that a cause of action for breach of the implied warranty of good faith and fair dealing cannot be maintained because it is premised on the same conduct that underlies a breach of contract cause of action and is "intrinsically tied to the damages allegedly resulting from the breach of contract". (*MBIA Corp. v. Merrill Lynch,* 81 A.d.3d 419 [1 Dept.2011]). The Third Counterclaim is dismissed.

Fourth Counterclaim

This counterclaim seeks reformation of the Buy-Out Formula in the Cross Purchase Agreement so as to reflect the "true" Net Liquidation Value of RJM, including, as it is commonly understood, the cost of goods sold ("COGS") or the acquisition costs of the portfolios of consumer debt it purchased. The Matte Defendants contend that they misunderstood the meaning of the formula as originally drafted by Shah, and that they were led to their unilateral misunderstanding as a result of fraud perpetrated by Shah. He allegedly misled them into believing that the Buy-Out Formula included a consideration of the cost of acquisition, as is the usual case in estimating a Net Liquidation Value. In their amended reformation counterclaim, they assert that, rather than affirmatively misrepresenting the contents of the Buy-Out Formula to them, Shah concealed from them the meaning of the term, and that the parties were mutually mistaken about the definition of Net Liquidation Value as contained in the Formula.

Reformation is an equitable remedy that generally applies to cases of mutual mistake, but it can also be "predicated upon a unilateral mistake on one side and deceptive conduct on the other side which tended to obscure the true agreement..." (*Nash v. Kornblum*, 12 NY2d 42, 48 [1962]). As this is only on a motion to dismiss, the court considers only whether the facts as alleged adequately state a cause for legal relief. The defendants have adequately alleged mutual mistake, or in the alternative, their unilateral mistake and the deceptive conduct of Rodeo and/or Shah. Neither is it relevant that the Buy/Sell Agreement contained a merger clause. (*See Barash v. Pa. Terminal*, 26 NY2d 77 [1970]). The motion to dismiss the Fourth Counterclaim of Matte Defendants is denied.

Fifth Counterclaim - Rescission or Nullification

The Matte Defendants also allege that the Cross-Purchase Agreement and Formula should be rescinded or modified on the grounds that the formula does not represent "Net Liquidation Value", and that this was caused by unilateral or mutual mistake, or as a result of fraud by Shah. A court may rescind a contract if it involves fraud in the inducement, lack of consideration, impossibility of performance, or illegality. CPLR § 3002 (e).

In order for a New York court to allow rescission of a contract based on unilateral mistake, 'a party must establish that (i) he entered into a contract under a mistake of material fact, and that (ii) the other contracting party either knew or should have known that such mistake was being made.' (*Waste Management, Inc. v. Capitol Environmental Services, Inc.*, 429 F.Supp.2d 582 [S.D.N.Y.2006], citing *Ludwig v. NYNEX Serv. Co.*, 838 F.Supp. 769, 795 [S.D.N.Y.1993]). "As a basic proposition, a contract is made voidable by either unilateral or mutual mistake only where the asserted mistake concerns a 'basic assumption on which the contract was made' ". (*The Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.* 157 F.3d 933, 939 [2d Cir.1998], citing RESTATEMENT (SECOND) OF CONTRACTS, §§ 152 — 153).

The essential difference between what the Buy-Out Agreement appears to say, and what the Fifth Counterclaim alleges it should say, is that the acquisition cost of certain assets should be deducted from the value categorized as the Net Liquidation Value *of RJM*, rather than base this calculation only on the Net Liquidation Value *of the portfolio of consumer debt*, which would represent only a partial or incomplete picture of RJM's asset balance or equity . The motion to dismiss Fifth Counterclaim is denied.

Sixth Counterclaim

This counterclaim seeks Declaratory Relief that the Agreement as written is impossible of performance because the Formula requires an Audited Special Purpose Report, which Defendants contend does not exist, and because the term "Net Liquidation Value" fails to include costs and expenses normally utilized to compute the net liquidation value. The motion to dismiss it is granted.

The defense of impossibility may be invoked when the subject matter or the means of performance is made objectively impossible due to circumstances that could not have been

anticipated, or guarded against in the contract. (*Menorah Home and Hosp. For the Aged and Infirm v. Laufer,* 19 Misc.3d 1102(A), [Sup.Ct. Kings Co.2008], *see also Kel Kim Corp. v. Central Markets, Inc.,* 70 N.Y.2d 900, 902 [1987]). In this case there are no such *unanticipated* circumstances, and the assertion that the terms of the formula should have included a deduction for cost of acquisition could have been guarded against in the Agreement—if in fact the Buy/Sell Agreement unambiguously excludes acquisition costs from the Net Liquidated Value of RJM—or the absence of a deduction for these acquisition costs was the result of unilateral or mutual mistake.

Seventh Counterclaim

Matte Defendants claim unjust enrichment in that Shah/Rodeo received over-distribution of funds from OBG and received excessive bonus payments, which they have refused to refund, although demanded.

The concept of unjust enrichment is "quasi-contractual" in nature, and is based upon the equitable principle that a person must not be allowed to enrich himself unjustly at the expense of another. (*Waldman v. Englishtown Sportswear, Ltd.,* 92 A.D.2d 833, 836 [1 Dept.1983]). What distribution of funds or payments of bonuses Shah/Rodeo are entitled to is a matter governed by the various agreements to which they are parties. As such, the claim for unjust enrichment is duplicative of the breach of contract claim and the motion to dismiss the Seventh Affirmative Defense is granted. (*Benn v. Benn,* 2011 WL 904197 [1 Dept.2011]).

