Schulte Roth&Zabel LLP

919 Third Avenue
New York, NY 10022
212.756.2000
212.593.5955 fax

www.srz.com

**BY E-MAIL**

**To:** ISDA Credit Derivatives Determinations Committee (Americas) **Date:** August 1, 2014

**From:** Schulte Roth & Zabel LLP (counsel to CDS Holder)
Craig Stein, Esq. (craig.stein@srz.com)
Kristin Boggiano, Esq. (kristin.boggiano@srz.com)

**Subject:** Argentine Republic CDS Repudiation/Moratorium Credit Event

Dear Determinations Committee Members,

We write to the Determinations Committee, ("the Committee") regarding whether a "Repudiation/Moratorium" Credit Event has occurred with respect to the Argentine Republic's payment obligations on its foreign debt. This letter is written as a new question for the Committee given additional events and information.

The relevant ISDA Definitions define a "Repudiation/Moratorium" Credit Event as:

> "Repudiation/Moratorium" means the occurrence of both of the following events: (i) an authorized officer of a Reference Entity or a Governmental Authority (x) disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, one or more Obligations in an aggregate amount of not less than the Default Requirement or (y) declares or imposes a moratorium, standstill, rollover or deferral, whether de facto or de jure, with respect to one or more Obligations in an aggregate amount of not less than the Default Requirement and (ii) a Failure to Pay, determined without regard to the Payment Requirement, or a Restructuring, determined without regard to the Default Requirement, with respect to any such Obligation occurs on or prior to the Repudiation/Moratorium Evaluation Date.

Thus, the ISDA Definitions require two conditions for this credit event to occur captured in subsections (i) and (ii) of the above. On July 31, 2014, Argentina indisputably took action that satisfies subsection (ii) by committing a Failure to Pay, as noted in public sources attached hereto as Exs. A and B, and as noted by a question submitted to the Committee by UBS AG on July 31,

2014. We ask for clarification that a Failure to Pay under Sec. 4.5 satisfies the subset of the Failure to Pay under Sec. 4.6(a)(ii) of the ISDA Definitions.

It is also the case that Argentina has taken actions that satisfy subsection (i) in public statements by leaders of its government that it is impossible for Argentina to satisfy its obligations under the debt and thus that it will not meet its obligations. As noted in a question submitted by us on June 20, 2014, Argentine officials stated on June 17th and June 18th that it will be *impossible* for Argentina to meet its debt obligations. Therefore, prior to June 20th, there was a repudiation/moratorium with respect to Argentina's debt. *See* Ex. C.

Beyond the general definitions supplied above of "Repudiation/Moratorium," we thought that it is important to highlight to the Committee that what exactly constitutes conduct that could satisfy subsection (i) is not defined by the credit derivative definitions and the analysis requires careful review of external sources. Authority in both New York and international law supports a determination that Argentina's conduct constituted a repudiation and we submit for your review this additional analysis.

Focusing on the verbs "disaffirms, disclaims, repudiates or rejects" in subsection (i)(x) of Section 4.6, New York law provides ample support for the argument that Argentina has "repudiated" its debt. First, New York's highest court, the Court of Appeals has defined repudiation of a contract to occur "when a party to a contract (1) states that he cannot or will not perform his obligations, or (2) commits a voluntary affirmative act that renders the obligor unable or apparently unable to perform his obligations." *Norcon Power* Partners*, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458 (1998) (attached hereto as Ex. D). The Court of Appeals took this language from a leading treatise on American contract law, RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981) (attached hereto as Ex. E). Here, Argentina's leaders have made these exact, unequivocal statements: it cannot and will not meet its obligations under the debt, thereby *repudiating* the debt, a term specifically used in Sec. 4.6.

Furthermore, under New York law, Argentina's voluntary, purposeful conduct, which has lead the country into a position of not being able to discharge its obligations under its debt, and is the basis for its officials making statements that it will be "impossible" to make its payments, itself constitutes a repudiation. In the Official Comment to the New York Uniform Commercial Code, repudiation is defined as "an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." *See Cary Oil Co., Inc. v. MG Ref. & Mktg., Inc.*, 90 F. Supp. 2d 401, 410-11 (S.D.N.Y. 2000) (attached hereto as Ex. F). This language is captured in other leading treatises, such as *Corbin on Contracts*, which notes that where "a promisor so conducts himself as to make the substantial performance of his promise impossible, this is a repudiation of his promise and has the same legal effect as would a repudiation in words." CORBIN ON CONTRACTS § 54-26 (attached hereto as Ex. G), and this language is cited favorably by New York courts. *See 200 E. 87th St. Associates v. MTS, Inc.*, 793 F. Supp. 1237, 1253 (S.D.N.Y. 1992) (attached hereto as Ex. H), *aff'd sub nom. 200 E. 87th St. Asso. v. MTS, Inc.*, 978 F.2d 706 (2d Cir. 1992). Argentina's actions have done just this: rendered performance under their contract impossible and thus effectively repudiating the contract. *See Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.,* 301 A.D.2d 70, 78 (1st Dep't 2002), (finding repudiation where plaintiff had rendered its performance impossible by "secretly entering into an agreement with a third-

party distributor that gave the distributor complete control over the prices to be charged for the product.") (attached hereto as Ex. I); *Pitcher v. Benderson–Wainberg Assoc. II, Ltd P'ship,* 277 A.D.2d 586, 586–88 (3d Dep't 2000) (plaintiffs repudiated a restaurant lease by informing the landlord that their restaurant "must cease operations" by a certain date, closed the restaurant; and sold "considerable equipment" by that date) (attached hereto as Ex. J).

With regard to whether Argentina has "declare[d] or impose[d] a moratorium, standstill, rollover or deferral, whether *de facto or de jure,*" it is clear that such a result has been satisfied. It is important to note here that the words "declares" and "imposes" are used disconjunctively, meaning either can satisfy this condition. Based on a reading of the plain language of the ISDA Definitions (as required by all American jurisdictions), Argentina's conduct satisfies this condition by merely *declaring* a *de facto moratorium.* This language clearly creates a credit event before a formal, explicit moratorium is *imposed* by Argentina. By its government officials' public statements that it cannot and thus will not be paying its obligations under the debt, Argentina has declared a de facto moratorium on its payments of foreign debt. Such a finding is supported by the clear policy reasons embedded in the wording of this section of the ISDA Definitions: it gives risk-buyers protection before a country has actually imposed an explicit, legal moratorium on payments.

Examples of *de facto* moratoria can be located in international law in comparable contexts. In fact, Argentina, itself, along with the United States and Canada, argued in a WTO dispute against the European Union that the EU has instituted a *de facto* moratorium on the sale of certain biotech products in the EU. The EU denied any such moratorium existed. The WTO found that the EU's unnecessary delay in approving the products for use in Europe constituted a *de facto* moratorium, and found for Argentina. *See* Ex. K. The same analysis should apply here: Argentina's actions and statements effectively amount to a moratorium on its payment of public debt, even though no official legal act prevents Argentina from making these payments.

For additional background and discussion on debt moratoria, please see the following articles: Alice de Jonge, *Returning to Fundamentals: Principles of International Law Applicable to the Resolution of Sovereign Debt Crises*, 36 Suffolk Transnat'l L. Rev. 1 (2013); Philip R. Wood, *How the Greek Debt Reorganization of 2012 Changed the Rules of Sovereign Insolvency*, 14 Bus. L. Int'l 3 (2013); Alice de Jonge, *What Are the Principles of International Law Applicable to the Resolution of Sovereign Debt Crises?*, 32 Polish Y.B. Int'l L. 129 (2012); Bradley R. Larschan, *Comity, Act of State, and the International Debt Crisis: Is there An Emerging Legal Equivalent of Bankruptcy Protection for Nations?*, 79 Am. Soc'y Int'l L. Proc. 126 (1985).

* * *

Based on the foregoing, there can be no question that when considered in combination with its July 31, 2014 failure to pay, Argentina's conduct constitutes a Repudiation/Moratorium credit event. We thank the Committee for its consideration of this letter.

# EXHIBIT A

Exhibit A: http://www.bloomberg.com/news/2014-07-31/argentina-s-default-clock-runs-out-as-debt-talks-collapse.html

# EXHIBIT B

Exhibit B: http://online.wsj.com/articles/argentina-bonds-rise-to-multiyear-highs-on-prospect-of-deal-1406728458

# EXHIBIT C

Schulte Roth & Zabel LLP

**MEMORANDUM**

**BY E-MAIL**


**To:** ISDA Credit Derivatives Determinations Committee (Americas) **Date:** June 20, 2014

**From:** Schulte Roth & Zabel LLP (counsel to CDS Holder)
Craig Stein, Esq. (craig.stein@srz.com)
Kristin Boggiano, Esq. (kristin.boggiano@srz.com)


**Subject:** Argentina CDS Potential Repudiation/Moratorium

## INTRODUCTION

Argentina defaulted in 2001 on $95 billion in debt. The substantial majority of bondholders exchanged defaulted debt for new exchange bonds ("Obligations")[1] but certain bondholders refused to exchange and instead litigated against the sovereign. After years of litigation, federal district and circuit courts ruled that Argentina should be enjoined from paying interest or principal on the Obligations unless litigating holdouts also are paid in full. However, Argentina appealed to the Supreme Court and enforcement of the injunction was stayed pending appeal. On June 16, 2014, the Supreme Court denied Argentina's petition for writ of certiorari, which automatically led to lifting of the stay under Federal Rule of Appellate Procedure §41(d)(2)(D). Publicly Available Information describing the injunction and legal saga is widely

[1] These new bonds are "Obligations," which satisfy the Obligation Category and Obligation Characteristics set forth in the CDS Contract. The non-exchanged bonds already are in default and are not Obligations. Capitalized terms not otherwise defined herein shall have the definitions set forth in the 2003 ISDA Credit Derivatives Definitions, published on July 14, 2009, as modified by the 2009 ISDA Credit Derivatives Determinations Committees, Auction Settlement and Restructuring Supplement, published on July 14, 2009 (as so amended, the "2003 Credit Derivatives Definitions").

available.[2] In response to the denial of certiorari petition and expected imposition of the injunction, Argentinian officials ultimately declared that it was "impossible" for the sovereign to pay its Obligations in accordance with the legal terms. Specifically, Economy Minister Axel Kicillof[3] held a press conference on June 17 detailing the sovereign's proposed strategy – or, more properly, non-strategy – with respect to making the June 30 interest payment in accordance with the legal terms (the "June 17 Declaration").[4] As reported by multiple news outlets, Argentina announced that it would not pay its Obligations in accordance with the legal terms and, instead, would pursue a local-law exchange strategy.[5] Further, following a hearing before the US District Court on June 18 during which Judge Griesa made it clear that Argentina's restructuring strategy would violate the injunction, Minister Kicillof declared definitively that it would be "impossible" to make the payment.[6] Our client believes that the June 17 Declaration,

---

[2] See Argentina v. NML Capital, No. 13-990, __ U.S. __ (2014) (declining to hear the appeal from 699 F.3d 246 (2d Cir. 2012) (affirming the district court's order requiring Argentina to make "Ratable Payments" to the holdout bondholders concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt)); see also e.g., Parks, Ken et. al., "Supreme Court Sides with Holdout Creditors in Argentina Debt Case." The Wall Street Journal, June 16, 2014, available at http://online.wsj.com/articles/u-s-supreme-court-rejects-argentina-appeal-in-sovereign-debt-case-1402926119; see also, Liptak, Adam. "Argentina's Debt Appeal is Rejected by Supreme Court." New York Times, Deal Book, June 16, 2014, available at http://dealbook.nytimes.com/2014/06/16/supreme-court-denies-appeal-by-argentina/?_php=true&_type=blogs&_r=0.

[3] Kicillof is an authorized officer of the Governmental Authority. See e.g..Minister Kicillof's official bio, available at http://www.mecon.gov.ar/ministerio-de-economia-y-finanzas-publicas/ministro/.

[4] The June 17, 2014 Press Conference is available in its entirety at http://www.lanacion.com.ar/1702187-axel-kicillof-a-los-fondos-buitre-no-pasaran. A Bloomberg transcript of the press conference is attached hereto as Exhibit 1.

[5] See e.g., Werning, Vladimir, "Argentina: Minister Kicillof Scrambles to Improvise an Open-Ended Plan B to the Holdout Creditor Conflict." J.P. Morgain Latin America Emerging Markets Research, June 17, 2014, attached hereto as Exhibit 2 ("[Kicillof's announced] measures do not outline a clear strategy but instead indicate the fact that Argentina finds itself improvising a Plan B in response to the legal challenges…Argentina will initiate steps aimed at preparing a debt swap to pay restructured bonds in Argentina"; see also, Reckman Casey and Chodos, Daniel. "Argentina: Local Law Anyone?" Credit Suisse Fixed Income Research, June 17, 2014, attached hereto as Exhibit 3 ("Kicillof announced that Argentina will try to swap foreign law bonds for local law securities."); see also, "Argentina would default if forced to pay bondholders: Kicillof." The Star Online, June 18, 2014.

[6] See June 18, 2014 Press Conference of the Economic Minister, available in Spanish at http://www.mecon.gov.ar/comunicado-de-prensa-del-ministerio-de-economia/, and translated in relevant part as, "[L]ifting of the stay by the Second Circuit makes it impossible to make payment in New York on the payment date of the restructured debt." See also Russo, Camila, "Argentina Won't Make June 30 Debt Payment After Court

as confirmed by Kicillof's statement on June 18, constitutes a Potential Repudiation/Moratorium event.[7]

## QUESTION POSED

Our client ("CDS Holder") currently is a buyer of a Credit Derivatives Transaction that is based upon the Standard Latin American Sovereign provisions in the Credit Derivatives Physical Settlement Matrix (the "CDS Contract"), which is scheduled to terminate on June 20, 2014 (the "Scheduled Termination Date"). The CDS Holder maintains that the Credit Derivatives Determinations Committee (the "Determinations Committee") should Resolve an event that constitutes a Potential Repudiation/Moratorium for purposes of the relevant Credit Derivative Transaction has occurred (thereby establishing that a Repudiation/Moratorium Extension Condition has been satisfied).

## DISCUSSION

### A. Argentina's Statements Meet the Definition of a Potential Repudiation/Moratorium

Argentina's June 17 Declaration of its intention not to make the June 30 interest payments[8] on Obligations in accordance with the legal terms is a *de facto* moratorium or standstill such that a Potential Repudiation/Moratorium has occurred. Section 4.6(a) of the 2003 Credit Derivatives Definitions defines a Repudiation/Moratorium Credit Event as follows:

> [T]he occurrence of both of the following events: (i) an authorized officer of a Reference Entity or a Governmental Authority (x) disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, one or more Obligations in an aggregate amount of not less than the Default

---

Ruling." Bloomberg, June 18, 2014, available at http://www.bloomberg.com/news/2014-06-19/argentina-won-t-make-june-30-debt-payment-because-of-u-s-ruling.html. ("Argentina said it's 'impossible' for it to make a June 30 bond payment as a court order…goes into effect.")

[7] In the alternative, the June 18 statements constitute the Potential Repudiation/Moratorium event.

[8] The June 30, 2014, interest payment amount with respect to just New York law bonds is approximately $228 million. That does not include another $304 million USD equivalent also to be paid on June 30 with respect to bonds denominated in Euro and Yen. Default threshold amounts plainly are met.

> Requirement or (y) declares or imposes a moratorium, standstill, roll- over or deferral, whether de facto or de jure, with respect to one or more Obligations in an aggregate amount of not less than the Default Requirement and (ii) a Failure to Pay, determined without regard to the Payment Requirement, or a Restructuring, determined without regard to the Default Requirement, with respect to any such Obligation occurs on or prior to the Repudiation/Moratorium Evaluation Date.

The declaration of a Repudiation/Moratorium Credit Event is a contractually different process than the declaration of other types of credit events and reflects dissimilar fundamental risk. First, unlike other Credit Events, only Section 4.6 uses a two-step process that deliberately separates the "potential" for default from actual default. Second, declaration of "Potential Repudiation/Moratorium" is the only event under Article 4 that primarily affects only near-dated Credit Derivatives Transactions rather than all outstanding Credit Derivatives Transactions.

Credit Events including Bankruptcy (§4.2), Obligation Acceleration (§4.3), Obligation Default (§4.4), Failure to Pay (§4.5) and Restructuring (§4.7) all envision a single-stage evaluation process wherein a Credit Event is either declared, or not. Under these provisions, the Determinations Committee must evaluate whether definitions and conditions have been met and all ambiguities and issues must be resolved and reflected in a binary yes-or-no vote. Section 4.6 is constructed differently. The Potential Repudiation/Moratorium provision recognizes that a declaration indicating that Obligations will be repudiated or will not be paid in accordance with its terms does not inexorably lead to a default. Parties to a Credit Default Transaction instead are placed in a wait-and-see mode, and the process itself allows factual ambiguities to become determinate through the passage of time. Accordingly, whether a Potential Repudiation/Moratorium has occurred turns only on whether a declaration of repudiation or refusal to pay has been made, and not at all on whether the declaration later is reversed or if subsequent events in fact allow payment to be made. Or, in other words, a Potential

Repudiation/Moratorium concerns only the declaration of a default in the future and it is not relevant if the default is ever actually realized. Subsequent events exclusively are addressed in clause (ii) of the definition of Repudiation/Moratorium. To read the 2003 Credit Derivatives Definitions otherwise would render clause (i) a nullity and effectively convert §4.6 into a simple Failure to Pay or Restructuring provision with slightly adjusted default thresholds.

Moreover, the declaration of a Potential Repudiation/Moratorium does not collapse all Credit Default Transactions whatever the tenor, unlike all other Article 4 Credit Events. Instead, when Obligations include Bonds, the immediate practical effect of such a declaration is to extend the Scheduled Termination Date of the next-to-expire Credit Default Transaction to the next payment date under any such Bond or 60 days, whichever is later.[9] (In theory, the extension of the Scheduled Termination Date could affect more than the nearest-dated contract but in practice bonds pay semi-annually or more frequently and the extension of the Scheduled Termination Date is not relevant until later-dated CDS contracts otherwise would expire.) Accordingly, the action referenced in clause (i) of Section 4.6 is categorically different than other Article 4 Credit Events because in-and-of-itself no Credit Event is declared. The plain intent of clause (i) is to extend the Scheduled Termination Date of an expiring Credit Default Transaction to allow for a subsequent Failure to Pay or Restructuring Credit Event, not to collapse all contracts.

Argentina has declared, unequivocally, that it is "impossible" to make payments on the Obligations.[10] Specifically, at a press conference on June 18, Minister Kicillof stated that "the *pari passu* orders prevent Argentina from being able to effect payment of its coupons of its

---

[9] See the definition of "Repudiation/Moratorium Evaluation Date" at §4.6(b)(i). In the case of Argentina, the only effect of a Potential Repudiation/Moratorium declaration is to extend the June 20, 2014 CDS Termination Date to June 30 (the next bond payment date), plus applicable grace period, and to uncheck Credit Event boxes other than Failure to Pay or Restructuring during the Extension Condition period.

[10] See e.g., Russo, Camila. "Argentina Won't Make June 30 Debt Payment After Court Ruling," infra at n.6

restructured obligations on June 30" and that “[t]he lifting of the 'stay' by the Second Circuit makes payment of the next coupon of the restructured debt in New York *impossible*."[11] These statements are not ambiguous, and not conditional.[12]

Minister Kicillof's declaration of his country's inability and unwillingness to meet its Obligations is a Potential Repudiation/Moratorium even if later facts prove the assertion wrong. Critically, it is not just our client who views the statements as a declaration of future default. Market-makers in securities issued by Argentina and newspaper reporters agree that Kicillof’s statements are functionally equivalent to a statement that Argentina will default.[13] To illustrate one example, J.P. Morgan’s June 19 Latin American Emerging Markets Research piece (attached hereto as Exhibit 4) is entitled “Argentina: Plays hardball with holdouts and signals it will not pay upcoming coupon on restructured bonds.”

In effect, Argentina declared an indefinite suspension or prohibition of its payments on its Obligations. In Minister Kicillof's own words,"[i]f Argentina were forced to pay hedge fund (holdout) bondholders [as required by the US Courts], the country would be pushed into

---

[11] These quotes are translations from the transcript of the June 18 Press Conference, available at http://www.mecon.gov.ar/comunicado-de-prensa-del-ministerio-de-economia/ (emphasis added).

[12] The terms "moratorium" and "standstill" are not themselves defined in the 2003 Credit Derivatives Definitions. However, the common meaning is "suspension” of payments (see Black’s Law Dictionary (Tenth Edition 2014)) or "halt of debt payments." see Das, Udaibir S. et al., "Sovereign Debt Restructurings 1950-2010: Literature Survey, Data and Stylized Facts." International Monetary Fund Working Paper, August 2012 at p. 8, available at http://www.un.org/esa/ffd/ecosoc/debt/2013/IMF_wp12_203.pdf; see also, Oxford Dictionary, defining moratorium as a "temporary prohibition of an activity" and providing a sample use of the word that refers to an indefinite moratorium, indicating that there is no need for the moratorium to be declared as temporary, available at http://www.oxforddictionaries.com/us/definition/american_english/moratorium.

[13] Notably, in an article published on June 18, Bank of America Merrill Lynch stated that it recognized Minister Kicillof's proposed strategy for handling the fallout from the US Courts' decisions as an "implicit indication" Argentina would not make its June 30 payment pursuant to its Obligations. See Brauer, Jane. "Argentina Watch: Cutting it Both Ways Won't Work." Bank of America Merrill Lynch Global Research, June 18, 2014; see also, Exhibit 2 (J.P Morgan noting that Minister Kicillof's proposed strategy results in a Catch-22 situation that would leave Argentina in default); see also, "Imminent Risk of Default as Battle Between Argentina and Paul Singer's Elliott Continues." Forbes, June 19, 2014 available at http://www.forbes.com/sites/afontevecchia/2014/06/19/imminent-risk-of-default-as-battle-between-argentina-and-paul-singers-elliott-continues/ ("[Argentina] being forced to pay holdout creditors in full is a practical impossibility, while negotiation appears doomed to fail given the nature of the bond contracts…an ominous default looks increasingly likely.").

default."[14] The June 17 Declaration, and the even more strident declarations made on June 18, fall squarely within the meaning of the terms moratorium and standstill as found within clause (i) of Section 4.6(a).

**B. Argentina's Willingness to Negotiate with Its Bondholders, or Desire to Lift the Injunction, Does Not Create Conditionality.**

The Determinations Committee (and predecessors) historically have expressed reluctance to declare Credit Events based on statements about inability or unwillingness to pay. For example, in the corporate context under Section 4.2, the standard for finding that a Reference Entity “admit[ed] in writing in a judicial, regulatory or administrative proceeding or filing its inability generally to pay its debts as they become due” is extremely high. And so it should be – because such a finding necessarily leads to the declaration of a Bankruptcy Credit Event and collapse of all Credit Derivative Transactions. However, no such concern applies to Section 4.6 and the standard for evaluating the conditionality of Potential Repudiation/Moratorium declarations should be relaxed. In effect, the term "potential" inherently allows for some degree of conditionality because the Credit Event does not ripen unless the Failure to Pay or Restructuring actually occur.

Here, parties opposing the declaration of a Potential Repudiation/Moratorium event might argue that Argentina could settle with the litigating holdouts, or that the injunction could be modified, to allow for payment of the Obligations. While theoretically true, the argument proves too much. It is *always* the case that a party claiming inability or unwillingness to pay would pay if opposing litigating parties capitulate, or if the limiting condition is removed. An insolvent debtor *always* would pay upon winning the lottery. But, Section 4.6 uses the term “de

[14] See e.g. The Star Online, "Argentina Would Default if Forced to Pay Bondholders: Kicillof" June 18, 2014, available at http://www.thestar.com.my/Business/Business-News/2014/06/18/Argentina-would-default-if-forced-to-pay-bondholders/.

facto" for a reason. As a matter of factual inquiry, and as of June 17 and 18, the possibility that Argentina would settle with litigants demanding that Argentina violate its own laws (the Lock Law) and pay them in a manner that would cause immediate and cascading default on the Obligations did not condition the statement of a potential moratorium. Similarly, as a matter of factual inquiry, the possibility that Judge Griesa would amend the injunction after repeatedly refusing to do so did not condition the statement of a potential moratorium. (Factually, on June 18, Judge Griesa did not amend the injunction and pointedly rejected requests to do so. However, this refusal to amend the injunction is no more relevant to determining the existence of a "potential" event than if the Court had granted Argentina relief.) In short, Argentina saying "I can't pay and won't pay but want to pay if the status quo improbably changes" is not a conditioned statement, when *de facto* evaluating that statement under clause (i) of Section 4.6(a).[15]

Even if Argentina is able to successfully reach a settlement that allows payment of the Obligations, such settlement would not amount to negation of the Potential Repudiation/Moratorium event but rather would constitute failure to satisfy clause (ii) of Section 4.6(a). Regardless of Argentina's subsequent success or failure, the June 17 and 18 declarations satisfy the Potential Repudiation/Moratorium prong of Section 4.6. Any other interpretation would render the term "potential" meaningless.

[15] Of course, even if some holders of Obligations exchange into local-law bonds it would not change the fact that Argentina would default on the terms of still-outstanding Obligations.

# EXHIBIT 1

From: (BLOOMBERG/ NEWSROOM:)

**17-06-2014**

**CONFERENCIA DE PRENSA DEL MINISTRO DE ECONOMÍA, AXEL KICILLOF, DESDE EL PALACIO DE HACIENDA.**

KICILLOF.- Buenas tardes, en primer lugar quiero hacer dos muy breves aclaraciones, antes de comenzar con la exposición, comentando un poco cuáles son los pasos a seguir, pero antes que nada quería aclarar algunas cuestiones que me parece que en estos días han sido más o menos tergiversadas. La primera de ellas es que la Argentina, desde el 2003, está pagando absolutamente todos vencimientos de su deuda reestructurada; Argentina quiere seguir pagando los vencimientos de su deuda reestructurada y la situación que se da es que paradójicamente, algunos no la quieren dejar pagar. En segundo lugar, con respecto no al país, sino a este gobierno que no es el gobierno de sobreendeudamiento, que incluye el megacanje, el blindaje, que llevó a la Argentina a uno de los default más grandes de la historia del capitalismo.

Por el contrario, así como no somos el gobierno del default somos lo que venimos a arreglar de Néstor Kirchner y Cristina Fernández de Kirchner, en ambas presidencias y sus funcionarios, somos los que venimos a normalizar y regularizar nuevamente las relaciones financieras internacionales del país, después de ese mega-desastre, ocurrido en el 2001. Ahora bien, por eso mismo, por más que este fallo sea desfavorable, que quede bien en claro que no estamos dispuestos a hacer cualquier cosa, a arreglar bajo cualquier condición, a pagar condiciones exorbitantes, a aceptar cualquier tipo de tasa de interés, de plazo, de bono o de pago. Todo lo contrario, nuestros principios, que nos llevaron exitosamente a reestructurar la deuda que el país tenía, después del default 2001, van a seguir aplicándose en esta situación.

Digo más, mi impresión como ministro de Economía, es que quieren tirar abajo la reestructuración de la deuda argentina. Esta fue una reestructuración sin precedentes, fue una reestructuración por 81.000 millones de dólares, hecha con una quita también sin precedentes, cercana al 70 por ciento del monto adeudado; fue hecha sin intervención de organismos financieros internacionales y fue hecha sin absolutamente ningún tipo de condicionamiento para la política económica argentina. Es decir, que esa reestructuración – que ahora está en juego – es uno de los pilares centrales del crecimiento económico que ha tenido el país en estos años, de su distribución de la riqueza, de la reindustrialización del país, la inclusión social. Lo que están atentando es contra esa reestructuración, contra ese éxito.

Tengo para decir también que si se aplicara la sentencia de Griesa, tal y como consta en el fallo de Griesa, en el fallo en segunda instancia, y que ahora ha ratificado la Corte Suprema de Justicia, al no tomarlo y Argentina se viera obligada a pagar a los fondos buitres esto empujaría al país a un default. Porque no son 1.500 millones de dólares lo que está en cuestión, sino que son 15.000 millones de dólares, o sea los reclamos de todos aquellos que están en la misma condición; así que de aplicarse el fallo de Griesa – tal y como está escrito – la Argentina sería empujada a un default. Pero que quede bien claro y que se queden todos bien tranquilos con respecto a nuestro criterio de negociación, pero también con respecto a lo que pensamos hacer: vamos a tomar

todos los recaudos para pagar los vencimientos de nuestra deuda reestructurada y eso es parte de lo que voy a anunciar hoy.
Antes de esto, quiero mencionar algunos elementos centrales de esta historia, para que todos los argentinos entiendan bien qué es lo que estamos discutiendo, de dónde viene, cuál es su origen y cuál es su situación actual. En primer lugar – y repito esto porque es central – en el año 2002, la deuda externa de Argentina, después de ese default catastrófico representaba el 166 por ciento de su Producto Interno Bruto, o sea era absolutamente impagable y lo fue por eso el default. ¿Por qué hablo de esto? Por dos motivos: primero, antes que nada porque lo que está en discusión ahora, ante el juzgado de Griesa, son títulos del 2001, tan viejo como eso es este asunto. Y esta causa no fue iniciada ni siquiera bajo este gobierno, sino que inmediatamente después del default se iniciaron causas tras causas de bonistas, que tenían esos títulos defaulteados para cobrar de una manera o de otra. Esta es una de las tantas causas y después me voy a referir también a esto.
Pero quiero decir también un segundo punto, que quiero marcar, con respecto a ese 166 por ciento de deudas que teníamos en 2002. Hoy esa misma relación entre la deuda y el PIB está alrededor del 40 por ciento, es decir se ha reducido a un cuarto de lo que era, ese es el proceso exitoso de desendeudamiento de la Argentina, esa es la deuda total con respecto al Producto, pero si uno toma la parte más recalcitrante de la deuda – recalcitrante en términos de la dificultad que tiene un país para afrontarla, que es la deuda, no con el sector público, sino con el sector privado, no en pesos argentinos, sino en dólares, esa deuda con el sector privado está en alrededor del 8 por ciento del Producto, es decir que la relación entre deuda externa con privados en dólares o en moneda extranjera, en general, es de la más baja de toda la serie histórica. Esto es lo que le da enormes posibilidades al país de seguir creciendo, esto es lo que le da al país esa fortaleza, que tiene en términos de su política económica.
Déjenme simplemente hacer una reflexión sobre la cuestión de la deuda que da para charlar muchísimo, aquí tenemos en este gráfico, en línea roja, desde 1970, la evolución de la deuda externa argentina, en moneda constante, ven esa evolución como es creciente hasta el default y en el 2003 se reduce la deuda en dólares. Por eso la relación con el Producto va cayendo a medida que crece el Producto, después cae y se mantiene prácticamente constante.
La otra línea en azul es mucho más importante para los argentinos, es la tasa del crecimiento del país. Esa línea azul, la tasa de crecimiento del país –como ven ustedes – queda estancada en toda esa fase de crecimiento de la deuda, o sea cuando la deuda crece y crece, es decir que ese modelo que ayer la Presidenta de la Nación denominaba de bicicleta financiera, de sobre-endeudamiento, de dependencia externa, de financiarización de la economía lo que determinó es la imposibilidad de crecer para la Argentina y fíjense como casualmente cuando esa evolución, esa tendencia creciente se detiene, a partir del año 2003, esa es ahí que la Argentina, y en esta serie larga, muestra una tendencia al crecimiento muchísimo más veloz. De forma tal, que podríamos teorizar sobre esto, pero para que lo entiendan los argentinos, ese modelo estuvo atrás, pero que algunos de los que son candidatos para el período que viene también enarbolan como su programa económico, ese modelo de sobre-endeudamiento, de tomar plata porque es barato, de refinanciar la deuda todo el tiempo

ese modelo impidió que la Argentina creciera y lo va a volver a hacer y esta es la demostración.
Ahora bien, decía ese 166 de relación deuda-Producto, de 2002, es lo que este gobierno viene regularizando de manera sistemática, de manera clara, transparente, ordenada y concienzuda de forma tal de no poner en riesgo el crecimiento del país. Los principios que han tenido los gobiernos de Néstor Kirchner y Cristina Fernández de Kirchner para renegociar esa enorme, esa enorme pelota de nieve de deuda que nos dejó el neoliberalismo, esos principios son los que nos permitieron crecer y los pasos que se han dado son muchos.
En el 2005, se dio el primer canje de deuda, ese primer canje de deuda que es motivo de la cuestión que hoy tenemos ante nosotros, fue un canje de deuda también con muy pocos precedentes, que tomó esos títulos en default, esos 81.000 millones de dólares y los ofreció a los tenedores pagarles deuda con títulos nuevos, pero con una quita sustancial, con una reducción de deuda. ¿Por qué, cuál es el principio? Necesitamos crecer para poder pagar, si la deuda no se refinanciaba, si la deuda no se reestructuraba, si la deuda no tenía una quita no íbamos a poder crecer y por tanto no íbamos a poder pagar y por tanto íbamos a estar – como tantas veces estuvo la Argentina – prometiendo algo que no íbamos a poder cumplir.
En el 2006, la cancelación anticipada prácticamente por 10.000 millones de dólares con la deuda del Fondo Monetario Internacional, esto también no tiene precedentes y saben ustedes, porque era algo que estuvimos discutiendo, en estos últimos día, por la cuestión del Club de París, que cuando el FMI tiene una acreencia muy importante con un país es uno de los resortes que interviene en la reestructuración de la deuda, cuando el país no puede pagar, esas refinanciaciones vienen siempre con condicionalidades.
Los argentinos – dolorosamente – conocemos muchos ejemplos de esto, porque el Fondo Monetario Internacional tuvo un papel central en las políticas económicas aplicadas, durante la década del 90 y antes, como diciéndonos que el principal objetivo del país era pagar esa deuda. Y para refinanciarnos teníamos que tomar medidas cruentas, medidas que implicaban el ajuste de las cuentas públicas. Y los ajustes de las cuentas públicas quieren decir la reducción de la salud, la reducción de la educación, de los salarios públicos, los pagos de jubilaciones, la cantidad de jubilados, es decir que todas esas medidas, que se tomaron en la Argentina, estuvieron presididas por algún problema de imposibilidad pagar la deuda y tener que ir a pedirle a quien después porque te presta, te impone una condicionalidad. Esos 10.000 millones de pagos de deuda no sacaron de ese verdadero cepo para la política de crecimiento de la Argentina. Después, en septiembre, se anuncia el pago al Club de París, después la caída del Lehman Brothers y Wall Street no se puede realizar; en 2009 se hace un nuevo canje de deuda, pero en 2010 se vuelve a abrir el canje de deuda, que se abrió en 2005, para los acreedores privados externos y conseguimos lo que aquí estamos defendiendo, que el 92 por ciento de quienes tenían títulos públicos de deuda, más del 92, casi todos, uno diría unanimidad aceptarán ese canje, en el 2010. Ese canje es el que se ha ido pagando, sin ninguna dificultad, cumpliendo todos y cada uno de los vencimientos.
En el 2013, viene el acuerdo para los pagos de los fallos del CIADI, pendientes de resolución; en el 2014- ahora en marzo –el acuerdo con Repsol para la indemnización

por la expropiación y después el acuerdo con los 19 países del Club de París para la refinanciación, podríamos decir, de la deuda con el Club de París. Es decir, quiero decirlo muy claro, este gobierno no endeudó a la Argentina de esa manera, este gobierno no provocó el default, al contrario nos dedicamos a arreglar y a pagar los platos rotos de la fiesta neoliberal, y hoy aparece una herencia de esa situación. ¿Por qué digo que aparece una herencia de esa situación? Básicamente porque los títulos que están reclamando los fondos buitres son títulos que no entraron a esas dos reestructuraciones. Como mencionaba ayer la Presidenta, son títulos correspondientes al 7 por ciento restante, que no entró a la reestructuración, es más son poquitos títulos, de ese 7 por ciento, no son todos, son algunos de ese 7 por ciento. ¿Por qué? Porque un juez norteamericano, y de nuevo lo digo no es una estrategia de este gobierno, sino porque esos títulos tenían ley norteamericana y con esos títulos fueron a reclamarle a un juez norteamericano. ¿Qué le reclamaron? Le reclamaron el total del pago de esa deuda.

Y quiero dejarlo muy en claro, porqué nosotros hablamos de fondos buitres, por qué hablamos de fondos buitres. Porque podríamos distinguir una situación, que es la de aquel que tenía títulos de deuda argentina y no entró al canje, a la reestructuración porque no quiso, porque no pudo, porque se lo perdió o porque tenía otra idea. Pero este no es el caso de los fondos buitres. Los fondos buitres no eran acreedores de la Argentina. O sea, nunca le prestaron plata a la Argentina, sino que por el contrario, fueron y compraron alrededor del año 2008, algunos de ellos, otros vienen de antes, títulos que están por fuera de la reestructuración. O sea, cuando en 2008 nosotros ya habíamos hecho el primer canje e íbamos al segundo, compraron títulos que están ahí dando vueltas en el mercado y con esos títulos se presentaron a un tribunal, no porque ellos le hubieran prestado a la Argentina, porque ese es el negocio de los fondos buitres, como los caranchos de la película argentina.

Ese es el negocio de los fondos buitres: encontrar una falla judicial y obtener una ganancia extraordinaria. ¿Por qué? Porque pagaron, por ejemplo este fondo MNL pagó 48 millones de dólares por títulos argentinos y hoy, un juez en los Estados Unidos, le dijo que le corresponde cobrar 832 millones de dólares, teniendo una ganancia del 1.608 por ciento.

Pero de nuevo: no era un acreedor nuestro de aquella época, sino que fue uno que fue a comprar esos títulos justamente para ir a reclamarle a un juez.

Y esta no es la primera vez que lo hace, porque estos fondos hace 12 años que están litigando contra la Argentina. Ahí, al borde del default empezaron los litigios y empezaron a intentar embargos. Lo tengo acá anotado, trataron de embargar los intereses de deuda que efectivamente pagábamos; propiedades diplomáticas de la Argentina; propiedades militares; las reservas del Banco Central trataron de embargar también; trataron de embargar el Tango 01, en 2007; trataron de embargar fondos de la ANSES, de nuestros jubilados, tanto que defendemos, los fondos de nuestros jubilados, fue uno de estos fondos a decir “embárguese con este títulos los fondos de los jubilados”; fondos de ENARSA; partes de un satélite argentino, que hace poco estuvimos hablando de él, de ARSAT; un satélite de la CONAE; la Fragata Libertad, lo recordarán; bienes del INTA; bienes de Aerolíneas Argentinas. Es decir, van por todo, van absolutamente por todas las posesiones argentinas y no por lo que hizo este Gobierno en términos de reestructuración, sino por el default 2001, van con los títulos

de default de 2001 a quedarse con la Fragata Libertad, a quedarse con los fondos de los jubilados, a quedarse con el Tango 01.
Todos estos intentos de embargar bienes de la Argentina, fueron detenidos por jueces en el extranjero, son más de 900 demandas, no son pocas.
Es decir, que esta es una fisura, la que estamos viendo ahora, es una fisura por la que lograron introducirse con el objetivo de derribar todo este trabajo que hemos hecho los argentinos para normalizar de nuevo nuestra situación internacional después del 2001. Con un 1 por ciento, quieren tirar abajo lo que arregló el 97 por ciento.
En esa situación estamos y para los que dicen que nuestra estrategia judicial fue desacertada, lo único que quiero decir, primero, es que estas 900 causas judiciales, aquí, allá, lo de la Fragata Libertad, lo de ANSES, lo de las reservas del Central, todo eso fue detenido por nuestra estrategia judicial. Y además, no contamos con pocos apoyos, hay muchos que nos han apoyado.
Nos han apoyado directamente en las causas algunos, yo los voy a mencionar a todos; otros, simplemente, han dicho que este problema que sufre la Argentina, es un problema del sistema económico global, es un problema de todos los países, es un problema del mundo. ¿Por qué? Porque si algún país, como tuvo Argentina en 2001, tiene una dificultad y no puede pagar su deuda y con un 1 por ciento en el extremo, con un papelito se puede voltear todo el trabajo que haga el país para reestructurar y volver a pagar, entonces son imposibles las reestructuraciones de deuda. Por eso, la cuestión del riesgo sistémico, del riesgo para la economía global que tiene esta causa, fue reconocida por muchos.
Voy a mencionar algunos, los que nos acompañaron en esta última causa contra los fondos buitres en la Corte Suprema como son el gobierno de Francia; el gobierno de México, acompañando nuestra estrategia judicial; el gobierno de Brasil; el grupo Jubilé; Euroclear; Puente Hnos., de acá de Argentina; Fondo de Valores; el Fondo Fintech. Pero también están de acuerdo con que esta es una causa muy complicada, no solo para el país, sino para el mundo entero y con que el reclamo este es injusto, están de acuerdo: Joseph Stiglitz, Ann Krugan, Nuriel Rubino, la CELAC, el G-24, ayer el G-77, contra los fondos buitres, parlamentarios británicos que se han expresado con preocupación por esta cuestión. Pero también al Fondo Monetario Internacional le preocupa, también le preocupa al gobierno norteamericano.
Así que, estamos ante un problema de dimensiones globales, que atenta hoy contra nuestro canje, atenta contra nuestro esfuerzo y lo que contestamos es: no pasarán, no van a voltear nuestras reestructuraciones, lo vamos a impedir.
Y quiero mencionar ahora de qué se trata en concreto, el fallo de Griesa. Porque lo que pasó ahora es que la Corte Suprema de Justicia norteamericana, no consideró el reclamo argentino que implicaba revisar este fallo de Griesa.
Griesa es un juez de primera instancia; ese fallo fue confirmado por la segunda instancia y luego, a instancias del Gobierno argentino, llegó a la Corte Suprema, se le pidió a la Corte Suprema y la Corte Suprema denegó el caso, rechazó el aso y no lo tomó. Con lo cual, queda firme la sentencia de Griesa.
Me voy a referir a las consecuencias de la sentencia de Griesa. ¿Qué significan? Bueno, habiendo fracasado todos los embargos, abogados de algunos de estos fondos buitres, MNL, es uno de ellos, Aurelius, Blue Angel, que están en estas causas,

pidieron otra cosa, pidieron una interpretación de una cláusula jurídica, que no lo voy a explicar porque es técnico y complejo pero voy a decir cuál es el resultado.
Lo que pidieron concretamente es que Argentina le pague a los buitres todo lo que los buitres reclaman en el próximo pago que haga la Argentina de intereses de su deuda reestructurada. Pidieron que pase eso.
¿Qué quiere decir eso concretamente, se entiende? En este momento esos son 1.500 millones de dólares. En este momento, eso significa 1.500 millones de dólares por los fondos que actuaron y cuanto le fue reconocido.
¿Qué significa? Primero: que todos los que estén en igual condición, que esos fondos que reclamaron, obtuvieron 1.500 millones de dólares, es decir, el equivalente a 15.000 millones de dólares, según nuestros cálculos, están en la misma situación y pueden reclamar lo mismo. ¿Qué quiere decir? Que si va a pagar la Argentina a sus acreedores, debe pagarle también lo que reclaman a los fondos buitres por un total de hasta 15.000 millones de dólares.
Entonces, para que lo entienda todo el mundo, vamos a la cuestión concreta: ¿cuándo es nuestro próximo vencimiento, que sería lo que Griesa señaló a pedido de los fondos buitres? Nuestro próximo vencimiento es el 30 de junio. Argentina tiene que pagar 900 millones de dólares, Argentina los tiene, está en condiciones de pagar y se los va a pagar. ¿A quiénes? A sus tenedores de deuda, a nuestros bonistas, a los bonistas que entraron en los canjes. Lo vamos a pagar.
Ahora, ¿qué problema hay? Lo que dice este fallo es, primero: que nosotros para pagarle a ellos, debemos también pagarle a los fondos buitres, 15.000 millones de dólares.
Es decir que es mentira que este fallo implica solo los 1.500 de ahora, implica los 15.000. Y a medida que vayan entrando los otros reclamantes en iguales condiciones, se va a ir sumando un monto mayor. 15.000 millones de dólares es más de la mitad de las reservas que tiene hoy la República Argentina.
O sea, que si nosotros queremos pagar los 900 que debemos y que vamos a pagar y que tenemos, tenemos que pagar 15.000 más. Lo cual, como decía recién, empuja a Argentina a un default, porque Argentina no puede pagar todo junto y cuando vayan apareciendo las demandas todo lo que se le reclama por una deuda de quienes no entraron a los canjes, algunos nos dicen, y voy a hacer el comentario de esta manera, que hay que negociar con los buitres. Pero voy a decirles claramente: los buitres son buitres porque no negocian, los buitres son buitres porque van a juicio para obtener el total de sus reclamos.
Si estuvieran en condiciones de negociar, lo hubieran hecho como todos los demás bonistas, como el 93, como la mayoría, casi la unanimidad que aceptó la oferta argentina y que hoy está cobrando. Pero no, se quedaron esos títulos sin cobrar a la espera de que algunas de estas 900 causas entraran en el arco. Y fue esta y es ahora, porque es el 30 de junio.
Entonces, fíjense las implicancias del fallo: si nosotros queremos pagar los 900, deberíamos pagar, dice el fallo de Griesa, primero o al mismo tiempo, los 1.500. Esto significa 15.000.
Pero veamos, supongamos que no queremos hacerlo y queremos pagar solo los 900 a quienes tienen nuestros títulos. El juez Griesa le ordenó a nuestro banco en Nueva

York que no le pague a nuestros acreedores, que no le pague a nuestros bonistas, sino que le pague a los buitres o que le pague una parte y una parte.
Es decir, que si nosotros pagamos los 900 que tenemos y que queremos pagar el 30, vamos y lo depositamos en Nueva York, van a ser embargados, no van a llegar a sus destinatarios y Argentina estaría en un default, no porque no tiene la plata, sino porque no nos dejan pagar, por eso les decía, porque no le podríamos pagar a nuestros bonistas.
Ahora supongamos, porque algunos opinólogos están diciendo esto, que vamos y le pagamos los 1.500 a estos fondos buitres y además los 900, esto el 30, que eso es lo que dice la orden judicial. La orden judicial no dice "negóciese, discútase, váyase a algún lado, a un café, a un bar, a los tribunales, a Washington", no dice nada, lo único que dice es "hágase esto".
Si nosotros pagamos los 1.500, atrás de los 1.500 vienen 15.000, que no podemos pagar, no es razonable pagar.
Y déjenme decir algo: supónganse que, como dicen otros, vamos y renegociamos esos 15.000, los pagamos en bonos, cosa que no está en el fallo, por supuesto, pero si nosotros les ofrecemos a los fondos buitres más de lo que les ofrecemos a nuestros bonistas que entraron en el 93 por ciento de la reestructuración, estos bonistas, también con razón probablemente, vayan a un juez y le digan "yo entré al canje y me pagaron menos que a ese otro que le pagan el total de lo que decían los títulos más los intereses vencidos más los punitorios".
Entonces, hay una cláusula que están en los bonos, pero que también está en la Justicia argentina, porque es lo que dice nuestra Ley, que dice que no le podemos hacer una mejor oferta a quien no entró al canje que al que entró al canje.
Quiere decir que no son solo los 15.000 que vienen después de los 1.500; después de los 1.500 y los 15.000, vienen cifras que son de alrededor de 120.000 millones de dólares, de todos los que entraron al canje que, repito, con razón. Un bonista que de buena fe entró al canje, va a ir y le va a decir a un juez argentino que quiere que le paguen lo mismo que le pagaron al fondo buitre que reclamó. Y yo no puedo pronunciarme si está bien o está mal desde el punto de vista jurídico.
Ahora, no dudo que pueda haber un juez como Griesa o un juez como algún juez argentino que ponga una cautelar y nos impida pagar el resto de la deuda o que nos obligue a pagarles a todos esos lo mismo que a los otros. Con lo cual, la magnitud de la deuda externa argentina, no porque hayamos hecho las cosas mal, sino precisamente, porque las hicimos bien y renegociamos, pero porque encontraron una forma jurídica de reclamarnos todo este pilón de plata que corresponde a títulos que compraron para hacer esto, no para otra cosa, ni siquiera para cobrar. Compraron para hacer un negocio financiero extraordinario como no hay ninguno y que pone en jaque todos los demás negocios.
Porque si haciendo esto en 2008, uno consigue 1.600 por ciento, el hobby de todo el mundo va a ser ir a comprar bonos en default de algún país a ver si lo pueden obligar a pagar.
Y lo han hecho, porque lo han hecho con otros países también en Panamá, Perú, Ecuador y siguen.
Cuando el país está en el piso, compran los bonos, y cuando empieza a crecer, van y le reclaman aquello que está por fuera de las condiciones generales que se han hecho.