MOTION SEQUENCE # 10

By this motion Plaintiffs Shah/Rodeo move to strike the Fifth, Sixth, Seventh, Ninth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Twentieth and Twenty-First Affirmative Defenses of the Matte Defendants. The foregoing Affirmative Defenses and the bases for Plaintiffs' opposition is summarized as follows:

AFFIRMATIVE DEFENSES	BASIS FOR OBJECTION
First. Complaint fails to state claim upon which relief can be granted	

Second. Barred by Doctrine of Unclean Hands	
Third. Plaintiffs have not satisfied all conditions on their part to be performed.	
Fourth. Failure to join Shanti, necessary party	
Fifth. Plaintiffs have tortiously interfered with Oyster Bay Group's Credit Facility	Plaintiff asserts this is reinstatement of Second Counterclaim in original answer which was withdrawn by stipulation. Fail on merits because none of Matte defendants party to Credit Facility Agreement; and Key Bank's default notice based on RJM's failure to provided audited 2009 financials, and not Plaintiff's contacting Credit Facility
Sixth. Plaintiff liable to Defendant for Breach of Fiduciary Duty	Resurrects claims in Third - Tenth Counterclaims withdrawn by stipulation. On merits, failure to plead with particularity; no fiduciary duty owed by Rodeo to Mattes. Rodeo never a Managing Member of OBG. Any breach of f.d. by Shah was after he resigned as manager of RJM and OBG
Seventh: Plaintiff liable to defendant for breach of implied covenant of Good Faith and Fair Dealing	No allegations as to how plaintiffs sought to prevent performance of on or more of Agreements; Rodeo and Mattes are not parties to Shah's Management Agreement; neither Shah nor Mattes parties to Buy Sell Agreement; Mattes and Shah not parties to Cross-Purchase Agreement.
Eighth. Defendants entitled to offset or set-off against buy-out price for Rodeo's membership interest	
Ninth. By competing against some or more of defendants, Shah should be disgorged of his compensation and/or buy-out price.	Resurrects Third & Eighth CC in First Answer. On substance, only OBG, not Mattes have standing; 5.7 of Oper. Agreement permits Shah to have competing business interests if referred to in any written agreement with the Company. Claim is duplicative of Breach of Contract.

Tenth. Individual defendants not liable for any claims in complaint because of veil of LLCs.	
Eleventh. Plaintiffs have not pled allegations to pierce LLC veil.	
Twelfth. Plaintiffs' complaint violates CPLR 3014	3014 and 3016 are rules of pleading which do not belong as affirmative defenses. Remedy is pre-answer motion, not AD. Defendants have not stated how the Amended Complaint fails to comply with pleading requirements.
Thirteenth. Plaintiffs' claim of breach of fiduciary duty not pled with specificity required by 3016.	" "
Fourteenth. Plaintiff created impossibility of performance by suing OBG's accountant prior to completion of Audited Special Purpose Report.	Not objectively impossible to prepare Special Purpose Report; Mattes could have forseen that report could not be produced, or that accountants would resign
Fifteenth. "Audited Special Purpose Report" as provided for in Cross-purchase Agreement does not exist and formula should be declared nullity, or reformed	" "
Sixteenth. Buy-out formula should be reformed because unilateral mistake to extent that it does not reflect true "Net Liquidation Value" as commonly understood to include cost of goods sold and/or acquisition cost of assets	Matte defendants relying on inconsistent factual allegations; Cross-purchase Agreement has integration clause; document attached to Katz Affirm. Ex. 9 establishes that Mattes not mistaken as to meaning of Net Liquidation Value; OBG Operating Agreement establishes that Mattes sophisticated contracting parties.
Seventeenth. Cross-purchase and/or Buy-out "formula" at para. 2 (b)(i) should be rescinded and/or nullified to extent it does not reflect "Net Liquidation Value" as generally understood to include cost of goods sold and/or acquisition cost of assets	Mattes did not act promptly to rescind Cross Purchase Agreement; impossible to return parties to status quo ante; contract cannot be partially rescinded.

Eighteenth. Cross-purchase Agreement and/or Buy-out formula principally drafted by Shah and should be construed against him	Rule of Construction is not an Affirmative Defense.
Nineteenth. Accounting curve known between parties as "DDA curve" was repeatedly endorsed by Shah and is disavowed by Shah for purpose of buy-out of Rodeo's membership interest in OBG	
Twentieth. By reason of Subordination Agreement dated June 30, 2004 controversy is not yet justiciable	Pursuant to Subordination Agreement, only Key Bank has standing to enforce covenant not to sue; Mattes have no standing; Shah cannot be sued because not a party to Subordination Agreement; Money damages not available for such breach.
Twenty-first. By virtue of Twenty, action is frivolous and sanctionable.	AD is akin to denial or claim that it fails to state a cause of action, not affirmative defense. Not commenced in violation of covenant not to sue in Subordination Agreement and not frivolous.

Fifth Affirmative Defense - Tortious Interference with Credit Facility

Tortious Interference with Contract

The elements of tortious interference with contractual relations are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff resulting therefrom. (*Lama Holding Co. v. Smith Barney,* 88 N.Y.2d 413, 424 [1996]). Defendants therefore must establish a contract between them and Credit Facility, plaintiffs' awareness of the contract, plaintiffs' intentional inducement of Credit Facility to breach or otherwise render performance impossible, and damages incurred as a result.

The Fifth Affirmative Defense states that "(p)laintiffs have tortiously interfered with Oyster Bay's Credit Facility and caused a default to be declared." To reiterate, the "Matte Defendants" consist of the following: Scott Matte, Neil Matte, NMY Corp., and S & CM Enterprises, LLC. The Amended and Restated Credit Agreement of June 30, 2004 is between

RJM Acquisitions, LLC *(Borrower)*, the Lender, the Administrative Agent, and the Guarantor. None of the Matte Defendants are parties to the Credit Agreement, and plaintiffs, whatever they are alleged to have done, did not interfere with a contract to which the answering defendants were a party.