Dicho de otra manera: si no le pagamos a los buitres, la sentencia dice que no le podemos pagar a nuestros bonistas. Y si le pagamos a los buitres, se nos desencadena una cantidad de recursos que deberíamos pagar que es impagable y que no sabemos dónde termina.
De forma tal que la sentencia de Griesa por un lado o por el otro, parece empujarnos al default. O sea, porque no nos deja pagar a los acreedores nuestros de los bonos reestructurados o sea, por el contrario, porque le pagamos a los buitres, nos deja pagar a los reestructurados pero vienen reclamos por sumas multimillonarias después de esto.
Esto es lo que se desprende de la sentencia de Griesa, no dice absolutamente nada más.
¿Qué va a hacer el Gobierno argentino? En primer lugar, no podemos permitir que nos impidan honrar nuestro compromiso con los acreedores, con los bonistas que entraron a la reestructuración, con nuestro 93 por ciento que está cobrando, que aceptó la quita y que ha cobrado puntualmente y que tiene sus bonos en su poder. Así que, no vamos a permitir que nos impidan pagarles.
Es por eso que estamos iniciando los pasos para realizar un canje de deuda para pagarle en Argentina y bajo la ley argentina. Estamos iniciando los pasos.
Pero les quiero comentar otro punto: esto es lo que dice la sentencia de Griesa, lo que acabo de describir. Si una sentencia nos dice “suicídense”, nosotros no podemos, aunque queramos responsablemente, ciegamente aceptar eso que dice.
¿Pero qué ocurrió? Lo quiero dejar en claro: el juez dijo algo que no coincide con el fallo. ¿Qué dijo? Que no quiere empujar, no recuerdo las palabras exactas, pero salió en la prensa y salió también en la conversación con nuestros abogados, que no quiere empujar al país al default, que no va a provocar un default. Eso es lo que dijo el juez. No se sigue de la sentencia, no se sigue del fallo. De forma tal que nosotros vamos a tomar los recaudos para poder pagar, pero también vamos a enviar a nuestros abogados a hablar con el juez Griesa. Eso es lo que voy a instruir en este momento, por instrucciones a su vez de la Presidenta de la Nación.
Por un lado, dar los pasos para hacer un canje a legislación local; por otro lado, enviar a nuestros abogados a hablar con el juez Griesa a ver a qué se refiere con esto de que no está empujando al default con esta sentencia que es muy clara y que como he leído, así como todos los analistas, yo diría el 90 por ciento, el 95 por ciento de los analistas, decía que la Corte Suprema de Justicia de Estados Unidos por su importancia global, por todos los que nos acompañaron, por la preocupación incluso del propio Gobierno norteamericano, el Poder Ejecutivo norteamericano, el Fondo Monetario, por preocupaciones de países vecinos tan importantes como Francia, como Brasil, que iban a considerar esta causa, ya sea tomándola directamente o consultándole al Gobierno Federal de los Estados Unidos.
Eso era lo que decían todos, esos pronósticos fallaron y lo hemos leído estos días porque era lo que prácticamente seguro iba a ocurrir, excepto, claro está, quienes teníamos la responsabilidad de ver cuáles eran las alternativas.
Por otro lado, entonces vamos a ir a hablar con el juez Griesa y, por otro lado, mañana, a las 10 de la mañana, nos vamos a juntar con los presidentes de los bloques de la Cámara de Diputados y de la Cámara de Senadores, junto con el secretario General de la Presidencia y colaboradores, para básicamente comentarles cuál es nuestro punto

de vista sobre esta situación, las medidas que hemos instrumentado y cuáles son las alternativas que tiene por delante el país.
Lo que debe quedar muy claro a todos los argentinos es que el Gobierno no tomó esta deuda, no defaulteó esta deuda, sino que ha tenido principios férreos que tienen que ver con que la capacidad de pago de la Argentina es aquella que nos permite seguir creciendo.
No podemos nuevamente estar en una situación donde por pagar la deuda, lo que reine en la Argentina es el hambre, el desempleo, la miseria.
De la misma forma, eso que hemos reestructurado, desde que lo hemos hecho lo estamos pagando puntualmente. Lo vamos a seguir pagando, esa es la voluntad del Gobierno argentino.
Y por último, quédense todos tranquilos que esto está estudiado en profundidad, que se han tomado todas las medidas para impedir que la reconstrucción realmente de la situación financiera de la Argentina después del default, para impedir que esa reconstrucción esté en riesgo, más todavía por pequeños grupos de bonistas, lo más extremista del sector financiero, que no busca otra cosa que jaquear a los países, que impedir su crecimiento, que a toda costa cobrar una deuda que ni siquiera proviene de haber hecho un préstamo, de haber invertido en ese país.
Muchísimas gracias. (APLAUSOS)

# EXHIBIT D

92 N.Y.2d 458, 705 N.E.2d 656, 682 N.Y.S.2d 664, 37 UCC Rep.Serv.2d 323, 1998 N.Y. Slip Op. 10518

Norcon Power Partners, L.P., Respondent,
v.
Niagara Mohawk Power Corp., Appellant.

Court of Appeals of New York
Argued October 22, 1998;
Decided December 1, 1998

CITE TITLE AS: Norcon Power Partners v Niagara Mohawk Power Corp.

## SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.17, to review a question certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "Does a party have the right to demand adequate assurance of future performance when reasonable grounds arise to believe that the other party will commit a breach by non-performance of a contract governed by New York law, where the other party is solvent and the contract is not governed by the U.C.C.?"

## HEADNOTE

Contracts
Breach or Performance of Contract
Demand for Adequate Assurance

With respect to a long-term commercial contract between corporate entities, which is governed by New York law, and is complex and not reasonably susceptible of all security features being anticipated, bargained for and incorporated in the original contract, a party has the right to demand adequate assurance of future performance when reasonable grounds arise to believe that the other party will commit a breach by non-performance of the contract, even where the other party is solvent and the contract is not governed by the Uniform Commercial Code. Extension of the doctrine of demand for adequate assurance (*see,* UCC 2-609) as a common-law analogue in these circumstances puts commercial parties in these kinds of disputes at relatively arm's length equilibrium in terms of reliability and uniformity of governing legal rubrics. The availability of the doctrine may even provide an incentive and tool for parties to resolve their own differences, perhaps without the necessity of judicial intervention. Open, serious renegotiation of dramatic developments and changes in unusual contractual expectations and qualifying circumstances would occur because of and with an eye to the doctrine's application.

## TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Sales, §§ 512, 513, 515-519.

McKinney's, UCC 2-609.

NY Jur 2d, Contracts, §§ 443-445; Sales and Exchanges of Personal Property, §§ 82-85. ***459**

## ANNOTATION REFERENCES

See ALR Index under Sale and Transfer of Property; Uniform Commercial Code.

## POINTS OF COUNSEL

*Swidler & Berlin, Chartered (John R. Ferguson* and *Timothy A. Ngau,* of the District of Columbia Bar, admitted *pro hac vice,* of counsel), *Lankenau, Kovner & Kurtz, L. L. P.,* New York City (*Sharon L. Schneier* of counsel), *Paul J. Kaleta,* Syracuse, and *Brian K. Billinson* for appellant.

Niagara Mohawk is not obligated to continue to buy electricity from Norcon without adequate assurances that Norcon will be able to repay the hundreds of millions of dollars that it is reasonably expected to owe, and expressly obligated to repay, under the parties' contract. The need for assurances of Norcon's performance of its repayment obligations arises because of the precipitous and unexpected drop in Niagara Mohawk's avoided cost since the formation of the contract. (*Nichols v Scranton Steel Co.,* 137 NY 471; *Hanna v Florence Iron Co.,* 222 NY 290; *Pardee v Kanady,* 100 NY 121; *Updike v Oakland Motor Car Co.,* 229 App Div 632; *American Castype Corp. v Niles-Bement-Pond Co.,* 266 App Div 557; *Marine Midland Bank v Stein,* 105 Misc 2d 768; *Gelder Med. Group v Webber,* 41 NY2d 680; *Components Direct v European Am. Bank & Trust Co.,* 175 AD2d 227; *Coyne Enters. v Union Carbide Corp.,* 89 AD2d 545; *Schenectady Steel Co. v Trimpoli Gen. Constr. Co.,* 43 AD2d 234, 34 NY2d 939.)

*Chadbourne & Parke, L. L. P.,* New York City (*Thomas J. Hall, Brian A. Miller* and *Christine P. Searl* of counsel), for respondent.

To answer the certified question in the affirmative as Niagara Mohawk urges, this Court must overturn well-established New York law. The drastic change in New York law that Niagara Mohawk advocates would cause far more insecurity than it could ever hope to resolve. (*American List Corp. v U.S. News & World Report,* 75 NY2d 38; *Didier v Macfadden Publs.,* 299 NY 49; *Nichols v Scranton Steel Co.,* 137 NY 471; *O'Shanter Resources v Niagara Mohawk Power Corp.,* 915 F Supp 560; *Tenavision, Inc. v Neuman,* 45 NY2d 145; *Ga Nun v Palmer,* 202 NY 483; *Rachmani Corp. v 9 E. 96th St. Apt. Corp.,* 211 AD2d 262; *City of New York v New York Yankees,* 117 Misc 2d 332; *Schenectady Steel Co. v Trimpoli Gen. Constr. Co.,* 43 AD2d 234, 34 NY2d 939; *Sterling Power Partners v Niagara Mohawk Power Corp.,* 239 AD2d 191.) ***460**

*Lawrence G. Malone,* Albany, and *Jonathan D. Feinberg* for Public Service Commission of the State of New York, *amicus curiae.*

I. Independent power producers should be required to provide firm security that they will perform for the full life of contracts signed pursuant to the Public Utility Regulatory Policies Act. (*Matter of Coastal Power Prod. Co. v New York State Pub. Serv. Commn.,* 153 AD2d 235; *Metropolitan Life Ins. Co. v Noble Lowndes Intl.,* 84 NY2d 430; *Westinghouse Elec. Corp. v New York City Tr. Auth.,* 82 NY2d 47.) II. The contract in its current state poses a significant threat to consumers.

## OPINION OF THE COURT

Bellacosa, J.

The doctrine, known as demand for adequate assurance of future performance, is at the heart of a Federal lawsuit that stems from a 1989 contract between Norcon Power Partners, L.P., an independent power producer, and Niagara Mohawk Power Corporation, a public utility provider. Niagara Mohawk undertook to purchase electricity generated at Norcon's Pennsylvania facility. The contract was for 25 years, but the differences emerged during the early years of the arrangement.

The case arrives on this Court's docket by certification of the substantive law question from the United States Court of Appeals for the Second Circuit. Our Court is presented with an open issue that should be settled within the framework of New York's common-law development. We accepted the responsibility to address this question involving New York contract law:

"Does a party have the right to demand adequate assurance of future performance when reasonable grounds arise to believe that the other party will commit a breach by non-performance of a contract governed by New York law, where the other party is solvent and the contract is not governed by the U.C.C.?" (*Norcon Power Partners v Niagara Mohawk Power Corp.,* 110 F3d 6, 9.)

As framed by the particular dispute, we answer the law question in the affirmative with an appreciation of this Court's traditional common-law developmental method, and as proportioned to the precedential sweep of our rulings.

### I.

The Second Circuit Court of Appeals describes the three pricing periods, structure and details as follows: ***461**

"In the first period, Niagara Mohawk pays Norcon six cents per kilowatt-hour for electricity. In the second and third periods, the price paid by Niagara Mohawk is based on its 'avoided cost.' The avoided cost reflects the cost that Niagara Mohawk would incur to generate electricity itself or purchase it from other sources. In the second period, if the avoided cost falls below a certain floor price (calculated according to a formula), Niagara Mohawk is obligated to pay the floor price. By the same token, if the avoided cost rises above a certain amount (calculated according to a formula), Niagara Mohawk's payments are capped by a ceiling price. An 'adjustment account' tracks the difference between payments actually made by Niagara Mohawk in the second period and what those payments would have been if based solely on Niagara Mohawk's avoided cost.

"In the third period, the price paid by Niagara Mohawk is based on its avoided cost without any ceiling or floor price. Payments made by Niagara Mohawk in the third period are adjusted to account for any balance existing in the adjustment account that operated in the second period. If the adjustment account contains a balance in favor of Niagara Mohawk--that is, the payments actually made by Niagara Mohawk in the second period exceeded what those payments would have been if based solely on Niagara Mohawk's avoided cost--then the rate paid by Niagara Mohawk will be reduced to reflect the credit. If the adjustment account contains a balance in favor of Norcon, Niagara Mohawk must make increased payments to Norcon. If a balance exists in the adjustment account at

the end of the third period, the party owing the balance must pay the balance in full within thirty days of the termination of the third period" (*Norcon Power Partners v Niagara Mohawk Power Corp.,* 110 F3d 6, 7, *supra*).

In February 1994, Niagara Mohawk presented Norcon with a letter stating its belief, based on revised avoided cost estimates, that substantial credits in Niagara Mohawk's favor would accrue in the adjustment account during the second pricing period. "[A]nalysis shows that the Cumulative Avoided ***462** Cost Account ... will reach over $610 million by the end of the second period." Anticipating that Norcon would not be able to satisfy the daily escalating credits in the third period, Niagara Mohawk demanded that "Norcon provide adequate assurance to Niagara Mohawk that Norcon will duly perform all of its future repayment obligations."

Norcon promptly sued Niagara Mohawk in the United States District Court, Southern District of New York. It sought a declaration that Niagara Mohawk had no contractual right under New York State law to demand adequate assurance, beyond security provisions negotiated and expressed in the agreement. Norcon also sought a permanent injunction to stop Niagara Mohawk from anticipatorily terminating the contract based on the reasons described in the demand letter. Niagara Mohawk counterclaimed. It sought a counter declaration that it properly invoked a right to demand adequate assurance of Norcon's future payment performance of the contract.

The District Court granted Norcon's motion for summary judgment. It reasoned that New York common law recognizes the exceptional doctrine of demand for adequate assurance only when a promisor becomes insolvent, and also when the statutory sale of goods provision under UCC 2-609, is involved. Thus, the District Court ruled in Norcon's favor because neither exception applied, in fact or by analogy to the particular dispute (*decided sub nom. Encogen Four Partners v Niagara Mohawk Power Corp.,* 914 F Supp 57).

The Second Circuit Court of Appeals preliminarily agrees (110 F3d 6, *supra*) with the District Court that, except in the case of insolvency, no common-law or statutory right to demand adequate assurance exists under New York law which would affect non-UCC contracts, like the instant one. Because of the uncertainty concerning this substantive law question the Second Circuit certified the question to our Court as an aid to its correct application of New York law, and with an eye toward settlement of the important precedential impact on existing and future non-UCC commercial law matters and disputes.

## II.

Our analysis should reference a brief review of the evolution of the doctrine of demands for adequate assurance. Its roots spring from the doctrine of anticipatory repudiation (*see,* Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition,* 69 U Colo L Rev 71, 77 [1998]). Under that familiar precept, when a party repudiates contractual duties ***463** "prior to the time designated for performance and before" all of the consideration has been fulfilled, the "repudiation entitles the nonrepudiating party to claim damages for total breach" (*Long Is. R. R. Co. v Northville Indus. Corp.,* 41 NY2d 455, 463; *see,* II Farnsworth, Contracts § 8.20; Restatement [Second] of Contracts § 253; UCC 2-610). A repudiation can be either "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach" or "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (Restatement [Second] of Contracts § 250; *see,* II Farnsworth, Contracts § 8.21; UCC 2-610, Comment 1).

That switch in performance expectation and burden is readily available, applied and justified when a breaching party's words or deeds are unequivocal. Such a discernible line in the sand clears the way for the nonbreaching party to broach some responsive action. When, however, the apparently breaching party's actions are equivocal or less certain, then the nonbreaching party who senses an approaching storm cloud, affecting the contractual performance, is presented with a dilemma, and must weigh hard choices and serious consequences. One commentator has described the forecast options in this way:

"If the promisee regards the apparent repudiation as an anticipatory repudiation, terminates his or her own performance and sues for breach, the promisee is placed in jeopardy of being found to have breached if the court determines that the apparent repudiation was not sufficiently clear and unequivocal to constitute an anticipatory repudiation justifying nonperformance. If, on the other hand, the promisee continues to perform after perceiving an apparent repudiation, and it is subsequently determined that an anticipatory repudiation took place, the promisee may be denied recovery for post-repudiation expenditures because of his or her failure to avoid those

expenses as part of a reasonable effort to mitigate damages after the repudiation" (Crespi, *The Adequate Assurances Doctrine after U.C.C. § 2-609: A Test of the Efficiency of the Common Law,* 38 Vill L Rev 179, 183 [1993]; *see,* Robertson, *The Right to Demand Adequate Assurance of Due Performance: Uniform Commercial* ***464** *Code Section 2-609 and Restatement [Second] of Contracts Section 251,* 38 Drake L Rev 305, 310 [1988-1989]; Dowling, *A Right to Adequate Assurance of Performance in All Transactions: U.C.C. § 2-609 Beyond Sales of Goods,* 48 S Cal L Rev 1358, 1358-1360, 1386-1387 [1975]; II Farnsworth, Contracts § 8.23a).

### III.

The Uniform Commercial Code settled on a mechanism for relieving some of this uncertainty. It allows a party to a contract for the sale of goods to demand assurance of future performance from the other party when reasonable grounds for insecurity exist (*see,* UCC 2-609; II Farnsworth, Contracts § 8.23). When adequate assurance is not forthcoming, repudiation is deemed confirmed, and the nonbreaching party is allowed to take reasonable actions as though a repudiation had occurred (*see,* 4 Anderson, Uniform Commercial Code § 2-609:3 [3d ed 1997 rev]).

UCC 2-609 provides, in relevant part:

"(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return. ...

"(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

In theory, this UCC relief valve recognizes that "the essential purpose of a contract between commercial [parties] is actual performance ... and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain" (UCC 2-609, Comment 1). In application, section 2-609 successfully implements the laudatory objectives of quieting the doubt a party fearing repudiation may have, mitigating the dilemma flowing ***465** from that doubt, and offering the nonbreaching party the opportunity to interpose timely action to deal with the unusual development (*see,* II Farnsworth, Contracts § 8.23a; 4 Anderson, Uniform Commercial Code § 2-609:36 [3d ed 1997 rev]; Robertson, *op. cit.,* at 353; Dowling, *op. cit.,* at 1359, 1364-1365; Campbell, *The Right to Assurance of Performance under UCC § 2-609 and Restatement [Second] of Contracts § 251: Toward a Uniform Rule of Contract Law,* 50 Fordham L Rev 1292, 1296-1297 [1982]; *but see,* 1 White and Summers, Uniform Commercial Code § 6-2 [4th ed 1995]).

Indeed, UCC 2-609 has been considered so effective in bridging the doctrinal, exceptional and operational gap related to the doctrine of anticipatory breach that some States have imported the complementary regimen of demand for adequate assurance to common-law categories of contract law, using UCC 2-609 as the synapse (*see, e.g., Lo Re v Tel-Air Communications,* 200 NJ Super 59, 490 A2d 344 [finding support in UCC 2-609 and Restatement (Second) of Contracts § 251 for applying doctrine of adequate assurance to contract to purchase radio station]; *Conference Ctr. v TRC--The Research Corp. of New England,* 189 Conn 212, 455 A2d 857 [analogizing to UCC 2-609, as supported by Restatement (Second) of Contracts § 251, in context of constructive eviction]).

Commentators have helped nudge this development along. They have noted that the problems redressed by UCC 2-609 are not unique to contracts for sale of goods, regulated under a purely statutory regime. Thus, they have cogently identified the need for the doctrine to be available in exceptional and qualifying common-law contractual settings and disputes because of similar practical, theoretical and salutary objectives (*e.g.,* predictability, definiteness, and stability in commercial dealings and expectations) (*see, e.g.,* Campbell, *op. cit.,* at 1299-1304; *see generally,* White, *Eight Cases and Section 251,* 67 Cornell L Rev 841 [1982]; Dowling, *op. cit.*).

The American Law Institute through its Restatement (Second) of Contracts has also recognized and collected the authorities supporting this modern development. Its process and work settled upon this black letter language:

"(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach

WestlawNext © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

under § 243, the obligee may demand adequate assurance of due ***466** performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

"(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case" (Restatement [Second] of Contracts § 251).

Modeled on UCC 2-609, Restatement § 251 tracks "the principle that the parties to a contract look to actual performance 'and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain' " (Restatement [Second] of Contracts § 251, comment *a,* quoting UCC 2-609, Comment 1). The duty of good faith and fair dealing in the performance of the contract is also reflected in section 251 (*see,* Restatement [Second] of Contracts § 251, comment *a*).

Some States have adopted Restatement § 251 as their common law of contracts, in varying degrees and classifications (*see, e.g., Carfield & Sons v Cowling,* 616 P2d 1008 [Colo] [construction contract]; *Spitzer Co. v Barron,* 581 P2d 213 [Alaska] [construction contract]; *Drinkwater v Patten Realty Corp.,* 563 A2d 772 [Me] [sale of real estate]; *Jonnet Dev. Corp. v Dietrich Indus.,* 316 Pa Super 533, 463 A2d 1026 [real estate lease]; *but see, Mollohan v Black Rock Contr.,* 160 W Va 446, 235 SE2d 813 [declining to adopt section 251, except to the extent that failure to give adequate assurance on demand may be some evidence of repudiation]).

**IV.**

New York, up to now, has refrained from expanding the right to demand adequate assurance of performance beyond the Uniform Commercial Code (*see, Sterling Power Partners v Niagara Mohawk Power Corp.,* 239 AD2d 191, *appeal dismissed* 92 NY2d 877; *Schenectady Steel Co. v Trimpoli Gen. Constr. Co.,* 43 AD2d 234, *affd on other grounds* 34 NY2d 939). The only other recognized exception is the insolvency setting (*see, Hanna v Florence Iron Co.,* 222 NY 290; *Pardee v Kanady,* 100 NY 121; *Updike v Oakland Motor Car Co.,* 229 App Div 632). Hence, the need for this certified question emerged so this Court could provide guidance towards a correct resolution of the Federal lawsuit by settling New York law with a modern pronouncement governing this kind of contract and dispute. ***467**

Niagara Mohawk, before our Court through the certified question from the Federal court, urges a comprehensive adaptation of the exceptional demand tool. This wholesale approach has also been advocated by the commentators (*see generally,* Dowling, *op. cit.;* Campbell, *op. cit.*). Indeed, it is even reflected in the breadth of the wording of the certified question.

This Court's jurisprudence, however, usually evolves by deciding cases and settling the law more modestly (*Rooney v Tyson,* 91 NY2d 685, 694, citing Cardozo, *Nature of the Judicial Process,* in Selected Writings of Benjamin Nathan Cardozo, at 115, 134 [Margaret E. Hall ed 1947] [observing that Judges proceed interstitially]). The twin purposes and functions of this Court's work require significant professional discipline and judicious circumspection.

We conclude, therefore, that it is unnecessary, while fulfilling the important and useful certification role, to promulgate so sweeping a change and proposition in contract law, as has been sought, in one dramatic promulgation. That approach might clash with our customary incremental common-law developmental process, rooted in particular fact patterns and keener wisdom acquired through observations of empirical application of a proportioned, less than absolute, rule in future cases.

It is well to note the axiom that deciding a specific case, even with the precedential comet's tail its rationale illuminates, is very different from enacting a statute of general and universal application (*see,* Breitel, *The Lawmakers,* 2 Benjamin N. Cardozo Memorial Lectures 761, 788 [1965] ["(P)rocedurally, courts are limited to viewing the problem as presented in a litigated case within the four corners of its record. A multiplication of cases will broaden the view because of the multiplication of records, but the limitation still persists because the records are confined by the rules of procedure, legal relevance, and evidence."]).

Experience and patience thus offer a more secure and realistic path to a better and fairer rule, in theory and in practical application. Therefore, this Court chooses to take the traditionally subtler approach, consistent with the proven benefits of the maturation process of the common law, including in the very area of anticipatory repudiation which spawns this relatively newer demand for assurance corollary (*see,* Garvin, *op. cit.,* at 77-80; Robertson, *op. cit.,* at 307-310; Dowling, *op. cit.,* at 1359-1362; *see also,* Breitel, *op. cit.,* at 781-782 [1965] ***468** ["The commonplace, for which the

Holmeses and the Cardozos had to blaze a trail in the judicial realm, assumes the rightness of courts in making interstitial law, filling gaps in the statutory and decisional rules, and at a snail-like pace giving some forward movement to the developing law. Any law creation more drastic than this is often said and thought to be an invalid encroachment on the legislative branch.”]).

This Court is now persuaded that the policies underlying the UCC 2-609 counterpart should apply with similar cogency for the resolution of this kind of controversy. A useful analogy can be drawn between the contract at issue and a contract for the sale of goods. If the contract here was in all respects the same, except that it was for the sale of oil or some other tangible commodity instead of the sale of electricity, the parties would unquestionably be governed by the demand for adequate assurance of performance factors in UCC 2-609. We are convinced to take this prudent step because it puts commercial parties in these kinds of disputes at relatively arm's length equilibrium in terms of reliability and uniformity of governing legal rubrics. The availability of the doctrine may even provide an incentive and tool for parties to resolve their own differences, perhaps without the necessity of judicial intervention. Open, serious renegotiation of dramatic developments and changes in unusual contractual expectations and qualifying circumstances would occur because of and with an eye to the doctrine's application.

The various authorities, factors and concerns, in sum, prompt the prudence and awareness of the usefulness of recognizing the extension of the doctrine of demand for adequate assurance, as a common-law analogue. It should apply to the type of long-term commercial contract between corporate entities entered into by Norcon and Niagara Mohawk here, which is complex and not reasonably susceptible of all security features being anticipated, bargained for and incorporated in the original contract. Norcon's performance, in terms of reimbursing Niagara Mohawk for credits, is still years away. In the meantime, potential quantifiable damages are accumulating and Niagara Mohawk must weigh the hard choices and serious consequences that the doctrine of demand for adequate assurance is designed to mitigate. This Court needs to go no further in its promulgation of the legal standard as this suffices to declare a dispositive and proportioned answer to the certified question.

Accordingly, the certified question should be answered in the affirmative. ***469**

Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley concur.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the affirmative. ***470**

Copr. (c) 2014, Secretary of State, State of New York

**End of Document** © 2014 Thomson Reuters. No claim to original U.S. Government Works.

# EXHIBIT E

# RESTATEMENT OF THE LAW
# SECOND

# CONTRACTS 2d

Volume 2
§§ 178-315

*As Adopted and Promulgated*

BY

THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.

May 17, 1979

ST. PAUL, MINN.
AMERICAN LAW INSTITUTE PUBLISHERS
1981

Sections 253 and 255 deal with the three possible effects of a repudiation. First, a repudiation may, before any breach by non-performance, give rise to a claim for damages for total breach (§ 253(1)). (As to when a repudiation coupled with a breach by non-performance gives rise to such a claim, see § 243(2).) Second, a repudiation may discharge the other party's remaining duties of performance (§ 253(2)). Third, a repudiation may excuse the non-occurrence of a condition of the repudiator's duty (§ 255).

The effect of subsequent events on the repudiator's duty to pay damages is dealt with in § 254, while §§ 256 and 257 deal with the possible effects of subsequent events on the repudiation, itself. Section 256 tells when subsequent events nullify a statement or other event that would otherwise amount to a repudiation under § 250 or the basis for a repudiation under § 251. Section 257 states that efforts by the injured party to obtain performance in spite of a repudiation do not change its effect.

## REPORTER'S NOTE

Topic 3 collects and generally preserves the rules on repudiation contained in Chapters 10 and 11 of the former Restatement. In § 251 it introduces a new rule, analogous to that in Uniform Commercial Code § 2–609, to protect the obligee when reasonable grounds arise to believe that the obligor will commit a serious breach. On prospective non-performance generally, see 4 Corbin, Contracts §§ 959–69 (1951 & Supp. 1980), 6 id. §§ 1252–64 (1962 & Supp. 1980); 6 Williston, Contracts §§ 875–85 (3d ed. 1962), 11 id. §§ 1300–37A (3d ed. 1968).

## § 250. When a Statement or an Act Is a Repudiation

**A repudiation is**

**(a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or**

**(b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.**

**Comment:**

*a. Consequences of repudiation.* A statement by a party to the other that he will not or cannot perform without a breach, or a voluntary affirmative act that renders him unable or apparently unable to

perform without a breach may impair the value of the contract to the other party. It may have several consequences under this Restatement. If it accompanies a breach by non-performance that would otherwise give rise to only a claim for damages for partial breach, it may give rise to a claim for damages for total breach instead (§ 243). Even if it occurs before any breach by non-performance, it may give rise to a claim for damages for total breach (§ 253(1)), discharge the other party's duties (§ 253(2)), or excuse the non-occurrence of a condition (§ 255).

*b. Nature of statement.* In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation, although such an expression may give an obligee reasonable grounds to believe that the obligor will commit a serious breach and may ultimately result in a repudiation under the rule stated in § 251. However, language that under a fair reading "amounts to a statement of intention not to perform except on conditions which go beyond the contract" constitutes a repudiation. Comment 2 to Uniform Commercial Code § 2–610. Language that is accompanied by a breach by non-performance may amount to a repudiation even though, standing alone, it would not be sufficiently positive. See § 243(2). The statement must be made to an obligee under the contract, including a third party beneficiary or an assignee.

**Illustrations:**

1. On April 1, A contracts to sell and B to buy land, delivery of the deed and payment of the price to be on July 30. On May 1, A tells B that he will not perform. A's statement is a repudiation.

2. A contracts to build a house for B for $50,000, progress payments to be made monthly in an amount equal to 85% of the price of the work performed during the preceding month, the balance to be paid on the architect's certificate of satisfactory completion of the house. Without justification B fails to make a $5,000 progress payment and tells A that because of financial difficulties he will be unable to pay him anything for at least another month. If, after a month, it would be too late for B to cure his material failure of performance by making the delayed payment, B's statement is a repudiation. See Illustration 2 to § 237.

3. The facts being otherwise as stated in Illustration 1, A does not tell B that he will not perform but says, "I am not sure

that I can perform, and I do not intend to do so unless I am legally bound to." A's statement is not a repudiation.

4. The facts being otherwise as in Illustration 1, A tells C, a third person having no right under the contract, and not B, that he will not perform. C informs B of this conversation, although not requested by A to do so. A's statement is not a repudiation. But see Comments *b* and *c* to § 251.

*c. Nature of act.* In order to constitute a repudiation, a party's act must be both voluntary and affirmative, and must make it actually or apparently impossible for him to perform. An act that falls short of these requirements may, however, give reasonable grounds to believe that the obligor will commit a serious breach for the purposes of the rule stated in § 251. The effect of bankruptcy is governed in large part by federal law. In liquidation cases, for example, Bankruptcy Reform Act § 365(a), (d) and (e) gives the trustee the power to assume or reject an executory contract within a statutory period, and the obligee must give him the time to exercise this power. A contract not assumed during this period is deemed to be rejected. Under Bankruptcy Reform Act § 365(g)(1), notwithstanding state law, the trustee's rejection of a contract "constitutes a breach of such contract . . . immediately before the date of the filing of the petition . . . ." The rules stated in this Restatement apply to the extent that they are consistent with federal bankruptcy law.

**Illustrations:**

5. The facts being otherwise as stated in Illustration 1, A says nothing to B on May 1, but on that date he contracts to sell the land to C. A's making of the contract with C is a repudiation.

6. The facts being otherwise as stated in Illustration 1, A says nothing to B on May 1, but on that date he mortgages the land to C as security for a $40,000 loan which is not payable until one year later. A's mortgaging the land is a repudiation. Compare Illustration 4 to § 251.

7. A contracts to employ B, and B to work for A, the employment to last a year beginning in ten days. Three days after making the contract B embarks on a ship for a voyage around the world. B's embarking for the voyage is a repudiation.

*d. Gravity of threatened breach.* In order for a statement or an act to be a repudiation, the threatened breach must be of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach under § 243(1). Gener-

ally, a party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty. His statement is a repudiation if the threatened breach would, without more, have given the injured party a claim for damages for total breach. Modern procedural devices, such as the declaratory judgment, may be used to mitigate the harsh results that might otherwise result from this rule. Furthermore, if the threatened breach would not itself have given the injured party a claim for damages for total breach, the statement or voluntary act that threatens it is not a repudiation. But where a party wrongfully states that he will not perform at all unless the other party consents to a modification of his contract rights, the statement is a repudiation even though the concession that he seeks is a minor one, because the breach that he threatens in order to exact it is a complete refusal of performance.

**Illustrations:**

8. On April 1, A contracts to sell and B to buy land for $50,000, delivery of the deed and payment of the price to be on August 1. On May 1, the parties make an enforceable modification under which delivery of the deed and payment of the price are to be on July 30 instead of August 1. On June 1, A tells B that he will not deliver a deed until August 1. A's statement is not a repudiation unless the one-day delay would, in the absence of a repudiation, have given B a claim for damages for total breach. See Illustration 4 to § 242.

9. The facts being otherwise as stated in Illustration 8, A tells B that he will not deliver a deed at all unless B agrees to accept it on August 1. A's statement is a repudiation. The result is the same even though A acts in the erroneous belief that the modification has no legal effect.

## REPORTER'S NOTE

This Section is based on former § 318. See also former § 284. See Uniform Commercial Code § 2–610, which states a rule for repudiation "with respect to a performance . . . the loss of which will substantially impair the value of the contract to the other"; 4 Corbin, Contracts §§ 972–94 (1951 & Supp. 1980); 11 Williston, Contracts §§ 1322–25 (3d ed. 1968).

*Comment b.* This Comment follows the Code in disapproving Dingley v. Oler, 117 U.S. 490 (1886), under which a party might avoid repudiating by attaching to his refusal a qualification, even though the qualification went beyond the contract. But see City of Fairfax v. Washington Metro. Area Transit Auth., 582 F.2d 1321, 1326–27 (4th Cir. 1978), cert. denied, 440 U.S. 914 (1979). As to how posi-

tive a statement must be to constitute a repudiation, compare both the verbal formulas and their application to the facts in City of Fairfax v. Washington Metro. Area Transit Auth., supra ("absolute and unequivocal refusal to perform"), with those in Farwell Constr. Co. v. Ticktin, 59 Ill. App.3d 954, 17 Ill. Dec. 475, 376 N.E.2d 621 (1978) ("definite statement to the promisee that the promisor either will not or cannot perform"). Illustration 2 is based on Petrangelo v. Pollard, 356 Mass. 696, 255 N.E.2d 342 (1970). Illustration 3 is based on Illustration 4 to former § 318. See also Norrington v. Wright, 115 U.S. 188 (1885). Illustration 4 is based on Illustration 3 to former § 318.

*Comment c.* In Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974), an anticipatory repudiation was found under Uniform Commercial Code § 2–610 upon the death of the obligor and the apparent inability of his estate to perform his duties. That the repudiation must threaten a material breach, see City of Fairfax v. Washington Metro. Area Transit Auth., 582 F.2d 1321, 1331 (4th Cir. 1978), cert. denied, 440 U.S. 914 (1979). Illustration 5 is based on Illustration 9 to former § 318. See also former § 284 and James v. Burchell, 82 N.Y. 108 (1880). Illustration 6 is based on Illustration 1 to former § 284 and on Fort Payne Coal & Iron Co. v. Webster, 163 Mass. 134, 39 N.E. 786 (1895). On the problems raised by Illustrations 5 and 6, see 6 Corbin, Contracts § 1259 (1962 & Supp. 1980); 6 Williston, Contracts §§ 878, 879 (3d ed. 1962). Illustration 7 is based on Illustration 6 to former § 318. On bankruptcy, see Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439 (1973), 58 Minn. L. Rev. 479 (1974); former § 324. On the changes made by the Bankruptcy Reform Act of 1978, Pub. L. 95–598 (1978), see Collier, Bankruptcy Appendix 1 (15th ed. 1979); Bankruptcy Service Law. Ed. § 1:42 (1979).

*Comment d.* Illustration 8 is suggested by Bannister v. Victoria Coal & Coke Co., 63 W.Va. 502, 61 S.E. 338 (1908); see also Taylor v. Johnston, 15 Cal.3d 130, 123 Cal. Rptr. 641, 539 P.2d 425 (1975); cf. Walker v. Shasta Minerals and Chem. Co., 352 F.2d 634 (10th Cir. 1965). Illustration 9 is suggested by Illustration 1 to former § 318; see also National Farmers Organization v. Bartlett and Co., 560 F.2d 1350 (8th Cir. 1977).

## § 251. When a Failure to Give Assurance May Be Treated as a Repudiation

**(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.**

# EXHIBIT F

90 F.Supp.2d 401
United States District Court,
S.D. New York.

CARY OIL CO., INC., et al., Plaintiffs,
v.
MG REFINING AND MARKETING, INC., et al., Defendants.

No. 99 CIV. 1725 LAK. | March 30, 2000.

Buyers of petroleum products sued supplier, its parent, and bank, alleging breach of long-term "flexie" contracts, bad faith, and tortious interference. Defendants moved to dismiss. The District Court, Kaplan, J., held that: (1) supplier's liquidation of its long hedge positions did not start running of limitations period as to all of plaintiffs' claims; (2) letter to buyers purporting to confirm cancellation was anticipatory repudiation; (3) repudiation did not trigger running of limitations period; (4) even assuming triggering of limitations period, subsequent letter from supplier was interpretable as retraction of repudiation, barring limitations defense; (5) buyers stated claim against parent; (6) issue of fact existed as to effect of releases and sworn statements; and (7) buyers stated claim against bank.

Motions granted in part and denied in part.

**Attorneys and Law Firms**

***403** William H. Bode, Bode & Beckman, LLP, Washington, DC, Richard G. Tashjian, Tashjian & Padian, New York City, for Plaintiffs.

Michael Blechman, Robert B. Bernstein, Michael Pomerantz, Kaye, Scholer, Fierman, Hays & Handler, LLP, New York City, for Metallgesellschaft Defendants.

William Spiegelberger, Jeffrey Barist, Milbank, Tweed, Hadley & McCloy LLP, New York City, for Deutsche Bank Defendants.

**Opinion**

***404 MEMORANDUM OPINION**

KAPLAN, District Judge.

This case comes in the aftermath of the near collapse of the German metals and engineering conglomerate, Metallgesellschaft AG ("MGAG"), in late 1993. Reportedly faced with crippling trading losses from over-exposure in the oil futures market, MGAG nearly was forced into bankruptcy before its creditors, including Deutsche Bank AG, stepped in with an emergency loan and rescue package. Although this bail out averted financial disaster, the fallout continues and includes this case.

## I

***Parties***

Plaintiffs in this case are seventeen corporations engaged in the business of marketing and/or distributing petroleum products in the United States. Defendants MG Marketing and Refining, Inc. ("MGRM"), Metallgesellschaft Corp. ("MG Corp.") and MGAG (collectively the "MG Group") are in the business, among others, of selling petroleum products. MGAG is the sole shareholder of MG Corp., which in turn is the sole shareholder of MGRM. Defendant Deutsche Bank AG was a major shareholder of MGAG at all relevant times. Defendant Deutsche Bank North America is a subsidiary of Deutsche Bank AG, and defendant Deutsche Bank New York is a subsidiary of Deutsche Bank North America. [1]

***The Contracts***

Plaintiffs here allege breach of certain long-term petroleum supply contracts, entered into between January and September of 1993, [2] each of which provided that MGRM would sell, and the relevant plaintiff would buy, a fixed amount of a specified petroleum product over a period of time, usually five or ten years, at a fixed price. [3] The contracts were known as "flexies," so titled because they permitted plaintiffs flexibly to schedule delivery of the product on 45 days' notice, rather than obliging them to take delivery on fixed dates.

The contracts were flexible in another respect-they included a cash out, or "blow out," option exercisable by the customer which provided in relevant part as follows: [4]

> "(a) At any time during the Term of this Agreement that the Fixed Cash Price is less than the bid price for the applicable NYMEX Futures Contract, as defined in subparagraph (d) below, Purchaser may, in lieu of

accepting all or part (in lots of 42,000 gallons) of the remaining deliveries of Product, accept cash payments from Seller based on the average of bid prices obtained by Seller in totally or partially liquidating its long hedge positions for this Agreement (the 'Average Bid Price') in the applicable NYMEX Futures Contract. The cash payment to be received by the Purchaser shall be an amount equal to the product of the number of gallons represented by the long hedge positions to be liquidated multiplied by the difference between the Average Bid Price for the applicable NYMEX Futures Contract and the Fixed Cash Price. At any time that Purchaser exercises this option, Seller shall, as soon as practicable after receipt of telephonic notice of such election, ***405** liquidate the long hedge positions to the extent of the number of contract units that is equivalent to the number of gallons with respect to which the Purchaser has exercised the option. Purchaser shall promptly provide written confirmation of its telephone notice of such election. Seller does not guarantee that it can liquidate such positions at the bid prices existing at the time Purchaser gives notice that it is exercising this option or even that it can liquidate its positions above the Fixed Cash Price. Upon Purchaser's receipt of cash payments from Seller representing all of the remaining deliveries of Product, Seller shall have no obligation to deliver any further Product under this Agreement and this Agreement shall terminate."

* * * * * *

"(d) For the purpose of this paragraph, the applicable 'NYMEX Futures Contract' shall mean the futures contract for the underlying Product as traded on the NYMEX with a delivery month for which the last NYMEX Trading Day falls no earlier than forty-five (45) days and no later than seventy-five (75) days from the date of exercise of the option."

Thus, the option gave the customer the right to elect to receive a cash payment in lieu of further deliveries if the New York Mercantile Exchange ("NYMEX") bid price of the relevant futures contract for the specified petroleum product exceeded the flexie contract price. The payment was to be equal to the difference between the contract price and the average bid price obtained by MGRM in liquidating its long hedge positions in the applicable NYMEX futures contract multiplied by the number of gallons of the product not yet delivered under the contract. The purpose of this option allegedly was to protect the parties from the risk of supply shortages and short-term price spikes. [5]

As is readily apparent, the option clauses in the flexie contracts presupposed, not unreasonably, that MGRM would maintain long hedge positions-positions giving it the right to buy the product it was obliged to deliver to its customers at or near the prices at which it was obliged to sell-in order to avoid the risk of literally open-ended losses that otherwise could have been sustained by MGRM if market prices rose above the contract prices. [6] Nevertheless, the flexie contracts did not expressly require MGRM to maintain such hedge positions.

***The MG Group Crisis***

Soon after these contracts went into effect, the MG Group began to experience financial difficulty. [7] In order to reduce its exposure under the flexie contracts and others, MGRM had hedged by purchasing oil futures contracts on the NYMEX and off-exchange derivatives. When oil prices dropped sharply in late 1993, MGRM faced huge margin calls and suffered other short-term losses, plunging the entire conglomerate into a severe liquidity crisis and pushing it to the brink of insolvency. At the last minute, MGAG's creditors, including Deutsche Bank, stepped in and orchestrated a reorganization and bail out. [8] This involved, among other things, financial and managerial restructuring, new lines of credit and, most important for purposes of this motion, liquidation of MG's hedge positions in the exchange traded and off-exchange derivatives.

***The CFTC Settlement***

Although MGAG survived the crisis, the legal and regulatory fallout has been substantial. ***406** In addition to facing numerous law suits, MGRM apparently became the target of a Commodity Futures Trading Commission ("CFTC") inquiry. Prior to the institution of any enforcement action, the MGRM submitted an offer of settlement that was accepted by the Commission and resulted in the issuance of a consent order. The uncontested recitals that preceded the decretal portion of the order set forth the Commission's findings that the contracts here at issue were "illegal off-exchange futures contracts." [9] The decretal portion of the order, to which MGRM explicitly agreed, provided in relevant part that MGRM would cease offering the contracts and promptly notify all purchasers of the contracts that the Commission had found the contracts to be "illegal and void." [10] The order thus arguably relieved MGRM of its obligations under the contracts. And that is the heart of plaintiffs' grievance. They contend that the MG Group breached its duties to plaintiffs by proposing and entering into a settlement with the CFTC for

the express purpose of obtaining a statement that the contracts were void in order to eliminate its exposure to the plaintiffs.