The motion to strike the Fifth Affirmative Defense is granted

Sixth Affirmative Defense - Breaches of Fiduciary Duties

The Sixth Affirmative Defense states that "[p]laintiffs are liable to the Defendants for breaches of fiduciary duty". Defendants claim that Shah was a manager of defendant OBG and as such owed fiduciary duties to OBG and the other defendants, as members of OBG. Defendants also claim that Rodeo, as member of OBG, owed fiduciary duties to the Matte Defendants and to OBG, or alternatively, Shah so dominated and controlled Rodeo, that Rodeo was the alter ego of Shaw.. Plaintiffs assert that Rodeo was never a manager of OBG, and owed no fiduciary duty to it or its members.

Fiduciary duties are generally governed by common law, however, Limited Liability Law § 411 adopts the business judgment rule to shield manager from liability whenever a manger "performs his or her duties... in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." If the business judgment rule does not apply, such as because an action was made in bad faith, the action is evaluated for substantive fairness. (*Auerbach v. Bennett,* 47 N.Y.2d 619 [1979]). Similarly, the fiduciary duty of loyalty limits an officer, director, manager, or other fiduciary from self-dealing, misappropriation of business opportunities, or direct competition with the entity's line of business, unless the officer, director, or other fiduciary complies with certain procedural safeguards. (*See* LLCL § 411, BCL § 713; *cf. Rodgers v. Bell*, 202 A.D.2d 1040 [4th Dep't 1994], *Lirosi v. Elkins*, 89 A.D.2d 903 [2d Dep't 1982]; *Pepper v. Litton*, 308 U.S. 295 [1939]). Actual proof and analysis of such violations of the duty of loyalty would also present various threshold questions to determine shifting burdens of proof and evidence of substantive fairness, (*see, e.g., Iavarone v. Raymond Keyes Assoc.*, 733 F.Supp. 727 [S.D.N.Y. 1990]; *cf. Zimmerman v. Bogoff*, 402 Mass. 650 [1988]).

Plaintiff contends that Rodeo cannot be accused of any violations of fiduciary duties

because it was not a manager of OBG, and some alleged violations of Shah's fiduciary duties were taken after Shah had resigned from his position as manager. However, a cause of action against Rodeo for aiding and abetting breaches of fiduciary duty by Shah are adequately stated under New York's liberal pleading rules. Moreover, any question regarding whether OBG was managed generally by all its members (such that they all had agency under LLCL § 408) or only by one manager named in the Operating Agreement, are questions of fact that are more appropriate for summary judgment, rather than a motion to dismiss. Members of an LLC who perform some management functions are held to the same fiduciary duties of care and loyalty as managers. (*Willoughby Rehab. & Health Care Cen., LLC v. Webster*, 13 Misc.3d 1230[A] [Sup. Ct., Nassau Cty. 2006] *aff'd* 46 AD3d 801 [2d Dept. 2007]; *see* 1 Ribstein and Keatinge on Ltd. Liab. Cos. § 9:6). In any case, members of an LLC are also held to certain limited duties of candor and good faith, regardless of any management responsibilities or agency for the LLC, (*see* 1 Ribstein and Keatinge on Ltd. Liab. Cos. § 9:6), much like majority shareholders and any shareholder in a closed corporation, are held to certain duties of candor and good faith, (*Fender v. Prescott*, 101 AD2d 418 [1st Dept. 1984] *aff'd* 476 NY2d 128, *Cassata v.Brewster-Allen-Wichert, Inc.*, 248 AD2d 710 [2d Dept. 1998], *Stein v. McDowell* 74 AD3d 1323 [2d Dept. 2010]). Finally, even though Shah had resigned as manager and was in talks regarding buy out of his shares, even the "[e]xecution of a buy-sell agreement between plaintiff and defendant with respect to the stock of [a closely held corporation], did not automatically release [plaintiff] from his obligation as a shareholder, officer and director of that [LLC] not to co-opt a viable corporate opportunity...." or otherwise release him of his fiduciary duties. (*Fender v. Prescott,* 64 N.Y.2d 1077 [1985]). The motion to strike this affirmative defense is denied.

Seventh Affirmative Defense - Breach of Good Faith and Fair Dealing

The language of the Seventh Affirmative Defense is that "(p)laintiffs are liable to the Defendants for breach of implied covenant of good faith and fair dealing". For the same reasons that the Third Counterclaim was dismissed, the motion to strike the Seventh Affirmative Defense is granted.

Ninth Affirmative Defense - Disgorgement

Defendants assert that "(b)y competing against some or more of the Defendants, the Plaintiff Shah should be disgorged of his compensation and/or buy out price." Plaintiffs contend that this affirmative defense resurrects the Third and Eighth counterclaims from the original answer, couching this claim in breach of fiduciary duty, which defendants stipulated to discontinue, and are now in violation of the stipulation. They also contend that they fail as a matter of law.

First, they assert that the Matte defendants are without standing, and that only OBG could be damaged by such competition on the part of Shah. More pointedly, however, they point to Section 5.7 of the OBG Operating Agreement, which expressly permits the managers of OBG to have "competing business interests if referred to in any written agreement with the Company" and further prohibits OBG and any of its members from "shar[ing] or participat[ing] in [a Manager's] other investments or activities . . . or to the income or proceeds derived therefrom,".

These issues, involving as they do, whether or not involvement of Shah in potentially competing organizations, constitute a violation of the operating agreement, are duplicative of the issues involved in the claim of breach of contract.

The motion to strike the Ninth Affirmative Defense asserting an obligation of disgorgement, is granted.

Twelfth and Thirteenth Affirmative Defenses - Violations of CPLR §§ 3104 and 3016

CPLR § 3014 provides as follows:

> **Sec. 3014**
>
> Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately

> stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically. A copy of any writing which is attached to a pleading is a part thereof for all purposes.

Sec. 3016 sets standards of specificity in pleading for designated causes of action. In their affirmative defenses defendants fail to state in what respect the pleadings fail to comply with the "plain and concise statements" requirements of § 3014 or what allegations of plaintiff fail to meet the particularity requirements of § 3016. The purpose of these statutes, along with § 3013, is to require pleadings to be specific enough to enable a meaningful response. Defendants have responded to the complaint, and were obviously not precluded from doing so because of a lack of specificity or ambiguity. As a practical matter, there is no purpose in insisting on further particularity when it can be obtained by a bill of particulars. (*Pernet v. Peabody Eng'g Corp.*, 20 A.D.2d 781, 782 [1Dept.1964]).

The motion to strike the Twelfth and Thirteenth Affirmative Defenses is granted.

Fourteenth Affirmative Defense - Creating Impossibility by Suing Accountants prior to completion of Audited Special Purpose Report.

Generally, the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, force majeure, or by law. (*407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 [1968]). The defense of impossibility has been recognized in common law, but has been more narrowly construed, due in part to the judicial recognition that the purpose of contract law is the allocation of risk that might affect performance, and that performance should be excused only in extreme circumstances. (*Sassower v. Blumenfeld,* 24 Misc.3d 843, 845 [Sup.Ct. Nass.Co., 2009]).

The ostensible reason for the termination of accounting services by OBG's accountant was the fact that they were sued by plaintiffs. This does not appear to the Court to be the type of event which renders the preparation of a Special Purpose Report impossible. The refusal of retained accountants to continue to function in the face of having been sued in connection with the preparation of the report, is not an unforseeable event, the risk of which could not have been

apportioned among the parties.

The motion to strike the Fourteenth Affirmative Defense is granted.

Sixteenth Affirmative Defense - Reformation of Buy-Out Formula

The Affirmative Defense states that "(t)he buy-out 'formula' should be reformed as there was a unilateral mistake to the extent that it does not reflect true 'Net Liquidation Value' as that term is commonly understood specifically to include the cost of goods sold and/or acquisition cost of assets". For the reasons stated under this court's discussion of the Matte Defendants' Fourth Counterclaim, the motion to strike the affirmative defense of reformation is denied.

Seventeenth Affirmative Defense - Rescission or Nullification of Cross-Purchase Agreement.

This Affirmative Defense claims that "(t)he Cross-Purchase Agreement and/or the buy-out "formula" at paragraph 2(b)(i) should be rescinded and/or nullified as a result of mistake to the extent that it does not reflect true "Net Liquidation Value" as that term is commonly understood specifically to include the cost of goods sold and/or acquisition cost of assets". For the reasons stated under this court's discussion of the Matte Defendants' Fifth Counterclaim, the motion to strike the affirmative defense of rescission or nullification is denied.

Eighteenth Affirmative Defense - Contra Preferentem

This Affirmative Defense states that "(t)he Cross-Purchase Agreement and / or buy-out "formula" at paragraph 2(b)(i) was principally drafted by Shah and should be construed against him". This rule of contract interpretation does not come into play unless there is ambiguity in the language. (*Dorman v. Cohen,* 66 A.D.2d 411, 414 [1st Dept. 1979]). In the absence of ambiguity, the rules of construction are to be applied so that effect is given to the intent as indicated by the language itself. (10 N.Y.Jur., Contracts s. 189).

The plaintiffs have not established as a matter of law that there is no ambiguity in the Buy/Sell Agreement and that this court may not make use of this doctrine when it interprets the Buy/Sell Agreement to the extent that the doctrine is appropriate. The motion to strike the Eighteenth Affirmative Defense is denied.

Twentieth and Twenty-First Affirmative Defenses

Defendants' contend that by virtue of the Subordination Agreement of June 30, 2004, the controversy is not yet justiciable and should be dismissed because of the covenants made by the

plaintiffs. As a consequence, they assert in the Twenty-First Affirmative Defense, that the matter is frivolous and sanctionable. Plaintiff asserts that the action did not violate the covenant not to sue and is therefore not frivolous.

The Court has previously denied the motion to dismiss the counterclaim based upon defendants' claim that plaintiffs' are bound by a covenant not to sue contained in the Subordination Agreement. Defendants may be personally liable to the Credit Facility, and have a vested interest in enforcement of a covenant not to sue. There is at least a question of fact as to whether or not plaintiff is precluded from this action, or whether defendants have standing to enforce an agreement to which they were not individual parties. For this reason the motion to dismiss the Twentieth and Twenty-First Affirmative Defenses is denied.

MOTION SEQUENCE # 11

Plaintiffs Rodeo and Shah move pursuant to CPLR § 3211 (a)(1), 3211 (a)(3), 3211 (a)(7), and 3016 (b) to dismiss the Counterclaims of defendant Oyster Bay Group LLC. The allegations of these counterclaims and the positions taken by plaintiffs are summarized as follows:

COUNTERCLAIMS	BASIS FOR OPPOSITION
First: Breach of Contract. Buy Sell Agreement between Rodeo and Oyster Bay of 6/30/04 provided that upon termination of the management agreement, Rodeo was to sell its membership interest to OBG. Rodeo has not sold its membership interest as required.	Fails to allege which provision of contract violated. Fails to allege damage as a result of failure of Rodeo to sell interest.