## II

Plaintiffs assert the following claims:

• Count I asserts that MGRM breached its duty under the flexie contracts to maintain readiness to deliver the specified products and pay plaintiffs upon exercise of their options by agreeing to the CFTC order declaring the flexies illegal. It seeks to hold MG Corp. and MGAG liable on theories of *respondeat superior* and *alter ego* liability and by piercing MGRM's corporate veil.

• Count II alleges that MGRM breached the duty of good faith and fair dealing inherent in the flexie contracts by procuring and agreeing to the CFTC order on the theory, *inter alia,* that MGRM proposed language to the CFTC supporting a finding that the flexies were illegal. It asserts this claim against MG Corp. and MGAG also on the theories of liability listed in Count I.

• Count IV [11] charges Deutsche Bank with lender liability for the breaches of the flexie contracts on the grounds that Deutsche Bank or its agents (1) ousted members of the management of MGAG, MG Corp. and MGRM with whom it had conflicts, (2) took control of the MG Group's energy business in the United States, (3) directed that the hedge positions for the flexie contracts be liquidated, (4) directed that the flexies be terminated, and (5) falsely portrayed the flexies as illegal off-exchange futures contracts in communications to the CFTC.

• Count V seeks to hold Deutsche Bank liable for MGRM's breach of contract on *respondeat superior,* corporate veil piercing and *alter ego* liability theories.

• Count VI alleges that Deutsche Bank breached the duty of good faith and fair dealing inherent in the flexie contracts on the theories of liability listed in Count V.

• Count VII charges Deutsche Bank with tortiously interfering with plaintiffs' contracts with MGRM by engaging in the acts set forth in Count IV.

Defendants move to dismiss as follows:

The MG Group seeks dismissal of Counts I and II on the ground that the contract claims are time barred. MGAG and MG Corp. argue also that plaintiffs have not pleaded adequately a vicarious liability claim against them. [12] In the alternative, ***407** the MG Group moves for summary judgment on Counts I and II against seven plaintiff customers on the ground that each of these plaintiffs either released the claims in suit or gave sworn statements that the contracts had been canceled by mutual consent. Deutsche Bank moves to dismiss Counts IV, V, VI and VII on the grounds that (1) plaintiffs have not stated a vicarious liability claim against it on the contract counts, (2) the lender liability and tortious interference claims are legally insufficient, (3) the breach of the duty of good faith and fair dealing claim is duplicative of the breach of contract claim, and (4) the tortious interference claim is time barred.

## III

### *MG Group's Motion*

**A.** ***Timeliness of the Contract Claims***

***1. The Applicable Prescriptive Period***

The MG Group contends that plaintiffs' contract claims are governed by a four-year statute of limitations and therefore are time barred. Plaintiffs counter that either the entire contract or at least the cash payment option provision of the contract is governed by a six-year statute of limitations. [13]

**[1] [2]** As a general matter, a four-year statute of limitations applies under the New York [14] version of the Uniform Commercial Code [15] to contracts for the sale of goods and a six-year statute to all other contracts. [16] Where the contract at issue contains provisions, some of which are for the sale of goods and some of which are not, the court does not apply different limitations periods to different provisions, as plaintiffs suggest. Rather, the court looks to the "primary purpose" test to determine which statute of limitations applies to the entire contract. [17] If the primary purpose of the contract is the sale of goods, the four-year UCC statute of limitations applies to the entire instrument. If the contract primarily is a non-sale of goods agreement, the six-year limitations period applies. This analysis is made in light of the parties' intent as indicated by the circumstances rather than the content of the four corners of the contract alone. [18]

 © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

The MG Group contends that these contracts are primarily for the sale of goods and therefore are governed by the four year UCC statute of limitations. As the alleged breach was in July 1995 when the MG Group entered into the CFTC settlement, and this action was not commenced until more than four years later, they maintain that the contract claims are barred. And indeed, the contracts on their face appear to be agreements for the sale of goods. [19] Nevertheless, plaintiffs dispute this characterization.

***408** Plaintiffs argue that the contracts were "hedging" or "risk management" instruments, rather than agreements for the sale of goods, and therefore are subject to the general six-year contract limitations period. [20] Their argument draws support from the fact that the CFTC found, in accepting MGRM's offer of settlement, that "[v]irtually all purchasers entered the ... Agreements with the intent of invoking the 'blow-out' provision for the purpose of speculating on the price of the underlying product," [21] thus implying that the purchasers did not intend ever to accept physical delivery.

It is defendants' burden on this motion to establish that plaintiffs could prove no facts under the amended complaint which would entitle them to relief. [22] In view of the possibility that the primary purpose of these contracts may not have been sales of goods, the Court may not now conclude as a matter of law that the four year UCC prescriptive period applies, although of course it may prove applicable on a fuller record.

This alone is sufficient to dispose of the MG Group's statute of limitations argument. But the result would be the same even if the Court applied the four year prescriptive period.

***2. Accrual of the Claim***

Assuming that the four year prescriptive period applies, the MG Group claims that the complaint was not timely filed. It acknowledges that plaintiffs' contract claims are based only on the MG Group's July 1995 deal with the CFTC, less than four years before the March 1999 filing date. Nonetheless, it argues that the complaint alleges also two earlier breaches-the first in December 1993, when defendants allegedly liquidated their hedge positions on the NYMEX, [23] and the second in January 1994, when MGRM sent letters to plaintiffs purporting to confirm mutual cancellation of the flexie contracts. [24] It therefore maintains, on each of two independent legal theories, that plaintiffs' claims on these contracts accrued on one of these dates and therefore expired in either December 1997 or January 1998, well before plaintiffs filed this action.

The first of the MG Group's arguments is that MGRM's removal of the hedges breached its contractual obligation to keep the hedges in place and thus set the statute of limitations running for that and any subsequent breach, rendering this action untimely. [25]

**[3]** **[4]** As a general rule, every breach of contract gives rise to a claim for damages. [26] If the breach is material and the breaching party fails to cure the breach within a reasonable period of time, the aggrieved party can elect to terminate the contract and claim damages for total breach. [27] Where this occurs, the statute of limitations begins to run for all of the ***409** aggrieved party's remaining rights to performance. [28] In consequence, once the injured party terminates the contract, any action thereunder brought after the expiration of the limitations period is precluded, whether on the provision originally breached or on another provision of the contract.

In contrast, if the breach is not material or if the party aggrieved by a material breach elects not to terminate, the breach is deemed partial, and the contract remains in force. [29] In consequence, only those claims arising out of the partial breach accrue at that time. [30]

**[5]** **[6]** In this case, the amended complaint alleges that defendants were obliged to maintain the hedges and that they breached this duty in December 1993. [31] Although the existence of such an obligation perhaps is debatable, the Court is obliged on a motion to dismiss to take all well pleaded factual allegations in the complaint as true. [32] The Court assumes for purposes of this motion that there was such an obligation and that it was breached in 1993.

Following this alleged breach, plaintiffs apparently made no move to terminate the contracts. Hence, even if removal of the hedges were material breaches, [33] they ***410** were not total breaches, as plaintiffs chose not to treat them as such. In consequence, MGRM's December 1993 removal of the hedges at most was a partial breach that did not trigger the statute of limitations for all of plaintiffs' remaining rights to performance under the contracts.

WestlawNext © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

The MG Group makes a second argument as to why the statute of limitations began to run in December 1993, when defendants allegedly liquidated the hedges, or January 1994, when MGRM sent letters purporting to confirm cancellation of the contracts. It claims that either or both of these actions constituted an anticipatory repudiation of the contracts and that this repudiation set the statute of limitations running on all subsequent breaches, thus rendering this action untimely.[34] This contention ultimately fails as well.

**[7]** First, removal of the hedges was not an anticipatory repudiation.[35] The Official ***411** Comment to the New York Uniform Commercial Code defines anticipatory repudiation as "an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance."[36] Defendants' alleged unwinding of the hedges did neither. That action was susceptible to varying interpretations and, at least as far as the complaint discloses, did not necessarily evidence a clear determination not to deliver under or otherwise breach the contracts. Nor did it make performance impossible. The only conceivable argument on this score is that removal of the hedges made impossible the cash payment under the option provision because calculation of that payment depended on the hedges being in place. As discussed above,[37] however, it is not clear at this stage of the proceedings that this was so.

Removal of the hedges fails to qualify as an anticipatory repudiation for a second reason as well. The UCC notes that in order to qualify as an anticipatory repudiation, the performance repudiated must "substantially impair the value of the contract" to the other party.[38] In this case, the value of the contracts to plaintiffs at least arguably lay in plaintiffs' ability to purchase the petroleum product and invoke the option provision, not in defendants' maintenance of the hedges *per se.* In consequence, it is impossible to say at this juncture that removal of the hedges constituted an anticipatory repudiation.

**[8]** The same cannot be said of the January 1994 letters. The amended complaint alleges that the letters, sent by MGRM to its flexie contract customers, purported to "confirm our agreement" to cancel the contracts and "relieve both parties of any obligation thereunder."[39] It alleges also that no such agreements had been made.[40] Although plaintiffs acknowledge that these statements "in isolation" could "constitute a total repudiation,"[41] they argue that extrinsic circumstances, namely the state of "chaos" in which MGRM found itself at the time of the letters, made this conclusion unreasonable.[42] In consequence, they contend that the letters do not meet the standard for anticipatory repudiation.[43]

The Court is unpersuaded. Plaintiffs have not alleged extrinsic circumstances that would have led a reasonable customer to interpret the letters as anything but a clear statement that defendants would not perform under the contracts. Indeed, the facts recited by plaintiffs in the amended complaint suggest precisely the opposite, particularly two January 1994 newspaper reports stating that MGAG was suffering from "extreme financial problems" and "at the edge of insolvency."[44] This information bolsters the only reasonable inference one could have drawn from the letters-that defendants intended to treat the contracts as if they were canceled and thereby deprive plaintiffs of all expected benefits. This clearly meets the standard for anticipatory repudiation.

**[9]** That the 1994 letters qualify as an anticipatory repudiation, however, is only the beginning of the inquiry, as the parties disagree about the limitations effect of repudiation. The MG Group argues that the ***412** statute of limitations for all of an aggrieved party's rights under the contract runs from the moment of an anticipatory repudiation.[45] It therefore contends that plaintiffs' claim is time barred because it was brought more than four years after the January 1994 repudiation.

Plaintiffs counter that even if the letters were an anticipatory repudiation, they did not trigger the statute of limitations for subsequent breaches.[46] They argue that anticipatory repudiation gives the aggrieved party the option to sue immediately on the repudiation or await performance.[47] In the latter case, they claim, the statute of limitations does not begin to run until failure of performance.[48] Therefore, plaintiffs argue, they were free not to sue on the letters and are not time barred from bringing a claim based on defendants' alleged consent to the CFTC order in 1995.

The Code provision on anticipatory repudiation does little to clarify the issue. In relevant part, Section 2-610 permits a party aggrieved by an anticipatory repudiation to (1) await performance "for a commercially reasonable time" or (2) "resort to any remedy for breach."[49] This provision

WestlawNext © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

unquestionably gives an aggrieved party the choice to sue or await performance, at least for a "commercially reasonable time." However, it says nothing about when the statute of limitations begins to run.

This issue has received scant attention, particularly in UCC cases. At common law, a party aggrieved by an anticipatory repudiation was not required to sue immediately but could await the time of performance to see whether the other party intended to make good on its repudiation.[50] In consequence, the statute of limitations for failure to perform did not begin to run until the time fixed for performance.

The UCC appears to have adopted this approach, although it does not explicitly so state. The Official Comment to Section 2-610 states that "the aggrieved party is left to proceed *at any time* with his options under this section" and provides that "[i]naction and silence by the aggrieved party ... cannot be regarded as misleading the repudiating party."[51] Further, although the statute gives the aggrieved party the option to await performance for a "commercially reasonable time," rather than indefinitely, the Official Comment suggests that this provision merely creates a requirement to mitigate damages[52] rather than imposing an earlier start date for the statute of limitations. These comments contravene the MG Group's contention that, in the context of anticipatory repudiation, the UCC favors a policy of repose for the repudiating party rather than choice for the aggrieved party.[53] Indeed, they suggest precisely the opposite conclusion-that under the UCC an aggrieved party is free to await performance following an anticipatory repudiation. This reading of the statute is borne out as well by the case law[54] and scholarly commentators.[55] In ***413** consequence, defendants' January 1994 anticipatory repudiation did not start the statute of limitations running on the entire contract and thereby render Counts I and II untimely.

**[10]** Plaintiffs' action may not be dismissed as time barred, at least at this juncture, for another reason as well. Even if defendants' January 1994 anticipatory repudiation commenced the prescriptive period with respect to all claims on the contract, a March 1994 letter from defendants to plaintiffs appears to have retracted the anticipatory repudiation and reinstated the *status quo ante.* Section 2-611 of the UCC permits a party to retract an anticipatory repudiation "by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform."[56] This option is open to the repudiating party at any time "before its next performance is due" unless "the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final."[57] Once made, a ***414** retraction "reinstates the repudiating party's rights under the contract"[58] and restores "the relation between the parties ... before the repudiation was made,"[59] effectively nullifying the repudiation.

In this case, the amended complaint alleges that on March 3, 1994, MGRM sent a letter to its customers in which it "confirm[ed] [MGAG's] commitment to [MGRM's] business."[60] It enclosed a letter from MGAG to the customers in which MGAG outlined its efforts to provide financial stability to MG Corp. and affirmed its commitment to help "MG continue to honor all contractual obligations."[61] These statements certainly are susceptible of the interpretation that defendants intended to perform their contractual obligations. In consequence, even if defendants' anticipatory repudiation had triggered the statute of limitations for all actions under the contract, plaintiffs have pleaded adequate facts to support a finding that the March 3 letters retracted the anticipatory repudiation and reinstated the contracts.[62] Accordingly, the MG Group's motion to dismiss Counts I and II as time barred is denied.

**B.** ***Vicarious Liability of MGAG and MG Corp.***

MGAG and MG Corp. move also to dismiss Counts I and II of the amended complaint as against them on the ground that plaintiffs fail allege facts sufficient to hold them liable for the actions of their subsidiary, MGRM. This argument is unpersuasive.

Plaintiffs seek to hold MGAG and MG Corp. liable for breach of the flexie agreements, to which only MGRM was a signatory, on *respondeat superior* and *alter ago* theories as well as by piercing MGRM's corporate veil. The Court need find only that plaintiff has pleaded adequately one of these three theories in order to deny this aspect of the motion to dismiss.

**[11]** **[12]** In order to pierce the corporate veil on a contract claim, plaintiffs must show (1) complete domination of the corporation with respect to the transaction at issue, and (2) that such domination was used to commit a fraud or wrong against the aggrieved party.[63] Plaintiffs easily satisfy both

requirements of this standard. The amended complaint alleges that MGAG is the sole shareholder of MG Corp.; [64] MG Corp. is the sole shareholder ***415** of MGRM; [65] the funds of MGAG, MG Corp. and MGRM were commingled; [66] MGAG financed MG Corp.'s and MGRM's debts; [67] the operations of MGAG, MG Corp. and MGRM were not separate; [68] and corporate formalities were not followed as among the three entities. [69] They allege further that MGAG supervised and financially assisted MG Corp. and MGRM in connection with MGRM's performance under the supply contracts, [70] including a guarantee by MGAG securing all of the MG Group's futures trades and obligations; [71] MGAG and Deutsche Bank representatives stripped MGRM's president of responsibility for the hedge positions; [72] and MGAG directed its agents, including MG Corp. and MGRM, to provide false information to the CFTC, to encourage the CFTC to issue untrue findings, and to consent to the CFTC order declaring the contracts illegal. [73] Additionally, it alleges two communications among MGAG, MG Corp. and plaintiff customers that further suggest domination by these entities of MGRM-the first, a letter to the customers from the president of MG Corp. indicating that MGRM's president had been fired, [74] and the second, a letter to the customers from MGAG in which it discussed its "position with respect to MG Corp.'s and [MGRM's] future in the petroleum supply business," enumerated measures taken by MGAG to protect the financial stability of MG Corp. and help the MG Group honor "all contractual obligations," and assured the customers that MG had the appropriate hedges in place. [75]

These allegations suggest not only domination, but also use of this domination by MGAG and MG Corp. to commit a wrong against plaintiffs. The essence of plaintiffs' complaint is that the MGAG and MG Corp. acted to extricate MGRM from the flexie contracts by, *inter alia,* taking control of MGRM, ousting its management, unwinding the hedges, misleading plaintiffs into inaction, providing the CFTC with false information, and consenting to the 1995 CFTC order declaring the flexie contracts illegal. The amended complaint thus alleges facts sufficient to support a finding that MGAG and MG Corp. used their domination of MGRM to commit these wrongs against plaintiffs. The motion to dismiss Counts I and II as against MGAG and MG Corp. on this ground is denied.

### C. *Releases and Cancellations*

The MG Group moves in the alternative for summary judgment dismissing Counts I and II as against seven plaintiff customers on the ground that they gave complete releases or signed sworn statements that the flexies had been canceled by mutual consent. [76] Plaintiffs dispute both claims.

#### ***416** *1. Releases*

**[13]** The MG Group points first to releases allegedly signed by plaintiffs Corbin Fuel Co., Ports Petroleum Company, Inc., Ferrell Fuel Company Inc. and Fox Fuel Co. The releases specify particular contracts to be canceled, which do not include the flexies, and then purport to release defendants from liability *for all claims against MGRM,* "*including without limitation* " any claim arising from the specified contracts. [77] As no limitation is evident from the face of the releases, the MG Group argues that the releases reach more broadly than the specified contracts and release MGRM from all claims against it, including those brought in this case.

Although plaintiffs do not dispute having signed the releases, they argue that the releases applied to specified contracts only and did not cover the flexies. [78] They have submitted declarations by their principals to the effect that the releases were signed at MGRM's request in connection with the mutual cancellation of the contracts specified in each release and that they did not intend the releases to cover anything but those specified contracts. Further, plaintiffs attached to two of these declarations letters from MGRM to the declarants which appear to have been enclosed with the releases and in which MGRM stated explicitly that the releases applied to the specified contracts. [79]

The New York Court of Appeals has noted that language of general release must be treated with particular care and must yield to the purpose for which the release is given, the parties' intent and other attendant circumstances. [80] As plaintiffs have submitted evidence that the parties did not intend a general release, the MG Group's motion for summary judgment on Counts I and II as against Corbin Fuel Co., Ports Petroleum Company, Inc., Ferrell Fuel Company Inc. and Fox Fuel Co. is denied.

#### *2. The Sworn Statements*

**[14]** The MG Group points next to sworn statements signed by principals of plaintiffs Merritt Oil Co., Higginson Oil Co. and RK Distributing, Inc. stating that the flexie contracts had

been canceled by mutual consent. Plaintiffs dispute the legal effect of the sworn statements on two grounds. [81]

First, plaintiffs argue that defendants deceived them about the legal status of the contracts and misled them into signing the statements. [82] As plaintiffs have submitted declarations by the three plaintiffs to this effect, they have raised an issue of material fact that precludes summary judgment.

Plaintiffs contend alternatively that the sworn statements are without legal effect because the flexie contracts included a no oral modification clause. [83] They point out that the sworn statements themselves are ***417** not instruments of cancellation, but merely attest to a prior, apparently unwritten, agreement to cancel. [84] As the flexies, by their own terms, cannot be modified by such an agreement, the agreements attested to in the sworn statements are of no effect. [85] Accordingly, summary judgment on Counts I and II as against Merritt Oil Co., Higginson Oil Co. and RK Distributing, Inc. is denied.

## IV

### *The Deutsche Bank Motion*

**A.** ***Vicarious Liability***

Deutsche Bank moves to dismiss Counts V and VI of the amended complaint on the ground that plaintiffs fail to allege facts sufficiently to hold Deutsche Bank liable for the actions of MGAG, MG Corp. and MGRM. The Court finds this contention unpersuasive.

**[15]** As with their claims against MG Corp. and MGAG, plaintiffs contend that Deutsche Bank is liable on the contract counts on theories of corporate veil piercing, *respondeat superior* and *alter ego* liability. They allege that Deutsche Bank AG was a controlling shareholder of MGAG; [86] the chair of MGAG's supervisory board was a member of Deutsche Bank AG's management board and oversaw Deutsche Bank New York; [87] through MGAG, Deutsche Bank financed MG Corp.'s and MGRM's debts; [88] Deutsche Bank commingled its funds with MGAG, MG Corp. and MGRM; [89] the operations of Deutsche Bank, MGAG, MG Corp. and MGRM were not separate; [90] and corporate formalities among the entities were not followed. [91] They allege further that Deutsche Bank and MGAG supervised and financially assisted MG Corp. and MGRM in connection with their performance under the supply contracts; [92] the board member common to Deutsche Bank AG and MGAG and other Deutsche Bank agents oversaw MG's energy business, including the flexie contracts; [93] the same board member fired two-thirds of MGAG's management board, including the chief executive officer of MGAG and MG Corp.; [94] the firings took place at Deutsche Bank's offices; [95] Deutsche Bank and MGAG fired MG Corp.'s Chief Operating Officer [96] and required all personnel in MG Corp.'s New York office to report the CEO of Deutsche Bank North America and a Deutsche Bank consultant hired by the common board member; [97] Deutsche Bank and MGAG stripped MGRM's president of responsibility for the hedge positions and gave this responsibility to the Deutsche Bank consultant; [98] and the Deutsche Bank consultant directed MGRM to send the January 1994 letter to customers repudiating the ***418** contracts. [99]

Unlike MGAG and MG Corp., Deutsche Bank is alleged to be merely a controlling shareholder rather than a parent company with 100 percent ownership interest. For this reason, the sufficiency of plaintiffs' contract allegations against Deutsche Bank is a slightly closer question than is the case with respect to its allegations against MGAG and MG Corp. Nonetheless, plaintiffs plead numerous facts that, if established at trial, would show substantially complete domination of the MG Group by Deutsche Bank.

Deutsche Bank, perhaps recognizing the strength of the allegations of domination and control, rejoins that plaintiffs' assertions focus on the 1993-94 time period, whereas the breach of contract complained of is the July 1995 deal between MGRM and the CFTC. It maintains that there is no basis for suggesting that Deutsche Bank controlled MGRM with respect to that alleged breach. But Deutsche Bank reads the complaint too narrowly. The essence of plaintiffs' argument is that Deutsche Bank was deeply implicated in the management of the MG Group in general and the flexie contracts in particular, that it ousted much of the MG Group's management and replaced it with its own designee when it became concerned about its exposure in the petroleum futures area, and that it actively sought to extricate the MG Group from the hedge positions and the flexie contracts. Were plaintiffs to prove all of this, surely they reasonably could argue to the trier of fact that Deutsche Bank must have been involved in the decision to enter into the CFTC deal in light of

both its past actions with respect to the MG Group and the fact that the CFTC deal so neatly served the goal that Deutsche Bank was seeking to attain. In consequence, the complaint is entirely sufficient in alleging that Deutsche Bank dominated and controlled the MG Group with respect to the transaction at issue and that it used that control to commit a wrong against plaintiffs by consenting to a CFTC order prohibiting MGRM from performing under the contracts with plaintiffs. Deutsche Bank's motion to dismiss Counts V and VI on the ground that they do not sufficiently allege a basis for its liability is denied.