Second: Breach of Covenant Not to Sue/Breach of Fiduciary Duty. Subordination Agreement of 6/30/04 between Key Bank, OBG, S&CM, NMY and Shanti. As long as obligation to Key Bank under Credit Agreement, Shanti (Rodeo) may only receive scheduled payments of interest and principal under Buy Sell and Cross Purchase Agreements. Payments demanded by Shah are inconsistent. Shah/Shanti/Rodeo are alter egos of one another. Action calls for payments which OBG is contractually prohibited from making. Legal fees $72,000.	OBG has failed to allege how Rodeo's failure to sell its membership interest damaged it. In addition it is OBG and the Mattei defendants who have prevented Rodeo from being able to sell, and as a result of which the Matte defendants have greatly benefited from the delay.
Third: Similar to Second, claiming Breach of Covenant not to Sue and Breach of Fiduciary Duty. Until indebtedness under Credit Agreement paid in full, Rodeo/Shah agreed not to exercise any rights with respect to Buy Sell Agreement or Cross Purchase Agreement; assert claims against Oyster Bay or take any action or institute proceedings against OBG.	OBG does not have standing to sue to enforce the covenant. Only KeyBank has standing. The purpose was to ensure that OBG's obligation to buy out the membership interests of Shanti, or S&CM or NMY were to be subordinated to the obligation to repay KeyBank as a senior creditor. Shah is not a party to the subordination agreement. Conclusory allegations that the parties are alter egos are in adequate.
Fourth: Breach of Covenant of Good Faith and Fair Dealing. Shah/Rodeo did not act in good faith when it failed to draft OBG's documents in a fair and even-handed manner; worked for potential competitors; took OBG personal property and proprietary/confidential information; caused OBG's accountant to resign; failed to utilize proper accounting "curve" in connection with OBG's financials.	OBG does not satisfy the requirements for pleading a claim for breach of implied covenant. All contracts in New York imply such a covenant. Fails to allege facts that plaintiff sought to prevent performance or withhold benefits from defendants.

Fifth: Reformation of Contract. At time Formula created, parties believed that the Net Liquidation Value took into account cost of goods sold and/or acquisition costs. Shah drafted agreement so that it inured to his benefit, which he concealed from OBG and Matte defendants. Falsely led to believe that formula included cost of goods sold, and justifiably relied on misrepresentation.	For Reformation, party must show that parties came to an agreement, but in reducing it to writing omitted some provision agreed upon, or inserted one not agreed upon. Heavy presumption that what is written is what was agreed upon. Integration clause makes reformation less likely.
Sixth: Rescission or Nullification. To extent that Net Liquidation Value does not consider costs of goods sold or acquisition value it is the product of mutual mistake. Any unilateral mistake caused by Shah's fraudulent concealment. Formula advanced by Shah is unable to be properly calculated.	Rescission places persons in status quo, but cannot do so in this case. Also inappropriate where there is an adequate remedy at law.
Seventh: Declaratory Relief as to Impossibility of Performance. No such thing as "Audited Special Purpose Report" as provided for in formula. In addition Net Liquidation Value fails to include costs and expenses.	Impossibility only available when events make performance objectively impossible. Must be produced by unforseen event and not be something which could have been guarded against in contract. Preparation of Audited Special Purpose Report is not impossible.
Eighth: Unjust Enrichment. Shah/Rodeo received over-distribution of funds from OBG and excessive amounts of bonus payments. No adequate remedy at law.	

First Counterclaim - Breach of Contract for Failing to Sell Membership Interest

Defendants contend that at the termination of the management agreement, plaintiffs were obligated to sell their ownership interests in OBG and failed to do so. For the same reasons stated at p. 24 herein, the motion to dismiss the counterclaim is denied.

Second Counterclaim- Breach of Covenant Not to Sue/Breach of Fiduciary Duty

This motion is denied. Defendants had an interest in preserving the income necessary to pay the Credit Facility and avoid default. There are questions of fact with respect to the obligations of plaintiffs to refrain from suit, as well as issues with respect to standing of

defendants to enforce the covenant.

Third Counterclaim - Breach of Covenant Not to Sue/Breach of Fiduciary Duty

Similar to the claims in the Second Counterclaim, defendants claim that the plaintiffs have breached a Covenant Not to Sue as set forth in the Subordination Agreement. The motion is premised on the position that the only beneficiary of this agreement was Key Bank, and only they have the right to enforce it. Based on prior discussions on this issue, including indemnification agreements in favor of Shah, the Court believes that there are open questions of fact which preclude dismissal of this Affirmative Defense. Plaintiff's motion as to the Third Counterclaim is denied.

Fourth Counterclaim - Breach of Good Faith and Fair Dealing

The Fourth Counterclaim is dismissed for the same reasons that the Third Counterclaim of the Matte Defendants was dismissed, as set forth at pp. 26 - 27 herein. Essentially, the concept of good faith and fair dealing is "intrinsically tied to the damages allegedly resulting from the breach of contract". (*Mutual Life Ins. Co. of N.Y. v. Tailored Woman,* 309 N.Y. 248, 253 [1955]).

Fifth Counterclaim - Reformation of Contract

In this Counterclaim the defendants contend that they were falsely led by Shah and Rodeo that the formula expressed in the Cross-Purchase Agreement, drafted primarily by Shah, did not reflect the intended definition of "Net Liquidation Value" of RJM in that it did not consider the cost of acquisition of assets, and was therefore distorted to favor Shah and Rodeo.

The motion to dismiss the Fifth Counterclaim is denied for the reasons set forth for upholding the Fourth Counterclaim interposed by the Matte defendants.

Sixth Counterclaim - Rescission or Nullification

This is essentially the same argument raised by the Matte defendants in their Fifth Counterclaim. Defendants assert that any unilateral mistake on the part of OBG was caused by the fraud of plaintiffs, and that the formula as advanced by Shah and Rodeo is incapable of

calculation, since it does not accurately reflect "Net Liquidation Value". For the same reasons set forth for upholding the Matte Defendants' Fifth Counterclaim, the motion to strike the Counterclaim of Rescission and Nullification is denied.

Seventh Counterclaim - Declaratory Relief as to Impossibility of Performance

OBG claims that the Formula in question requires an "Audited Special Purpose Report" and that, upon information and belief "there is no such thing as 'an audited Special Purpose Report' ". OBG seeks a declaration that the Cross-Purchase Agreement and/or the Formula should be declared a nullity and/or reformed due to impossibility of performance to the extent that it requires an audited Special Purpose Report and that the term "Net Liquidated Value" cannot be computed in accordance with any accounting principles.

The motion to dismiss the Seventh Counterclaim is granted. As the Court has previously noted, an impossibility of performance is a narrow remedy afforded only to situations that could not have been anticipated and which render performance by either party to an Agreement impossible, and not merely disadvantageous or difficult.

Eighth Counterclaim - Unjust Enrichment

As previously noted at page 29, the claim of unjust enrichment is quasi-contractual, and is duplicative of the breach of contract claim. The motion to dismiss the Eighth Counterclaim is granted.

Motion Sequence # 12

Plaintiff moves to strike the Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Eighteenth, and Nineteenth Affirmative Defenses. A summary of the affirmative defenses is as follows:

AFFIRMATIVE DEFENSES	OBJECTION TO AFFIRMATIVE DEFENSES

Fifth: Plaintiffs have interfered with OBG's Credit Facility	Previously withdrawn by stipulation. OBG not party to Credit Facility Agreement, no standing; letter from Key Bank states reason for default was RJM's failure to deliver audited 2009 year-end financials, nothing to do with contact by plaintiff.
Sixth: Breaches of fiduciary duty	Resurrects Second Counterclaim in original answer which was withdrawn by stipulation; OBG not a party to Credit Facility Agreement and lacks standing; documentary evidence to effect that plaintiff did not induce RJM's breach of Credit Facility Agreement. Rodeo owes no fiduciary duty to OBG. LLC is "Manager-managed", not Managing member managed.
Seventh: Breach of implied covenant of good faith and fair dealing	No allegations how plaintiffs sought to prevent performance or withhold benefits from defendants. Neither Rodeo or OBG party to Shah's management agreement. Shah not party to 2004 Buy Sell or Cross Purchase Agreements
Ninth: By competing against defendants Shah should be disgorged of compensation and buy-out price.	Resurrects previously withdrawn Third Aff. Defense in original answer. OBG's Operating Agreement expressly permits Shah and other managers to have competing business interests.
Ten: Complaint violates CPLR 3014	3014 and 3016 are rules of pleading, not affirmative defenses. Pled with sufficient particularity in any event.
Eleven: Breach of Fiduciary Duty not pled with specificity required by CPLR 3016	" "
Twelve: Plaintiffs have created impossibility of performance by having accountant sued.	Not objectively impossible to prepare Special Purpose Report; defendants could have foreseen events involving accountant and guarded against this event

Thirteenth: Cross Purchase Agreement and Formula should be declared a nullity due to impossibility because required document, special purpose report, cannot be produced.	" "
Fourteenth: Buy-out formula should be reformed as there was unilateral mistake to the extent it does not reflect "Net Liquidation Value" as commonly understood	OBG relying on inconsistent factual allegations; Cross-purchase Agreement has Integration Clause; documentary evidence that OBG knew what Net Liquidation Value meant; OBG sophisticated party. They did not act promptly; it is impossible to restore parties to status pre agreement; contract cannot be partially rescinded.
Fifteenth: Cross-Purchase and Buy-out formula should be rescinded or nullified as result of mistake in that it does not reflect "Net Liquidation Value" as commonly understood.	" "
Sixteenth: Cross-Purchase Agreement and buy-out formula at para. 2(b)(1) drafted by Shah and should be construed against him.	Rule of construction applied as a last resort; not an affirmative defense.
Eighteenth: Because of Subordination Agreement matter is not yet justiciable.	Only Key Bank has standing to sue for breach of covenant not to sue. Shah not a party. Money damages unavailable. Barred by laches
Nineteenth: Action is frivolous by virtue of 18.	More akin to denial or claim that complaint fails to state a cause of action, not an affirmative defense; not commenced in violation of covenant not to sue in Subordination Agreement.

In the affirmation in opposition of Joseph N. Campolo, Esq., on behalf of defendant OBG, withdraws, without prejudice, the Fifth, Ninth, Tenth, Eleventh, Eighteenth and Nineteenth Affirmative Defenses. The remaining affirmative defenses are the Sixth, Seventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Seventeenth. OBG responds that each of them state a legally sufficient, viable and supportable defense requiring denial of the motion. They point to CPLR § 3018 (b) as requiring the pleading affirmative defenses to avoid surprise, and

that upon a motion to dismiss a defense, the defendant is entitled to every reasonable intendment of its pleading, which is to be liberally construed.

Sixth Affirmative Defense - Breach of Ficuciary Duty

OBG's answer claims as its Sixth Affirmative Defense that "[p]laintiffs are liable to the Defendant for breaches of fiduciary duty". Plaintiff asserts that this resurrects one or more of the Third through Tenth Counterclaims contained in OBG's original answer which were withdrawn by Stipulation. Substantively, plaintiff claims that the counterclaim fails for lack of particularity required by CPLR § 3016 (b); that Rodeo owes no fiduciary duty to OBG; and that Shah owed no fiduciary duty after resigning from RJM and OBG. Defendants reply that the counterclaims contain explicit details, and that Shah and Rodeo did owe a fiduciary duty to OBG.

As the court has previously noted, claims for breaches of fiduciary duty against Shah and Rodeo have been adequately stated.

Seventh Affirmative Defense - Breach of Covenant of Good Faith and Fair Dealing

The Court has previously noted that the concept of good faith and fair dealing is implicit in all contracts. It has long been held that a cause of action for breach of the implied warranty of good faith and fair dealing cannot be maintained since it is premised on the same conduct that underlies a breach of contract. (*MBIA v. Merrill Lynch,* 81 A.D.3d 419 [1 Dept. 2011]). The motion to strike the Seventh Affirmative Defense is granted.

Twelfth Affirmative Defense -Impossibility of Performance by causing OBG's accountant to be sued.