**B.** ***Lender Liability***

Deutsche Bank moves also to dismiss Count IV, the lender liability claim, on the ground that plaintiffs have failed to plead a basis for imposing liability upon it.

Lender liability is not an independent cause of action, but a term that refers to the imposition of traditional contract or tort liability on a bank or other financial institution.[100] It may be predicated on, *inter alia,* breach of contract, breach of fiduciary duty, common law fraud, duress, tortious interference with contract, defamation or negligence.[101]

Plaintiffs here seek recovery against Deutsche Bank for MGRM's breach of contract on both vicarious liability and tortious interference theories. To the extent there is basis for such claims, plaintiffs will prevail. But the stand-alone "lender liability" claim is entirely duplicative. Accordingly, Count IV will be dismissed.

**C.** ***Breach of the Implied Covenant of Good Faith and Fair Dealing***

Deutsche Bank moves also to dismiss Count VI, the claim for breach of the implied covenant of good faith and fair dealing, on the ground that it is duplicative ***419** of the contract claim.[102]

**[16]** Under New York law, a claim for breach of the implied covenant will be dismissed as duplicative if the conduct allegedly violating the implied covenant is also the predicate for breach of the underlying contract.[103] Plaintiffs attempt to distinguish the factual allegations underlying the two claims,[104] but their effort is unavailing. Both counts clearly rest on the same factual predicate-Deutsche Bank's alleged involvement in the 1995 CFTC order. In consequence, Count VI of the amended complaint is dismissed as duplicative.

**D.** ***Tortious Interference Claim***

Deutsche Bank moves to dismiss Count VII, the claim for tortious interference with contract, on the grounds that it fails to state a claim upon which relief may be granted and is time barred in any case. As the Court agrees that the claim is untimely, there is no need to address its legal sufficiency.

**[17]** Under New York law, a three-year statute of limitations applies to plaintiffs' claim for tortious interference with contract.[105] In this case, Deutsche Bank argues, and plaintiffs implicitly concede, that this claim accrued on July 27, 1995, when the CFTC order was entered.[106] Deutsche Bank contends that the statute of limitations on this claim therefore expired in July 1998, more than seven months before plaintiffs filed the original complaint in this action. Plaintiffs, however, argue that the limitations period was equitably tolled because Deutsche Bank concealed its role in procuring the order.[107]

**[18]** The doctrine of equitable tolling to which plaintiffs appeal is federal in nature and does not apply to claims based solely on New York law.[108] New York, however, recognizes the related but not identical doctrine of equitable estoppel, which bars a defendant from pleading the statute of limitations "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action."[109] Application of this doctrine requires defendant to have engaged in affirmative acts of misrepresentation or concealment, rather than mere passive failure to disclose facts.[110] It further requires plaintiff to ***420** demonstrate that it exercised due diligence in bringing the cause of action and reasonable care in ascertaining facts which might have led to discovery of plaintiff's claim.[111]

**[19]** In this case, plaintiffs have met none of these requirements. The amended complaint fails to plead any affirmative act of concealment or misrepresentation by Deutsche Bank other than the conclusory allegation that Deutsche Bank "concealed" its role in the "unlawfully-induced breaches" of the flexie agreements.[112] Nor does it affirmatively plead diligence in ascertaining the facts and bringing the claim. To the contrary, it simply asserts that plaintiff did not know of the cause of action until the fall of 1997 and that it commenced the action in March 1999. In consequence, plaintiffs have failed to allege the elements of equitable estoppel, and Count VII of the amended complaint therefore is dismissed.

## V

For the foregoing reasons, the motion by the MG Group to dismiss Counts I and II or, in the alternative, for summary judgment dismissing the claims of certain plaintiffs is denied in all respects. Count III is dismissed on consent. The motion by the Deutsche Bank defendants to dismiss is granted to the extent that Counts IV, VI and VII are dismissed and denied in all other respects.

SO ORDERED.

**Parallel Citations**

41 UCC Rep.Serv.2d 814, Comm. Fut. L. Rep. P 28,078

Footnotes

1 Unless distinction is made, defendants Deutsche Bank AG, Deutsche Bank North America, and Deutsche Bank New York will be referred to collectively as "Deutsche Bank."

2 Am. Cpt. ¶¶ 39-54. The amended complaint fails to mention a starting date for six of the 22 of the contracts at issue. *Id.*¶¶ 55-60.

3 Firm Fixed Price (45 Day) Agreement Contract for Sale of Petroleum Products ("Contract" or "Flexie") (Taylor Aff. Ex. 1; Ludwig Aff. Ex. B (Pl. Response to MGRM and MG Corp.'s Rule 56.1 Stmt. Ex. 8)).

4 Contract ¶ 16.

5 Am. Cpt. ¶¶ 35-36.

6 Indeed, the contracts perhaps presupposed that MGRM would hedge by entering into back-to-back purchase contracts in order to ensure its ability to deliver the physical commodity if the blow out options were not exercised as opposed to relying on spot market purchases to satisfy its delivery obligations.

7 *Id.*¶¶ 66-82.

8 *Id.*¶¶ 67-90.

9 *MG Refining and Marketing, Inc.,* CFTC Docket No. 95-14, 1995 WL 447455, *2, *6 (July 27, 1995).

10 *Id.* at *8.

11 Plaintiffs have dropped Count Ill. Pl. Mem. in Opp. to MG Parties at 1 n.1.

12 This issue was not raised by the MG Group until its reply memo. MG Group Repl. Mem. at 7-8. As Deutsche Bank raised the same issue in its motion to dismiss, however, plaintiffs had an opportunity to respond and would suffer no prejudice. Accordingly, the Court will consider the argument.

13 Although plaintiffs did not assert this argument in their original motion papers, they did so in a previous set of motion papers filed in May. Pl. Mem in Opp. to MG Group, filed May 25, 1999, at 11 n.2. As plaintiffs specifically requested in their reply papers and at oral argument that this claim be preserved, MG Group Repl. Mem. at 7-8; Tr. at 7, and as defendants will suffer no prejudice, the Court will consider it.

14 The parties agree that this case is governed by New York law.

15 N.Y. UNIF. COMM. C. § 2-725 (McKinney 1990).

16 N.Y. CIV. PRAC. L. & R. ("CPLR") § 213 (McKinney 1990).

17 *See Insurance Co. of North America v. ABB Power Generation, Inc.,* 925 F.Supp. 1053 (S.D.N.Y.1996).

18 *See, e.g., Dynamics Corp. of America v. International Harvester Co.,* 429 F.Supp. 341, 346 (S.D.N.Y.1977); *Curtis Publishing Co. v. Sheridan,* 53 F.R.D. 642, 644 (S.D.N.Y.1971).

19 Contract ¶ 16. On a motion to dismiss, the court may consider the complaint and any document attached as an exhibit or incorporated by reference. *See Goldman v. Belden,* 754 F.2d 1059, 1065-66 (2d Cir.1985); *Piccoli A/S v. Calvin Klein Jeanswear,* 19 F.Supp.2d 157, 162 n. 25 (S.D.N.Y.1998); *Mason Tenders District Council Welfare Fund v. Logic Construction Corp.,* 7 F.Supp.2d 351, 355 n. 15 (S.D.N.Y.1998). As the amended complaint makes frequent reference to the contract, the Court may properly consider it on the motion to dismiss without converting the motion into one for summary judgment.

20 Pl. Mem. in Opp. to MG Parties, filed May 25, 1999, at 11 n.2.

21 *MG Mining and Marketing, Inc.,* 1995 WL 447455, at *3.

22 *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

23 Am. Cpt. ¶ 71.

24 *Id.* ¶ 85.

25 MG Group Mem. at 9-11 (citing Am. Cpt. ¶¶ 61-62, 71); MG Group Repl. Mem. at 1 (citing Am. Cpt. ¶ 110).

26 RESTATEMENT (SECOND) OF CONTRACTS § 236, cmt. a (1981).

27 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 8.15, 8.16, 8.18 (1998); *Lovink v. Guilford Mills, Inc.,* 878 F.2d 584, 586 (2d Cir.1989) ("A total breach justifies termination of the contract and damages for complete failure of performance; a partial breach does not.").

28 *See generally* 2 FARNSWORTH § 8.15; RESTATEMENT (SECOND) OF CONTRACTS § 236(1).

29 2 FARNSWORTH § 8.16; RESTATEMENT (SECOND) OF CONTRACTS § 236, cmt. b.

30 *See generally* 2 FARNSWORTH § 8.15; RESTATEMENT (SECOND) OF CONTRACTS § 236(2) & cmt. b.

31 Am. Cpt. ¶ 61.

32 *See, e.g., Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1174 (2d Cir.1993); *L.L. Capital Partners, L.P. v. Rockefeller Center Properties, Inc.,* 921 F.Supp. 1174, 1176 (S.D.N.Y.1996). Whether MGRM was obliged contractually to maintain the hedges is actually a mixed question of fact and law, rather than a pure question of fact, and it is true that on a motion to dismiss, the court need not take the legal conclusions in the complaint as true. *See Sirna v. Prudential Securities Inc.,* No. 95 Civ. 8422(LAK), 1997 WL 53194, *2 (S.D.N.Y. Feb. 10, 1997). However, assuming that plaintiffs' factual allegations concerning the scope of the agreements are correct, the legal standard is met. The amended complaint states that "it was understood and agreed that MG would have to enter into appropriate transactions on the futures and over-the-counter markets." Am. Cpt. ¶ 61. Although it does not specify whether this alleged understanding was implicit in the flexie contracts or stemmed from a separate oral agreement between the parties, this ultimately is of no consequence, as in either case, the Court may interpret the contract in light of this alleged understanding.

The parol evidence rule generally prohibits consideration of extrinsic evidence to vary, contradict, explain or add to the plain meaning of a fully integrated contract such as the flexies, which contain integration clauses. *See Investors Ins. Co. of America v. Dorinco Reinsurance Co.,* 917 F.2d 100, 104 (2d Cir.1990); *Trans Pacific Leasing Corp. v. Aero Micronesia Inc.,* 26 F.Supp.2d 698, 705-06 (S.D.N.Y.1998). However, if the contract is ambiguous as to any of its terms, parol evidence is admissible to resolve the ambiguity. *Id.* The flexies are ambiguous as to whether MGRM was required to maintain long hedge positions. *See supra* note 6 and accompanying text. Therefore, even if the understanding alleged in the amended complaint stemmed from a separate oral agreement between the parties, the Court may resolve the contractual ambiguity regarding MGRM's obligation to maintain the hedges in light of this understanding. In consequence, for purposes of this motion to dismiss only, the Court accepts plaintiffs' allegation that the parties understood that the hedges would be maintained and concludes that this obligation constituted part of the flexie contracts.

33 A material breach is defined as one that is "significant enough to amount to the nonoccurrence of a constructive condition of exchange." 2 FARNSWORTH § 8.16. Whether removal of the hedges, assuming it to be a breach at all, rises to such a level is unclear.

The hedges appear to have been significant to these agreements in at least two respects. As noted above, they may have protected the buyers by securing MGRM's ability deliver physical product in the face of shortage and, in the event the blow-out options were exercised, by tending to protect its financial stability. More directly, the terms of the contracts measured the amounts payable upon exercise of the blow-out options as a function of the average bid prices obtained by MGRM in liquidating the hedges upon exercise of the options.

MGRM's primary obligations under the contracts were delivery of the physical product or, upon exercise of the options, payment of the sums required. The significance of the removal of the hedges to the ability of MGRM to perform these obligations cannot be determined on the pleadings. The Court cannot assume that MGRM would have been unable, absent the hedge positions, to secure physical product in sufficient quantity to satisfy its obligations to make physical delivery even in the tightest petroleum market. Nor may it assume that its financial position when the contracts were concluded made its ability to perform with respect to the exercise of the blow-out options in any reasonably foreseeable scenario questionable in the absence of the hedges.

The significance of the removal of the hedges to the calculation of the payments required in the event of exercise of the blow-out options is somewhat more troublesome. Given the removal of the hedges, it manifestly would have been impossible to determine the required payments in precise accordance with the contracts; the required payments in that event would have been the difference between the average bid prices secured by MGRM in unwinding the hedges and the contract prices, multiplied by the volume of undelivered product, but there were no hedges left to be unwound after 1993. Yet it is not clear that this alone establishes that the removal of the hedges was a material breach of the contracts.

For one thing, one arguably would have to take into account the likelihood that the blow-out options would be exercised. Even more basically, it is not self evident that one could not have computed the amounts due under the option clauses by some determination of the prices that MGRM would have secured in unwinding the hedges, assuming that the hedges were unwound at the time of the exercise of the options rather than in late 1993. One conceivably might have looked, for example, to the bid prices on the NYMEX for the relevant futures contracts at the time the options were exercised rather than at average bid

prices actually secured by MGRM. On the other hand, this may not have been feasible, as MGRM's hedge positions might have consisted of contracts maturing earlier than any exercise of the blow-out options that MGRM might have rolled forward at indeterminable times and at indeterminable costs.

Given all of the uncertainties, it is impossible to determine as a matter of law, simply on the basis of the pleadings, whether removal of the hedges in late 1993 was a material breach.

34 MG Group Mem. at 11-15; MG Group Repl. Mem. at 3-5. The theory that removal of the hedges constituted an anticipatory repudiation is at odds with the MG Group's earlier contention that removal of the hedges was a breach, as the latter is based on the assumption that maintenance of the hedges was required under the contract, and the former necessarily is based on the opposite assumption. However, as parties are permitted to plead in the alternative, the Court will consider both arguments.

35 It is unclear from plaintiffs' submissions and statements at oral argument whether they view removal of the hedges and/or the January 1994 letters as anticipatory repudiations. At one point in their papers, plaintiffs describe these actions as “at most, anticipatory breaches.” Pl. Mem. in Opp. to MG Group at 11. They state two pages later that the 1994 letters “qualified as an anticipatory repudiation under N.Y. U.C.C. § 2-610.” *Id.* at 13. At oral argument, plaintiffs' counsel retreated from this position when he protested defendants' “misconception” that plaintiffs had acknowledged the letters to be an anticipatory repudiation and later stated that the letters “did not constitute an anticipatory repudiation under the law.” Tr. at 8-10. Nevertheless, the Court is obliged to give the non-moving parties the benefit of the doubt on a motion to dismiss.

36 N.Y. UNIF. COMM. C. § 2-610, Official Comment 1 (McKinney 1993). *See also Holford U.S.A. Ltd. v. Cherokee, Inc.,* 864 F.Supp. 364, 373 n. 12 (S.D.N.Y.1994).

37 *See supra* note 33.

38 N.Y. UNIF. COMM. C.. § 2-610.

39 Am. Cpt. ¶ 85.

40 *Id.*

41 Tr. at 12.

42 Tr. at 9.

43 Tr. at 8-10.

44 Am. Cpt. ¶ 80.

45 MG Group Mem. at 11-15.

46 Pl. Mem. in Opp. to MG Group at 13-15.

47 *Id.*

48 *Id.*

49 N.Y. UNIF. COMM. C.. § 2-610(a)-(b).

50 *See Ga Nun v. Palmer,* 202 N.Y. 483, 96 N.E. 99 (1911); 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 989 (1951 & Supp.1999).

51 N.Y. UNIF. COMM. CC. § 2-610, Official Comment 4 (McKinney 1993) (emphasis added).

52 The Official Comment states that “if [the aggrieved party] awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.” N.Y. UNIF. COMM. C. § 2-610, Official Comment 1. This suggests that actions brought after a commercially reasonable time are not time barred, but merely involve limits on recovery.

53 Tr. at 4-5, 23-25.

54 *See G.N. Rupe v. Triton Oil & Gas Corp.,* 806 F.Supp. 1495 (D.Kan.1992) (gas purchase contract). *Cf. Ediciones Quiroga, S.L. v. Fall River Music, Inc.,* 93 Civ. 3914, 1995 WL 366287, *2 (S.D.N.Y. June 20, 1995) (non sale of goods agreement); *Sven Salen AB v. Jacq. Pierot, Jr., & Sons, Inc.,* 559 F.Supp. 503, 506 (S.D.N.Y.1983) (non sale of goods agreement); *Rachmani Corp. v. 9 East 96th St. Apt. Corp.,* 211 A.D.2d 262, 629 N.Y.S.2d 382, 384 (1st Dept.1995) (non sale of goods agreement); *Police Benev. Ass'n of New York State Police v. State,* 79 Misc.2d 334, 336, 358 N.Y.S.2d 280, 283 (Ct.Cl.1974) (non sale of goods agreement); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 213.10, at 2-345 (1999); 75 N.Y. JUR.2D, *Limitations* § 161 (1989). *But see American Cyanamid Co. v. Mississippi Chemical Corp.,* 817 F.2d 91 (11th Cir.1987) (contract for purchase of phosphate rock).

The MG Group cites several cases that hold that an anticipatory repudiation is a breach of contract regardless of whether it is accepted as such by the aggrieved party. MG Group Repl. Mem. at 5 n.5 (citing *William B. Tanner Co. v. WIOO, Inc.,* 528 F.2d 262 (3d Cir.1975); *Sawyer Farmers Coop. Assoc. v. Linke,* 231 N.W.2d 791 (N.D.1975)). From this premise, it argues that an anticipatory repudiation triggers the statute of limitations for all actions on the contract, regardless of whether the aggrieved party wishes to ignore the repudiation and await performance. These cases are quoted out of context and their doctrine misapplied. In each, the plaintiff brought suit for anticipatory repudiation, and defendant moved to dismiss on the

ground that the repudiation was not formally accepted as such by the aggrieved party and therefore did not constitute a breach giving rise to a cause of action. Both courts rejected this argument on the ground that an aggrieved party is not obliged to accept the repudiation formally before bringing suit. These cases thus are about the formal prerequisites to a claim based upon an anticipatory repudiation. Neither speaks to the issue of whether an aggrieved party may elect to ignore an anticipatory repudiation and await performance.

55 Professor Anderson, for instance, asserts that "[u]nder the Code, the view held by some pre-Code courts is continued by which an anticipatory repudiation is not a breach of the contract unless it is so accepted by the [aggrieved party]. Consequently, if the party who could complain does not choose to do so the contract continues in force as before." 4 RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 2-610:18, at 235 (3d ed.1983). He contends further that "[a]n anticipatory breach gives the other party a cause of action for damages which may be sued on immediately or at the time for performance by the party committing the breach." *Id.* § 2-610:17(5), at 235. Although Anderson states also that "[w]hen a party has made an anticipatory repudiation, the statute of limitations commences to run from that date," this appears to refer to the statute of limitations merely for claims based on the anticipatory repudiation, rather than that for actions based on future breach by nonperformance. *Id.* at § 2-610:3, at 227.

White and Summers likewise appear to interpret Section 2-610 as merely giving the aggrieved party the option to sue before performance is due, rather than obliging that party to take action on the anticipatory repudiation or forego its rights under the contract. *See* I JAMES J. WHITE & ROBERT S. SUMMERS , UNIFORM COMMERCIAL CODE § 6-7, at 336-47 (4th ed.1995). They agree also that if an aggrieved party awaits performance for more than a "commercially reasonable time," it probably loses only the right to cover and consequential damages, not the right to sue on the contract. *Id.* § 6-7, at 344-45.

56 N.Y. UNIF. COMM. CC. § 2-611(2).

57 *Id.* § 2-611(1).

58 *Id.* § 2-611(3).

59 4 ANDERSON § 2-611:6.

60 Am. Cpt. ¶ 87.

61 *Id.*

62 The MG Group refers to two cases that allegedly stand for the proposition that the repudiating party must state expressly that its prior repudiation of the contract is withdrawn in order to retract the repudiation. MG Group Repl. Mem. at 5-6 (citing *L. Albert & Son v. Armstrong Rubber Co.,* 178 F.2d 182, 186 (2d Cir.1949); *Aero Consulting Corp. v. Cessna Aircraft Co.,* 867 F.Supp. 1480, 1492-93 (D.Kan.1994)). It therefore argues that its repudiation of the contracts in January 1994 could not have been withdrawn by the March 1994 letters. MG Group Repl. Mem. at 6. It is mistaken. Its cases state merely that a communication consistent with the intent to proceed with the contract is insufficient to retract a repudiation and that a retraction is valid only if it states clearly the repudiating party's intention to perform. *Aero Consulting Corp.,* 867 F.Supp. at 1486; *L. Albert & Son,* 178 F.2d at 191. As the March 1994 letters arguably manifested defendants' unambiguous intention to perform their contractual obligations, these cases do not undermine the Court's conclusion that the letters at least raise an issue of fact as to whether defendants retracted their anticipatory repudiation.

63 *See, e.g., American Fuel Corp. v. Utah Energy Development Co.,* 122 F.3d 130, 134 (2d Cir.1997); *Freeman v. Complex Computing Co.,* 119 F.3d 1044, 1052 (2d Cir.1997); *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.,* 933 F.2d 131, 138 (2d Cir.1991); *Gartner v. Snyder,* 607 F.2d 582, 586 (2d Cir.1979); *United Orient Bank v. Green,* 215 B.R. 916, 925 (S.D.N.Y.1997), *aff'd,* 172 F.3d 38 (2d Cir.1999).

64 Am. Cpt. ¶¶ 23-24.

65 *Id.*

66 *Id.*

67 *Id.* ¶ 95.

68 *Id.* ¶ 96.

69 *Id.*

70 *Id.*

71 *Id.* ¶ 31.

72 *Id.* ¶ 76.

73 *Id.* ¶ 99.

74 *Id.* ¶ 86.

75 *Id.* ¶ 87.

The amended complaint alleges also a number of representations by MGRM to plaintiffs that MGAG and/or MG Corp. dominated MGRM with respect to the flexie contracts. It alleges that MGRM represented to plaintiffs that the contracts were

 © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

"completely backed up" by MGAG, that MGAG and MG Corp. would "support and guarantee" MGRM's performance, and that the MG Group constituted "one firm." *Id.*¶¶ 28, 30, 64. Furthermore, the contracts, which are incorporated by reference into the amended complaint, *see supra* note 19, list MG Corp. as the party to which all "financial notices" under the contract should be sent and note at the bottom of the first page that MGRM is a "member of the Metallgesellschaft Group." Contract at 1, 7.

76 MG Group Mem. at 23-29.

77 Cancellation and Release Agreement ¶¶ 2, 5 (Taylor Aff. Exs. 2-5) (emphasis added).

78 Pl. Mem. in Opp. to MG Group at 20-22.

79 MGRM letter to Coale, Feb. 9, 1996 (Coale Dec. Ex. A); MGRM letter to Ports, Jan. 29, 1996 (Ports Dec. Ex. A).

80 *See Cahill v. Regan,* 5 N.Y.2d 292, 299, 184 N.Y.S.2d 348, 354, 157 N.E.2d 505 (1959); *Lucio v. Curran,* 2 N.Y.2d 157, 157 N.Y.S.2d 948, 139 N.E.2d 133 (1956), *Mangini v. McClurg,* 24 N.Y.2d 556, 562-64, 301 N.Y.S.2d 508, 512-14, 249 N.E.2d 386 (1969). *See also Arias v. Mutual Cent. Alarm Serv. Inc.,* 182 F.R.D. 407 (1998), *aff'd,* 202 F.3d 553 (2d Cir.2000); *Simon v. Simon,* 274 A.D. 447, 448, 84 N.Y.S.2d 307, 309 (1st Dept.1948).