As previously noted, impossibility of performance is generally limited to the destruction of the means of performance by an act of God, force majeure, or by law. (*407 East 61st Garage, Inc. v. Savoy fith Ave. Corp.,* 23 N.Y.2d 275, 281 [1968]). The resignation of the OBG accountants as a result of their being sued by plaintiff is not the type of "impossibility of performance", typically found only in extreme circumstances, such as to render the preparation of an audited Special Purpose Report unfeasible and impossible.

The motion to strike the Twelfth Affirmative Defense is granted.

Thirteenth Affirmative Defense - Cross-Purchase Agreement Should be Declared a Nullity or Reformed.

The premise of this Affirmative Defense is that a special purpose report as called for in the Cross-Purchase Agreement and/or Formula, cannot be audited and therefore should be declared a nullity and/or reformed due to impossibility of performance to the extent that it requires a document to be created and audited which does not exist. Cancellation or rescission declares that what is seemingly a contract is not effective because the true intentions of the parties were not set forth. Reformation, on the other hand, presupposes the existence of a valid contract, but is intended to modify the document so as to express the true intention of the parties.

This claim is duplicative of Oyster Bay's other meritorious claims, and to the extent its allegations differ from those claims, it does not adequately state a cause of action. Cancellation or nullification for impossibility of performance has not been stated on the ground that a Special Purpose Report is impossible to prepare by Oyster Bay's preferred accountants. The motion to strike the Thirteenth Affirmative Defense is granted.

Fourteenth Affirmative Defense - Reformation of Buy-Out Formula on basis of Unilateral Mistake

The motion to strike the Fourteenth Affirmative Defense is denied for the reasons set forth in this court's discussion of the Matte Defendants' Fourth Counterclaim.

Fifteenth Affirmative Defense - Rescission orNullification of Buy-Out Formula

The motion to strike the Fifteenth Affirmative Defense is denied for the reasons set forth in this court's discussion of the Matte Defendants' Fifth Counterclaim.

Sixteenth Affirmative Defense - The Cross-Purchase Agreement was principally drafted by Shah and Should be Construed Against Him

The doctrine of contra preferendum is applicable in the event of an ambiguity in the document. The plaintiffs have not established as a matter of law that the Buy/Sell Agreement is not ambiguous as to "net liquidation value" of RJM, as opposed to the "net liquidation value" of

an asset of RJM, namely its large portfolio of consumer debt. The motion to strike the Sixteenth Affirmative Defense is denied.

Seventeenth Affirmative Defense - Disavowal of Previously Adopted "DDA Curve"

Defendants appear to contend that plaintiffs adopted a different formula in all prior instances, and support the curve not outlined in the Cross-Purchase Agreement only now. To the extent that this would otherwise constitute a surprise at trial, the Court will allow it to stand. The motion to strike the Seventeenth Affirmative Defense is denied.

OYSTER BAY'S CROSS-MOTION FOR LEAVE TO AMEND

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

> **Rule 3025. Amended and supplemental pleadings**
>
> **(a) Amendments without leave.** A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.
>
> **(b) Amendments and supplemental pleadings by leave.** A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.
>
> **(c) Amendment to conform to the evidence.** The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.
>
> **(d) Responses to amended or supplemental pleadings.** Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or defense, or it is patently devoid of merit.[2] Since this leave to amend the pleadings was filed in the context of a motion to dismiss meritless counterclaims, the court will not grant leave to amend to the extent that the amended counterclaims do not add any other facts such as to state any cognizable cause of action.

First, Second, Third, Fifth and Sixth Counterclaims

As is discussed above, Oyster Bay's first, second, third, fifth, and sixth counterclaims allege sufficient facts to state cognizable causes of action for breach of contract, breach of covenants not to sue, reformation, and rescission. Leave is granted to amend these counterclaims.

Fourth, Seventh, and Eighth Counterclaims

As is discussed above, Oyster Bay's counterclaims sounding in breach of implied covenant of good faith, impossibility, and unjust enrichment, are devoid of merit as they fail to state any cause of action that is not already stated in its counterclaims, or that would entitle Oyster Bay to any legal recovery or relief. The amended counterclaims do not add any facts that would make out any cause of action for legal recovery or relief for breach of covenant of good faith, impossibility, and unjust enrichment, separately from any recovery that Oyster Bay may be entitled to from breach of contract terms requiring sale of shares, breach of covenant not to sue, breach of fiduciary duties, reformation for mutual mistake, rescission for fraud, or from defendants' similarly pled affirmative defenses.

Proposed Ninth Counterclaim

Through this counterclaim, Oyster Bay repeats that Rodeo or Shah "drafted and/or participated in the drafting of [various provisions] such that [their] wording inured to his sole and unfair advantage to the detriment of Oyster Bay..." Oyster Bay asserts that these facts are unlawful acts of self-dealing and violations of Rodeo's or Shah's fiduciary duties of loyalty. The

---

[2] *Lucido v. Mancuso,* 49 A.D.3d 220, 230 (2d Dept. 2008).

allegations do not suggest that Rodeo or Shah committed any fraud or material misrepresentations during the negotiation of the relevant agreements, therefore any attempt to seek advantage from arm-length negotiations during a drafting process, is not unlawful on its face. If the *wording* of the agreement were itself a violation of fiduciary duties, any members who signed the agreement (and thus ratified the agreement as worded), would be equally liable for breaches of fiduciary duties. These facts do not state any cause of action. (*Cf. Gallagher v. Lambert*, 74 N.Y.2d 562 [1989] [enforcing buy-out formula which was alleged to be oppressive and in violation of various fiduciary duties]).