81 Pl. Mem. in Opp. to MG Group at 25-30.

82 Pl. Mem. in Opp. to MG Group at 29-30; Merritt Dec. of May 24, 1999 (Bernstein Aff. at Ex. 10); Higginson Dec. of May 24, 1999 (Bernstein Aff. Ex. 11); Cowden Dec. of May 24, 1999 (Bernstein Aff. Ex. 12).

83 The flexies provided that "[n]o amendment or waiver of any provision ... or any departure by either party therefrom, shall be effective unless the same is in writing and signed by the party to be charged with such amendment, waiver or consent." Contract ¶ 19(f).

84 Pl. Mem. in Opp. to MG Group at 26-27; Merritt Dec. of Aug. 1, 1995 (Bernstein Aff. Ex. 7); Higginson Dec. of Aug. 14, 1995 (Bernstein Aff. Ex. 8); Cowden Dec. of Aug. 2, 1995 (Bernstein Aff. Ex. 9).

85 The MG Group contends that, as the flexies do not expressly prohibit oral rescission, but merely amendment, waiver or departure by any party, the prior agreements attested to in the declarations are valid to rescind the contracts. MG Group Mem. at 9 n.11. This is unconvincing. Recission necessarily is included in amendment, waiver or departure. Therefore, the flexies prohibit not only modification, but also rescission.

86 Am. Cpt. ¶ 29.

87 *Id.*

88 *Id.*¶¶ 78, 95.

89 *Id.*

90 *Id.* ¶ 96.

91 *Id.*

92 *Id.* ¶ 95.

93 *Id.*¶¶ 65, 75.

94 *Id.* ¶ 67.

95 *Id.*

96 *Id.* ¶ 68.

97 *Id.*¶¶ 68-69, 73.

98 *Id.* ¶ 76.

99 *Id.* ¶ 85.

100 *See* Melvin L. Cantor, John J. Kerr, Jr., and Thomas C. Rice, *Lender Liability Theories, in* LENDER LIABILITY LITIGATION: RECENT DEVELOPMENTS , at 74 (PLI Commercial Law and Practice Course Handbook Series No. 434, 1987).

101 *See* HELEN DAVIS CHAITMAN, THE LAW OF LENDER LIABILITY ¶¶ 5.02-5.09, 5-3-5-67 (1990).

102 DB Mem. at 16-17; DB Repl. Mem. at 9-10.

103 *See ICD Holdings S.A. v. Frankel,* 976 F.Supp. 234, 243-44 (S.D.N.Y.1997). *See also Apfel v. Prudential-Bache Securities Inc.,* 183 A.D.2d 439, 583 N.Y.S.2d 386 (1st Dept.1992).

104 Pl. Mem. in Opp. to DB at 23-24.

105 N.Y. CPLR § 214(4). *See also Rosemeier v. Schenker Int'l,* 895 F.Supp. 65, 66 (S.D.N.Y.1995).

106 A cause of action for tortious interference with contract accrues at the time the injury is sustained, rather than the date of defendant's alleged wrongful conduct or the date of breach. *See Rosemeier,* 895 F.Supp. at 66; *Kronos, Inc. v. AVX Corp.,* 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 934, 612 N.E.2d 289 (1993). In the amended complaint, plaintiffs request damages plus interest from the date of the alleged breach. Am. Cpt. ¶ 113. This can be interpreted only as an allegation that plaintiffs sustained injury as of the date

of the breach, which occurred on July 27, 1995 at the latest. In consequence, the three year statue of limitations began running on that date. In any case, plaintiffs have not contended that the cause of action accrued later than July 1995.

107 Pl. Mem. in Opp. to DB at 9-12.

108 *See Johnson v. Nyack Hospital,* 86 F.3d 8, 11 (2d Cir.1996); *Long v. Frank,* 22 F.3d 54, 58 (2d Cir.1994), *cert. denied,* 513 U.S. 1128, 115 S.Ct. 938, 130 L.Ed.2d 883 (1995); *Dillman v. Combustion Engineering, Inc.,* 784 F.2d 57, 60 (2d Cir.1986).

109 *Simcuski v. Saeli,* 44 N.Y.2d 442, 448-49, 406 N.Y.S.2d 259, 262, 377 N.E.2d 713 (1978). *See also Whitney Holdings, Ltd. v. Givotovsky,* 988 F.Supp. 732, 746 (S.D.N.Y.1997).

110 *See Whitney Holdings,* 988 F.Supp. at 746. An exception to this rule exists where defendant stood in a fiduciary relationship to plaintiff that obligated defendant to inform plaintiff of certain facts. *Id.* This exception clearly does not apply in this case.

111 *Id.* at 747.

112 Am. Cpt. ¶ 106.

**End of Document** © 2014 Thomson Reuters. No claim to original U.S. Government Works.

# EXHIBIT G

. . . . . . . . . . . . . . . . 54.5
. . . . . . . . . . . . . . . . 54.6
. . . . . . . . . . . . . . . . 54.7
. . . . . . . . . . . . . . . . 54.8
. . . . . . . . . . . . . . . . 54.9
. . . . . . . . . . . . . . . 54.10
. . . . . . . . . . . . . . . 54.11
. . . . . . . . . . . . . . . 54.12
. . . . . . . . . . . . . . . 54.13
. . . . . . . . . . . . . . . 54.14
. . . . . . . . . . . . . . . 54.15
. . . . . . . . . . . . . . . 54.15A
. . . . . . . . . . . . . . . 54.16
. . . . . . . . . . . . . . . 54.16A
. . . . . . . . . . . . . . . 54.17
. . . . . . . . . . . . . . . 54.18
. . . . . . . . . . . . . . . 54.19
. . . . . . . . . . . . . . . 54.20
. . . . . . . . . . . . . . . 54.21
. . . . . . . . . . . . . . . 54.22
. . . . . . . . . . . . . . . 54.23
. . . . . . . . . . . . . . . 54.24
. . . . . . . . . . . . . . . 54.25
. . . . . . . . . . . . . . . 54.26
. . . . . . . . . . . . . . . . . 54.27
. . . . . . . . . . . . . . . . . 54.28
. . . . . . . . . . . . . . . . . 54.29
. . . . . . . . . . . . . . . . . 54.30
. . . . . . . . . . . . . . . . . 54.31

RECEIVED
JUN 27 2014
SRZ LIBRARY

# CORBIN ON CONTRACTS

## *BREACH OF CONTRACT*

*By*
***JOHN E. MURRAY, Jr.***
*Chancellor and Professor of Law*
*Duquesne University*

***Joseph M. Perillo***

Editor

**Volume 10**

REVISED EDITION

§§ 53.1–54.31

SCHULTE ROTH & ZABEL – LIBRARY

## QUESTIONS ABOUT THIS PUBLICATION?

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . . . . . . . . . . . . . . . . . . . . . . (800) 833-9844

Outside the United States and Canada, please call . . . . . . . . . . . . . . . . (518) 487-3000

Fax Number . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . (518) 487-3584

Customer Service Website . . . . . . . . . . . . . . . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . (800) 223-1940

Outside the United States and Canada, please call . . . . . . . . . . . . . . . . (518) 487-3000

Library of Congress Card Number: 93-60572

ISBN: 978-0-327-00069-3 (set)

ISBN: 978-0-327-18310-5 (eBook)

Cite as: [Vol. No.] [Author name] Corbin on Contracts § [sec. no.] (Joseph M. Perillo, ed.) (Matthew Bender)

Example: 10 John E. Murray Jr., Corbin on Contracts, § 53.1 (Joseph M. Perillo, ed.) (Matthew Bender)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

(2014–Pub.63310)

properly be put upon the repudiator.[16]

(A) The following cases cite this section:

(1) *Austin v. Parker*, 672 F.2d 508 (5th Cir. 1982).

(2) *Record Club of Am., Inc. v. United Artists Records, Inc.*, 643 F. Supp. 925 (S.D.N.Y. 1986), on remand, 731 F. Supp. 602 (S.D.N.Y. 1990).

(3) *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 653 P.2d 791 (1982) .

(4) *Hanson v. Boeder*, 2007 N.D. 20, 727 N.W.2d 280 (N.D. 2007).

## § 54.26 Repudiation by Making Performance Impossible

Repudiation is a manifestation of intention not to perform a contractual duty. Such manifestations are usually communicated by words; but they may be evidenced in other ways. It has become a proverb that actions speak louder than words. Therefore, if a promisor so conducts himself as to make the substantial performance of his promise impossible, this is a repudiation of his promise and has the same legal effect as would a repudiation in words.[1] If the time for the performance of the promise has not yet arrived, there is an anticipatory breach for which an action lies.[2] Moreover, the performance of conditions precedent by the other party is rendered unnecessary to his right of action.

In *Johnson v. Meyer*,[3] the owner of property had leased the premises to Hillner to operate a restaurant. Hillner made a general assignment of the business for the benefit of creditors to Meyer. The assignment did not include the lease. The owner made an offer to Meyer that if he would sell the debtor's restaurant business as a going concern, the owner would execute a lease to the buyer including an option to purchase. Meyer found such a buyer

---

[16] The Michigan court holds that the burden is on the plaintiff to show the amount of its actual damage. International Text-Book Co. v. Marvin, 166 Mich. 660, 132 N.W. 437 (1911); International Text-Book Co. v. Jones, 166 Mich. 86, 131 N.W. 98 (1911) .

[1] One who has employed another as editor of his paper for a term of years commits a breach by selling the paper to third parties making no provision for continuance of the employee as editor. Collier v. Sunday Referee Pub. Co. [1940] 4 All Eng. 234.

[2] Cavalliotis v. Gray & Co., 293 F. 1018 (C.C.A.2d, 1923) , affirming 276 F. 565 (D.C., 1922); In re Swift, 112 F. 315 (C.C.A.1st, 1901); Wm. Cramp & Sons Ship & Engine Building Co. v. United States, 50 Ct. Cl. 179 (1915); Wicks v. Knorr, 113 Conn. 449, 155 A. 816 (1931) (promise to share profits made impossible by transferring all property to a corporation for shares therein). Land v. Hedenberg, 277 Ill. 368, 115 N.E. 566 (1917); Gillis v. Bonelli-Adams Co., 284 Mass. 176, 187 N.E. 535 (1933), semble. Meyers v. Markham, 90 Minn. 230, 96 N.W. 335 (1903); Internal Water Heater Co. v. Burns Bros., 114 N.J.L. 368, 176 A. 380 (1935); James v. Burchell, 82 N.Y. 108 (1880); Delamater v. Miller, 1 Cow. 75, 13 Am.Dec. 512 (1823). Eng.—Ogdens Ltd. v. Nelson, [1905] A.C. 109; Caines v. Smith, 15 M. & W. 189 (1846); Lovelock v. Franklyn, 8 Q.B. 371 (1846); Short v. Stone, 8 Q.B. 358 (1846); Sir Anthony Mayne's Case, 5 Co.Rep. 20 b (1596).

[3] Johnson v. Meyer, 209 Cal. App. 2d 736, 26 Cal. Rptr. 157 (Ct. App. 1962).

# EXHIBIT H

793 F.Supp. 1237
United States District Court,
S.D. New York.

200 EAST 87TH STREET ASSOCIATES, Plaintiff,
v.
MTS, INC., Defendant.

No. 92 Civ. 2681 (RWS). | July 21, 1992.

In landlord tenant dispute, landlord sought declaratory judgment to enforce commercial building space lease and tenant sought to break lease and recover damages. The District Court, Sweet, J., held that: (1) landlord's failure to obtain temporary certificate of occupancy by date specified in lease was curable defect under New York law; (2) variance in required slab to slab floor to ceiling height was de minimis and did not render substantial performance subjectively impossible; and (3) claim that changes in construction plans would result in excessive impact noise from overhead tenant was premature where neither tenant had yet occupied space in building.

Judgment for plaintiff.

**Attorneys and Law Firms**

***1239** Michael B. Kramer, New York City (Artemis Croussouloudis, of counsel), for plaintiff.

Morrison & Foerster, New York City (Kim J. Landsman, Marc Schoenfeld, of counsel), for defendant.

**Opinion**

**OPINION**

SWEET, District Judge.

This is a $32 million dollar landlord-tenant dispute involving a newly constructed building at 200 East 87th Street (the "Building"). The plaintiff, 200 East 87th Street Associates (the "Landlord"), seeks a declaratory judgment to enforce a March 17, 1989 agreement (the "Lease") between its assignor, Zemnor 87 Corp. ("Zemnor"), and defendant MTS, Inc. ("Tower") one of its tenants. By its counterclaims Tower seeks to break the Lease and to recover damages. Upon a bench trial, all prior proceedings and the findings of fact and conclusions of law set forth below, judgment will be entered enforcing the Lease and dismissing the counterclaims.

This fact-rich controversy involves the complicated relationship between a developer, his architects, his contractor and his tenants. It requires a determination of the meaning of the Lease provisions, whether or not Tower's acts constituted a waiver of its rights, and the adequacy of the Building under the terms of the Lease. Notwithstanding the skilled representation of both the Landlord and the Tenant here, the dispute has engendered the familiar emotional climate of lesser landlord-tenant disputes.

## PRIOR PROCEEDINGS, THE PLEADINGS AND THE ISSUES

This action arises out of the Lease between the Landlord and Tower [1] dated as of March 17, 1989, which was for retail space in the Building. The Building consists of 25 stories for residential, educational, commercial and assembly use. Its top three floors are used for mechanical space. The residential units begin at the eighth floor. Tower served notice on April 7, 1992 terminating the Lease based upon the conceded failure of the Landlord to obtain a Temporary Certificate of Occupancy ("TCO") by March 17, 1992 as required by the Lease.

This action was commenced by the Landlord on April 13, 1992 by the filing of a verified complaint in New York State Supreme Court, New York County (the "Complaint"). Tower removed the action to this court, under its diversity jurisdiction, on April 14, 1992. On April 22, 1992, the Landlord moved by order to show cause for a preliminary injunction on the grounds that the holder of the underlying mortgage, the Manufacturers Hanover Trust Company ("MHT"), would foreclose upon the Building as a consequence of a certain notice to cure served upon MHT by Tower on March 17, 1992 (the "Notice to Cure"). The hearing on the preliminary injunction and the trial on the merits were ordered consolidated and expedited discovery was undertaken. MHT has taken no action as yet to foreclose on its mortgage, presumably abiding the event of this decision.

The Complaint seeks a declaration that the Landlord is not in violation of any of the provisions of the Lease based upon the failure to obtain a TCO for the Building by March 17, 1992, that the notice terminating the Lease is void, that the Landlord be afforded a reasonable opportunity to cure its breach and

WestlawNext © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

that Tower be enjoined and restrained from terminating the Lease based upon the March 17, 1992 Notice to Cure.

Tower's Answer asserts as an affirmative defense a right to terminate based upon Landlord's failure to obtain a TCO within three years of the date of the Lease. By its Answer, Tower has also interposed counterclaims asserting that the Landlord has repudiated or breached the Lease by failing to substantially perform because: (1) the slab-to-slab height on the first and second floors does not meet the requirement of ¶ 46(4) of the Lease; (2) the square ***1240** footage of the second floor is less than that required under ¶ 46(3) of the Lease; and (3) the service vestibule is unusable and does not conform to Exhibit A of the Lease. Tower also claims that the Landlord has breached the covenant of quiet enjoyment because the floor between the gymnasia of the Dalton School ("Dalton") and Tower's second-floor space is insufficient to prevent transmission of noise and impact sound. On its counterclaims, Tower seeks a declaration that the Lease is terminated and of no further force and effect, damages sustained as a result of the Landlord's alleged breach of the Lease and attorneys fees and costs.

By way of a Reply, the Landlord has alleged that Tower has waived and is equitably estopped from claiming a default and under the TCO requirement. The Reply also asserts that Tower is estopped from asserting the ceiling-height requirement, that the dispute as to the square footage of the space is subject to arbitration and that the cause of action for noise from the Dalton School gym is premature.

The trial before the Court took place from June 1, 1992 through June 9, 1992. Final submissions were filed on June 16, 1992.

**THE FACTS**

***The Parties***

The Landlord is a New York partnership, the general partners of which are Norman Segal ("Segal"), a self-styled real estate developer, and ROC–87 Corp., a New York corporation owned and controlled by The Olnick Organization.

Tower is a California corporation with its principal place of business in Sacramento, California. Tower owns and operates over seventy record stores throughout the United States and the world under the tradename Tower Records and claims distinction from its extensive offerings presented in a lively and compelling fashion. For all intents and purposes, the sole shareholder of Tower is and has been Russell Solomon.

***The Lease and its Amendment***

On or about November 1, 1988, Segal, through his wholly owned corporation Zemnor 87 Corp. ("Zemnor"), acquired a ground lease interest in the premises at 1531–1545 Third Avenue, New York, New York by executing a ground lease agreement with the fee owner, Ardmore Realty ("Ardmore"). In order to obtain the necessary construction financing from its lenders, Zemnor sought commercial tenants for the proposed mixed-use building which it sought to develop.

After negotiations with Dalton and the national retail chain, The Gap, Zemnor executed agreements with both Dalton and The Gap for space in the Building in early 1989. Dalton entered into an agreement to pay approximately $5 million dollars to Zemnor in exchange for a 195–year lease of the third, fourth and fifth floors of the Building. The Gap executed a Lease with Zemnor which provided for an annual rental of approximately $1 million dollars. The Gap leased approximately eight thousand square feet on the first floor and the basement level of the Building. The rent charged to The Gap was calculated solely upon the square footage of the ground floor space, having the greatest commercial space value, at the rate of $140 per square foot per year.

Negotiations between brokers for Zemnor and Tower began in late 1988 relating to the nature, size and location of the space to be leased by Tower as well as the rent. A general agreement was reached under which the Tower space was to be located at the southerly most portion of the Third Avenue side of the Building and below the space for Dalton gymnasia. Tower agreed to lease the entire second floor, and portions of the first floor, basement and sub-basement. Lawyers for both Zemnor and Tower then negotiated the terms of the Lease agreement over the next three to four months in approximately six drafts.

The Lease was a written lease agreement dated as of March 17, 1989 between Zemnor, as landlord, and Tower, as tenant. The Landlord is the assignee of all of the interests of Zemnor in and to the Lease and the ground lease covering the land on which the Building has been constructed pursuant to an agreement of lease dated as ***1241** of July 26, 1990. The term of the Lease is eighteen years at an annual base rent payable in an amount of approximately $1,131,000. At Tower's insistence, the Lease was modified to provide for specifics of the work to be done by the Landlord relative to

Tower's space. In addition, Tower requested the insertion of a provision acknowledging that Tower would be playing music in its space until midnight 365 days a year.

The Lease further provided that the Building would be constructed within three years and that rent would not commence until seven months after substantial completion of the Building. Commencement of the time to pay rent would be further deferred if the Landlord had not procured a TCO for the premises when Tower was ready to open for business.

Paragraph 59 contains the provisions relating to the commencement of the Lease. Paragraph 59(A) states in relevant part that:

> The parties further agree that if Owner does not construct the Building and obtain a Temporary Certificate of Occupancy for the Building within three (3) years from the date hereof, for whatever reasons, including the Owner's decision to abandon the project, then either party may terminate this Lease by sixty days notice to the other....

Paragraph 59(C) states in relevant part that:

> If, at the time that Tenant is ready to open for business, the Owner has failed to obtain a Temporary Certificate of Occupancy for the commercial space in the Building (Owner's TCO), or if obtained, the Owner's TCO is lost or suspended, and if such failure, loss or suspension shall prevent Tenant from proceeding with Tenant's work, or from obtaining a TCO or sign-off relative to Tenant's work (provided that such failure, loss or suspension has not been caused by acts or failures of Tenant), then the period of seven months set forth above shall be extended by the number of days from the date of prevention of Tenant's work or delay in opening until the Tenant is notified that the Owner's TCO has been obtained or reinstated.

Paragraph 44(C) states as follows:

> In the event of any act or omission of Owner which would give Tenant the right, immediately or after lapse of a period of time, to cancel or terminate this Lease, or to claim a partial or total eviction, Tenant shall not exercise such right (i) until it has given written notice of such act or omission to the holder of the first Mortgage ("Superior Mortgagee" [MHT] ) and the lessor under the Ground lease ("Superior Lessor" [Ardmore] ) whose name and address shall previously have been furnished to Tenant in writing, and (ii) unless such act or omission shall be one which is not capable of being remedied by Owner or the Superior Mortgagee or Superior Lessor within a reasonable period of time, until a reasonable period for remedying such act or omission shall have elapsed following the giving of such notice and following the time when the Superior Mortgagee and Superior Lessor shall have become entitled under such Superior Mortgage or Ground lease, as the case may be to remedy the same, which reasonable period shall in no event be less than the period to which Owner would be entitled under this Lease or otherwise, after similar notice to effect such remedy, provided the Superior Mortgagee or Superior Lessor shall, with due diligence, have given Tenant written notice of its intention to and shall commence and continue to remedy such act or omission, but nothing herein contained shall obligate any Superior Mortgagee or Superior Lessor to do so unless it so elects.

Paragraph 59(B) provided that Tower shall receive possession of the premises upon "substantial completion of Owner's Work set forth in Article 46." Of the "Owner's Work" enumerated in paragraph 46, several subsections are relevant here. Paragraph 46(3) provided that "the allocation of store

space in the new building ... shall have ... approximately 11,850 square feet of second level store space ... +/- 5%" and that the overall store space "shall be substantially in accordance with the ***1242** plan attached." Under the Lease, the retail store and basement space leased by the Owner to Tower was "as more particularly described in Exhibit A, annexed hereto." Paragraph 46(4) provided that Tower's "store space shall have 13 foot ceilings (slab to slab) on the street level and the second floor level." Finally, ¶ 46(10) provided that:

> (10) ... The service elevator shall be located in a receiving vestibule.... Owner shall submit shop drawings for Tenant's approval subject to subparagraph (14) hereof, prior to ordering elevators.

As defined in ¶ 59(B), "substantial completion" is:

> the stage of the progress of Owner's Work which shall enable Tenant a) to hook up with the basic electrical, plumbing and condenser systems installed by Owner as part of Owner's work; b) to commence its use or occupancy of the demised premises for its normal business purposes, including commencement of Tenant's Work, without material interference by reason of the completion of unfinished details of Owner's Work ...; c) to have elevator service to all four floors of Tenant's space by the use of at least one of the elevators allocated specifically to Tenant and designated herein as part of Owner's work and d) when the demised premises are completely enclosed and weathertight.

The Tower space represents 14% of the entire space in the Building and approximately 33% of its commercial space.

Pursuant to the Lease, Zemnor was required to commence construction of the Building no later than January 1990. Because Segal's original partner "went broke," Segal was unable to commence full construction of the Building by January 1990. As a result, Tower sought to terminate the Lease. Almost immediately, negotiations ensued between Tower and Zemnor which resulted in the Amendment of Lease dated as of April 23, 1990. The Amendment gave Tower the benefit of a base annual rent of $985,000, a reduction of $145,000 annually or $2,610,000 over the life of the Lease. The Lease Amendment provided for a "break ground" date of August 15, 1990. Regrettably for Segal, the date set forth in Paragraph 59(A) was not amended accordingly.