The proposed ninth counterclaim also alleges that "Shah competed against Oyster Bay in breach of his fiduciary duty to Oyster Bay" by accepting employment with entities that are competitors of Oyster Bay. This fact suggests a claim for self-dealing, misappropriation of business opportunities, or direct competition with the entity's line of business, which are violations of the fiduciary duty of loyalty. (*See* LLCL § 411, BCL § 713; *cf. Rodgers v. Bell*, 202 A.D.2d 1040 [4th Dep't 1994], *Lirosi v. Elkins*, 89 A.D.2d 903 [2d Dep't 1982]; *Pepper v. Litton*, 308 U.S. 295 [1939]). Actual proof and analysis of such violations of the duty of loyalty would present various threshold questions to determine shifting burdens of proof and evidence of intrinsic fairness, (*see, e.g., Iavarone v. Raymond Keyes Assoc.*, 733 F.Supp. 727 [S.D.N.Y. 1990]; *cf. Zimmerman v. Bogoff*, 402 Mass. 650 [1988]). Moreover, an operating agreement can displace LLCL § 411 and any requirements that might be imposed by the fiduciary duty of loyalty. Oyster Bay's operating agreement permitted Shah and any other members to have "competing business interests **if** referred to in any written agreement with the Company." (Katz Aff., Exh. 9 § 5.7). Thus, any actions that would otherwise violate Shah's fiduciary duty of loyalty would have to be disclosed and consented to, by reference in an agreement with the Company. Because these facts were not previously alleged in the first counterclaim for breach of an agreement to sell Rodeo's shares, these facts state a new cause of action for breach of fiduciary duties under the operating agreement. This court grants Oyster Bay leave to amend the Answer to allege facts regarding any violations of the fiduciary duty of loyalty, by Shah's employment in entities that are competitors of Oyster Bay and not referred to in a written agreement with the company.

The proposed ninth counterclaim further alleges that Shah breached his fiduciary duties by contacting RJM Credit Facility in bad faith to cause a declaration of default. If this action was not taken under a good-faith, rational belief that the action was in the best interests of the company, the action would not be shielded by the business judgment rule, and it could be a violation of Shah's fiduciary duty of care under a more substantive, fairness analysis. (*See Auerbach v. Bennett,* 47 N.Y.2d 619 [1979], LLCL § 409[a], BCL § 717). Whether one call by Shah to RJM Credit Facility could have actually caused the declaration of default, without more, or whether such a call was made outside the regular exercise of Shah's good faith business judgment, are issues of fact that are more appropriate on a motion for summary judgment rather than motion for leave to amend the pleadings.

Shah's call to RJM Credit Facility was placed after Shah had resigned as manager, and Shah contends that he owed no duties of loyalty from the moment he had resigned, although the buy-out agreement had not been executed. However, even the "[e]xecution of a buy-sell agreement between plaintiff and defendant with respect to the stock of [a closely held corporation], did not automatically release defendant from his obligation as a shareholder, officer and director of that close corporation not to co-opt a viable corporate opportunity...." or otherwise release him of his fiduciary duties. (*Fender v. Prescott,* 64 N.Y.2d 1077 [1985]). This court grants Oyster Bay leave to amend the Answer to allege facts regarding any violation of the fiduciary duty of care by Shah's call to RJM Credit Facility, as it may have caused the declaration of default.

Proposed Tenth Counterclaim

As already discussed, seeking advantage during an arms-length negotiation process and drafting of agreements, does not state a cause of action for breach of fiduciary, absent some fraud or material misrepresentations. (*Cf. Gallagher v. Lambert*, 74 N.Y.2d 562 [1989]). Therefore, there can be no cause of action for aiding and abetting Rodeo's drafting of those agreements, in breach of any fiduciary duties.

MATTE DEFENDANTS' CROSS-MOTION FOR LEAVE TO AMEND

As discussed above, amendment of pleadings is to be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or defense, or it is patently devoid of merit. Since this leave to amend the pleadings was filed in the context of a motion to dismiss meritless counterclaims, the court will not grant leave to amend to the extent that the amended counterclaims do not add any other facts such as to state any cognizable cause of action.

First, Second, Fourth, and Fifth Counterclaims

As is discussed above, the first, second, fourth, and fifth counterclaims allege sufficient facts to state cognizable causes of action for breach of contract, breach of covenants not to sue, reformation, and rescission. Leave is granted to amend these counterclaims.

Third, Sixth, and Seventh Counterclaims

As is discussed above, counterclaims sounding in breach of implied covenant of good faith, impossibility, and unjust enrichment, are devoid of merit as they fail to state any cause of action that is not already stated in the first two counterclaims, or that would entitle the defendants to any legal recovery or relief. The amended counterclaims do not add any facts that would make out any cause of action for legal recovery or relief for breach of covenant of good faith, impossibility, and unjust enrichment, separately from any recovery that defendants may be entitled to from breach of contract terms requiring sale of shares, breach of covenant not to sue, reformation, rescission, or from defendants' similarly pled affirmative defenses.

Proposed Eighth Counterclaim

As discussed for Oyster Bay's cross-motion to amend, there can be no cause of action for breach of fiduciary duty from a particular wording or drafting of any agreements, since any such wording is ratified by the signing of the agreement. However, the Answer may be amended to include a counterclaim for employment with Oyster Bay's competitors, in violation of the fiduciary duties owed under the Operating Agreement, and any call to RJM Credit Facility made in bad faith and not in the best interests of the company. The Matte Defendants' proposed eighth counterclaim also alleges malicious prosecution of this lawsuit. This may also be a violation of

fiduciary duties if made in bad faith and not in the best interests of the company. Therefore, it may also be included in the proposed eighth amended counterclaim.

Proposed Ninth Counterclaim

As already discussed drafting of an agreement without fraud or material misrepresentations, and drafted over arms-length negotiations, does not state any cause of action for violation of fiduciary duties. Therefore, there can be no action for aiding and abetting the drafting of those agreements, in violation of any fiduciary duties.

This constitutes the decision and order of the court

DATED: April 25, 2011

J.S.C.