On or about July 26, 1990, the ground lease and the Lease, as amended, were assigned to the Landlord which obtained a construction and project loan from MHT in the sum of $32 million dollars. The rental from the Lease represents approximately 40% of the sums required to carry the debt service on the MHT loan.

In recognition of the critical importance of the Lease, MHT, Ardmore and BRT Realty Trust ("BRT"), also the holder of a mortgage on the property at 1535–1545 Third Avenue and 206 East 87th Street, entered into certain Non–Disturbance and Attornment Agreements with Tower dated as of July 25 and 26, 1990 (the "Non–Disturbance Agreements"). These agreements, which are essentially identical in substance, provided, *inter alia,* that Tower would not terminate the Lease as a result of any acts or omission of the Landlord until it notified these parties and provided an opportunity to cure such act or omission. The only exception in the Non–Disturbance Agreements to this right to cure was a failure by the Landlord to commence construction on August 15, 1990, time being expressly "of the essence." No other time period in the Lease, as amended, contained a time-is-of-the-essence qualification.

***The Construction of the Building***

Segal had retained the architectural firm of Emery Roth & Sons ("Emery Roth") to do feasibility studies and early designs for the Building. While the Lease contained no reference to the basic construction material for the Building, by the spring of 1990 Emery Roth had produced preliminary drawings contemplating a concrete construction. Segal's general contractor, Marson Construction Co. ("Marson") was concerned about the cost of the project as designed by Emery Roth.

During the summer of 1990, Marson discussed the design of the Building on an informal basis with John Ciardullo ("Ciardullo"), an architect at the firm of John Ciardullo & Associates ("JCA"). Ciardullo ***1243** suggested that a change to steel construction might better accommodate the design. In September 1990, Segal replaced Emery Roth with JCA, believing that the change would result in savings in

WestlawNext © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

the construction as well as a better design for the Dalton gymnasia. At this time, the initial steps of construction, excavation and foundation were just about to commence. Ciardullo, a credible and impressive witness, designed the Building in three months, less than half the time the prior architects had anticipated. However, no critical path, fixed dates for performance of particular tasks, was set, leaving some ambiguity as to the time for the completion of design requirements for the Tower space.

The change of architects and construction plans created heavy time pressures on all concerned. Emery Roth's last foundation drawings showed a change and a "hold" notation on the passenger elevator in Tower's space. Because of the transition, that information either was not communicated to Ciardullo or was overlooked. As a result, the portion of the foundation for that elevator was poured and had to be ripped out and re-poured. In other instances, the foundation sub-contractor got ahead of the architect's drawings, and work had to be redone. Even under the Ciardullo design, the sub-basement, basement and first floor were to remain concrete. The only Tower floor which was to be constructed of steel was the second floor, which had a 2–inch steel deck and 3 ¼–inch concrete pour.

Because it could receive a $6,250 premium for each calendar day after the Building was completed prior to June 30, 1992, Marson sought to complete the Building expeditiously. However, Marson was held back in mid-October 1990 by "lack of information from [the] structural engineer." The foundation work was completed in November of 1990.

During the fall of 1990, Marson was unable to calculate the structural steel openings for Tower's escalators because Tower had not selected between two manufacturers. Therefore, when the time came to pour the pit and set the structural steel in that area, Marson made its calculations based upon the largest openings.

Marson was originally promised completed drawings of the steel design by November 15, 1990 so that it could contract with its steel suppliers. Some delay resulted, in part because the Tower space had not been fully designed, but by early January 1991 sufficient information was available to enter into a contract for the steel.

After January 14, 1991, Marson resumed at a "limited pace" while waiting for the boilers and oil tanks to be delivered a little over a week later. The structural steel did not arrive until April 15, 1991 which, according to Marson, was 103 days late.

Segal never gave the Tower lease to either his architect or his contractor. As a consequence, neither Ciardullo nor the contractor knew whether work in a tenant's space was extra work or work required by the Lease. In designing the overall Building, Ciardullo changed the Emery Roth plan for the Tower space and submitted a design to Tower's architects, Buttrick White & Burtis ("BWB"), showing 12 foot, 6 inch slab-to-slab ceilings on the street level and second floor, rather than the ceiling heights of 13 feet slab-to-slab set forth in ¶ 46(4) of the Lease or the 13 foot 8 inch second floor ceiling height represented in the Emery Roth drawings. This changed was accompanied by a change in slab thickness, from the 10–inch concrete slabs contemplated by the Emery Roth drawings, to 5 ¼–inch steel and concrete slabs on the first and second floors. There was no structural or physical reason that Ciardullo could not provide 13 foot slab-to-slab ceilings in his design. However, the overall height of the Building was limited by zoning, so that there was a trade-off of commercial for residential space.

Ciardullo's drawings also varied from the Emery Roth drawings as to the square footage on the second floor. The Emery Roth drawings showed 11,456 square feet on the second floor, which was within 3.3% of the 11,850 square feet called for in the Lease. Ciardullo's first drawings showed only 10,493 square feet on that floor, for a shortfall of 11.5%. In addition, the Ciardullo ***1244** drawings showed a change in the Tower service vestibule shown in Exhibit A to the Lease. This vestibule was to be used by Tower "to get merchandise in and ... to get garbage out." Tower desired a service vestibule large enough for one person to bring in a delivery pallet pulling a pallet jack and to store at least one pallet of merchandise being delivered to avoid the necessity of having store employees supervise every delivery as well as the risk of having delivery trucks double-parked on Third Avenue. Neither the Lease nor Exhibit A provided any dimensions or square footage for the vestibule, although the Emery Roth drawings showed a rectangular space 10 feet deep and wider than it was deep. In contrast, Ciardullo's drawings showed a service vestibule which was rectangular and approximately 9 feet by 10 feet, or 90 square feet.

As soon as he received the first set of Ciardullo's drawings for the Tower space on October 26, 1990, Theodore Burtis ("Burtis"), the BWB partner responsible for the design of the Tower space, wrote Segal to point out "areas where the

 © 2014 Thomson Reuters. No claim to original U.S. Government Works. 

work shown on the latest documents deviates from what is described in the lease, and [to] note[ ] differences between the lease and anticipated requirements of Tower Records." Among these areas was the difference in the slab thickness between the second and third floors, which caused Burtis "concern[ ] about the transmission of impact noise from the third floor gymnasium into the main Tower Records selling space." Burtis also pointed out that the Ciardullo drawings provided 11.5% less square footage on the second floor than that provided in the Lease as well as slab-to-slab ceiling heights on the first and second floors of only 12 feet, 6 inches as opposed to the 13 feet provided in the Lease. These issues were also raised by Robert F. Liner, counsel to Tower, in letters dated November 19, 1990, November 28, 1990 and December 20, 1990. In the last of these letters, Liner represented that his client did not "intend to accept the premises" under these conditions and requested a representation from Segal that he would fully comply with the terms of the Lease. Ciardullo made no changes, and Segal took no steps to accomplish any changes. However, Tower never took any action to terminate the Lease based on these deviations, and in fact indicated its intentions at all times to move ahead with the project.

In early 1991, Tower decided to abandon its escalator design. The redesign involved a reconfiguration of space, the replacement of the escalators by free floating stairs, and the installation of an additional passenger elevator which required the construction of an elevator shaft through four floors of their space. The decision to enlarge the stair required reframing of the opening for the steel. Tower sought a two-story atrium affect and the inclusion of revolving doors at the entrance. The redesign resulted in the demolition of concrete and metal deck in order to provide the penetrations as well as the demolition of masonry partitions. Moreover, changes were required to the entrance which involved the redesign of structural steel to create the atrium effect that Tower wanted. The specifics of the redesign were being developed in March and April, 1991.

In May 1991, Marson was at the point of pouring the first metal deck, which was the second floor of the Tower space. BWB instructed Marson to hold back on pouring the concrete because Tower was still considering aspects of its redesign of its space.

Marson was concerned about the expense involved in the redesign and the responsibility for the change orders and sought to have Segal resolve the matter as a condition to acquiescence to Tower's redesign. Through the attorneys for the parties, Segal obtained a letter dated May 17, 1991 from Michael Solomon, vice-president of Tower, acknowledging the request for changes in the design for the Tower Records store and stating that "[w]e acknowledge that taking these actions could have consequences in terms of the project's cost and schedule and we will work with you to make equitable adjustments." The majority of the work done relating to the redesign was done by Marson by January 1992 at a cost of $138,000.

***1245** As constructed, the slab-to-slab floor to ceiling height on the first floor is 12 feet, 6 inches, and on the second floor is 12 feet, 4 inches for most of the floor, and 12 feet, 6 inches for part of it. The structural ceiling is 5 ¼ inches thick and is composed of a concrete slab on a metal deck, yielding floor-to-ceiling heights of 12 feet, ¾ inch and 11 feet, 10 ¾ inches. Taking into account 16–inch steel beams plus one inch of fireproofing, the clear ceiling heights at the points of the beams on the first and second floors would be reduced to approximately 10 feet, 8 inches and approximately 10 feet 6 inches in some parts of the second floor.[2] Exhibit A of the Lease had anticipated beams of approximately 16–inch thickness thus yielding clear ceiling heights at the points of the beams of approximately 10 feet, 10 inches. The actual amount of space allocated to Tower on the second floor, as calculated by Tower, is now 10,600 square feet. The Landlord calculates the second floor square footage at 11,040 square feet.

The Gap lease required the Owner to provide The Gap with 100 feet of first floor street frontage, plus or minus 5%. The Gap complained that it was only given 87 feet, 11 inches of first floor street frontage. In order to give The Gap 95 feet of street frontage, the Landlord moved the service vestibule into the Tower retail space, removed 54 square feet of space from the vestibule, and changed the 9 by 10 feet vestibule into a corridor with an approximately three foot protrusion into the first floor retail space approximately four feet from the bottom of the stairs by which customers will descend from the second floor. Tower was aware of this change by at least September of 1991, as evidenced by a memorandum from Burtis to Michael Solomon dated September 27, 1991.

As built, the floor between the Dalton gymnasia and the second floor Tower retail space was changed from ten inches of concrete to just over five inches of concrete and steel deck, comprising 3 ¼ inches of lightweight concrete over a 2–inch metal deck.

With respect to this change, Dalton hired the engineering firm of Shen Milsom & Wilke to evaluate the potential the transmission of “excessive impact noise,” which is noise produced mainly by running footfall and ball-bouncing activities, to the retail spaces directly below. Dalton's acoustical expert evaluated the impact noise problem hypothetically, considering three different floor-types: (a) the actual floor built by the Owner, consisting of lightweight concrete of approximately 41 lb/sq. ft. density; (b) a floor similar to but somewhat thinner than the one originally contemplated when the Building was to be of concrete construction, consisting of a reinforced concrete slab weighing approximately 90 lb./sq. ft. density (or about 8 inches thick); and (c) a floor that had the same mass as the original floor but a different construction. The expert concluded that with the 8–inch thick concrete floor, the transmission of impact noise “would be slightly audible but not distracting or disruptive.” With the lightweight 3 ¼–inch concrete floor on a 2–inch metal deck actually built, however, the transmission of impact noise would be “perceived subjectively” as more than twice as loud as with the 8–inch thick concrete slab. Dalton has planned to use the best gymnasium floor available to provide the maximum attenuation of impact noise.

The Landlord retained an expert, Cerami and Associates, Inc., which reported to the Owner in March 1991:

> We are in agreement with the Dalton School consultant (Shen–Milsom–Wilke), that the existing slab is too lightweight, and that some impacts will be perceptible in the retail space below.... Notwithstanding the above, we must express a doubt that a real problem will occur, since it will be necessary for the gymnasium to be in use at a time of acoustical ***1246** “sensitivity” in the retail space. We have to expect that a record shop is relatively “insensitive,” since the ambience includes music played at a reasonable level. Thus, we believe that the potential for a real problem is certainly not great.... [I]n the event of a real problem occurring post construction, little or nothing could be done to relieve the situation. The usability of the affected space would potentially be restricted to the detriment of revenue production.

However, no tests have been conducted at the Building to measure the actual impact noise originating in the Dalton gymnasia or the extent to which it is perceived in the Tower space under normal operating conditions.

On January 22, 1992, the Landlord sent a letter to Tower stating that the Building would be substantially complete as of January 30, 1992 to permit Tower to work on its space. On January 30, 1992, Tower rejected the Landlord's claim of substantial completion as of January 30, 1992.

**THE ISSUANCE OF THE TCO**

As set forth above, the Lease required the Landlord to obtain “the Temporary Certificate for the Building” by March 17, 1992. A TCO is issued after inspection by the Buildings Department to determine if a building has been constructed in accordance with plans filed and approved by the Department. A TCO can be obtained for any portion of the building meeting this criterion.

The construction of the Building stayed well ahead of Buildings Department approvals until at least February 1992. After the excavation permit was issued, and for most of the time the Building was under construction, the Owner had approval only to build up to the 6th story. An application for Buildings Department approval for the plans for all 25 stories of the Building was filed in May 1991. The approval of the Building's plan was not issued until February 14, 1992, however, because the Landlord could not obtain approval for a building beyond 17 stories without approvals under the City's Quality Housing Program and what is termed Inclusionary Zoning. The Buildings Department's objection to the application on that basis was removed on November 26, 1991.

Segal wrote to Tower's lawyer on October 1, 1991 that “[w]e anticipate ... that an initial TCO for the residential space will be obtained by February 1, 1992.”

On October 16, 1991 Tower's counsel sent a certified letter to Segal outlining the sequence of past discussions and differences specifying six enumerated issues, floor area, zoning, construction costs, schedule, the Dalton gym and piping. The letter concluded with a warning that Tower “expects the Owner to timely comply with all of its obligations.”

Tower never mentioned to plaintiff the need to obtain the TCO by March 17, 1992, nor was the date for obtaining the TCO mentioned in any of the correspondence between the parties. However, an expediter on behalf of Tower was monitoring the Buildings Department in order to ascertain if the Landlord filed for a TCO. The only reference to a TCO between the parties is on page 4 of the October 16 letter and states:

> [s]o to assist in the process of obtaining a TCO, please advise us of any Tenant's work needed to be completed so to enable you to obtain the TCO.

Discussions among Tower architects, lawyers and officers late in 1991 indicated awareness of the Landlord's March 17, 1992 deadline for obtaining a TCO. A memorandum of December 23, 1991 from Burtis entitled “Outstanding Lease and Construction Issues” refers to the “March 17 scenario.”

The process of applying for a TCO for the residential portion began on February 24, 1992, when the contractor called a meeting to discuss the remaining tasks required to be completed before the Owner could apply for the TCO. The agenda prepared for that meeting indicated 14 remaining tasks, one of which involved the commercial tenants, and the filing of an amendment to reflect the plans as-built throughout the Building.

***1247** On March 17, 1992, Tower sent a document bearing the title “Notice to Cure,” to MHT, BRT and Ardmore stating that Zemnor was in default of paragraph 59 of the Lease based upon the alleged failure to obtain a TCO within three years of the date of the Lease. The notice stated that Tower acknowledged a 30–day period to cure the alleged default pursuant to the Non–Disturbance Agreements.

By letter dated March 23, 1992, MHT notified Tower that it was in receipt of the Notice to Cure and that it intended to effectuate a cure in accordance with the terms of the Non–Disturbance Agreement. By letter dated April 7, 1992, Tower advised MHT, BRT and Ardmore that the Notice to Cure, dated March 17, 1992, was not intended to acknowledge, nor did it contain, any right to cure the default in obtaining a TCO as the default was not curable.

By letter dated April 7, 1992, Tower sent a notice to Zemnor, informing it that the Landlord had failed to obtain a TCO within three years and that, pursuant to Article 59 of the Lease, Tower was therefore terminating the Lease effective 60 days from the notice.

Reports on March 30 and April 8, 1992 detailed the work to be completed before the issuance of a TCO, and noted that Segal had not cleared up violations issued before Marson took over as contractor.

The April 1992 application to the Buildings Department for a TCO, showing “as-planned” work in the Tower Records space and “as-built” conditions in the rest of the Building, engendered three objections relating to the Tower space. The first objection concerned a requirement that Tower's stairs be enclosed in 2–hour fire-rated sheetrock rather than glass. The Owner had the option of seeking a reconsideration of this objection. A request for reconsideration was signed by Ciardullo, and a meeting was scheduled with Deputy Borough Commissioner Chandler, but the Owner did not seek the reconsideration. Instead, Ciardullo revised the drawings to include the fire-rated enclosure.

Objections numbered 2 and 3 concerned the front doors of the Tower space. Under objection number 2, the configuration of the entrance was considered not to comply with laws concerning handicapped access. Ciardullo redrew the entrance to show only swinging doors. Objection number 3 was based on an incorrect calculation of the width required for the entryway doors, and it was removed.

The first inspection by the Buildings Department for purposes of obtaining a TCO was conducted on May 8, 1992. The Buildings Department inspector determined that the Building was not ready for a TCO based on 17 objections. These objections were satisfied and a TCO issued on June 1, 1992.

The TCO covered the residential floors of the Building on which final plans have been filed and construction completed in accordance with the plans. It does not cover the Tower space, on which work has been suspended.

## CONCLUSIONS OF LAW

### A. *The Landlord has Cured its Failure to Obtain a Building TCO by March 17, 1992*

**[1]** In a contract action, the court's general objective should be to give effect to the intentions of the parties in entering into an agreement, *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.,* 906 F.2d 884, 889 (2d Cir.1990) (citing *Hartford Accident & Indem. Co. v. Wesolowski,* 33 N.Y.2d 169, 171–72, 350

N.Y.S.2d 895, 898–99, 305 N.E.2d 907, 909–10 (1973); *Morlee Sales Corp. v. Manufacturers Trust Co.,* 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 518, 172 N.E.2d 280, 282 (1961)), in such a way as to produce a reasonable result. *Omath Holding Co. v. New York,* 149 A.D.2d 179, 185, 545 N.Y.S.2d 557, 560 (1st Dep't 1989). Under New York law, the application of which is not disputed here, where a contract is unambiguous on its face, its proper construction is a matter of law. *Id.* In determining whether an ambiguity exists, the court must look to the document as a whole rather than at sentences or clauses in isolation. *See id.* at 889 (citing ***1248** *Breed v. Insurance Co. of N. Am.,* 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282 (1978)); *Pantone, Inc. v. Esselte Letraset, Ltd.,* 691 F.Supp. 768, 771 (S.D.N.Y.1988), *aff'd,* 878 F.2d 601 (2d Cir.1989).

**[2]** Tower argues that ¶ 59(A) unambiguously states a condition subsequent, which, having not been satisfied, gives rise as a matter of law to an absolute right to cancel the Lease on sixty days' notice. As distinguished from a covenant, which is "a promise to do, or to forbear from doing, a specific act or acts....[,] a condition subsequent is one by the failure or nonperformance of which an estate already vested may be defeated." 74 N.Y.Jur.2d §§ 81–82, at 119–20 (1989). According to Tower, whereas the failure to perform a covenant results in a default that may be amenable to cure, the failure of a condition subsequent is not curable.

Were the Lease indeed unambiguous as to whether failure to obtain a building TCO by March 17, 1992 was an incurable condition, Tower may have proved a valid claim for rescission of the Lease. In *Abrams v. Thompson,* 251 N.Y. 79, 167 N.E. 178 (1929), the New York Court of Appeals interpreted a land-sale contract that provided the purchaser with the right to elect rescission of the contract if the seller failed to obtain mortgage releases from third parties within one year of the date of the contract. Upon the failure of the seller to obtain these releases within one year, the court upheld the purchaser's right to cancel, stating:

> We read this contract as giving the plaintiff an absolute right to rescission. This was the thing contracted and stipulated for; the title was closed with this inducement and understanding.

*Id.* at 85–86, 167 N.E. 178. *See also Waskewich v. Redding,* 97 A.D.2d 758, 759, 468 N.Y.S.2d 178, 179 (2d Dep't 1983) (provision explicitly conditioning contract upon purchaser's obtaining mortgage within 30 days); *Med–Guy Realty Corp. v. Amerada Hess Corp.,* 69 A.D.2d 812, 415 N.Y.S.2d 54 (2d Dep't 1979) (lease provision giving parties right to cancel lease if governmental approvals not obtained by date certain satisfied by notice of termination); *Guilford Dev. Corp. v. McCrory Corp.,* 23 A.D.2d 751, 752, 259 N.Y.S.2d 41, 42 (1st Dep't) (provision that tenant could cancel lease if landlord had not procured bona fide leases of store premises before date certain gives tenant absolute power to cancel if landlord fails to comply with condition), *aff'd,* 16 N.Y.2d 938, 264 N.Y.S.2d 924, 212 N.E.2d 441 (1965).

Nevertheless, the Lease as a whole is ambiguous as to the inflexibility of the TCO deadline, thus necessitating consideration of the intent of the parties as to the curability of a failure to meet the March 17, 1992 deadline. Specifically, uncertainty as to the intended curability of the TCO deadline is created by the phrasing of ¶ 59(A), the language of ¶¶ 59(C) and 44(C) and the conduct of the parties. [3] In reading the Lease, it is to be remembered that "[i]f a provision is so phrased as to make it doubtful whether it is a covenant or a condition, the courts will, as a general rule, construe it as a covenant to avoid a forfeiture." 74 N.Y.Jur.2d § 82, at 120.

Paragraph 44(C) provides in relevant part that:

> In the event of *any* act or omission of [the Landlord] which would give [Tower] the right, immediately or after lapse of a period of time, to cancel or terminate this Lease ... [Tower] shall not exercise such right (i) until it has given written notice ... to [MHT] and [Ardmore] ... and (ii) unless such act or omission shall be one which is not capable of being remedied by [the Landlord] or [MHT or Ardmore] within a reasonable period of time, *until* ***1249** *a reasonable period for remedying such act or omission shall have elapsed following the giving of such notice ... which reasonable period shall in no event be less than the period to which Owner would be entitled under this Lease or otherwise, after similar notice....*

Landlord Exh. 2 at 6–7 (emphasis added). Paragraph 59(C) provides in pertinent part that the period of free rent will be extended beyond seven months of delivery of possession of the space to Tower if a TCO has not obtained for

the commercial space at that time. Landlord Exh. 13 at 3 (emphasis added). The language of these paragraphs negates Tower's assertion that obtaining a building TCO by March 17, 1992 was intended to be an incurable condition.

First, as found above, only one kind of TCO can be obtained, namely, a building TCO covering particular areas. Thus, by providing a rent-abatement remedy for the Landlord's failure to obtain a TCO, ¶ 59(C) directly contradicts Tower's characterization of March 17, 1992 as a "drop-dead," unremediable date for obtaining a TCO. Second, ¶ 44(C) explicitly states the parties' intention that "*any* act or omission" by the Landlord that would give Tower the right to terminate shall be treated as a curable default, provided it is capable of being remedied by the Landlord, MHT or Ardmore within a "reasonable period of time." As an omission that gives rise to a right to terminate the Lease, the Landlord's failure to obtain a TCO by March 17, 1992 is thus a curable default under ¶ 44(C)'s catch-all "any."

Tower maintains that ¶ 44(C) is of no effect that respect to the March 17, 1992 TCO requirement because the specification of a date certain by which the TCO was to be obtained renders the failure to do so incapable of being cured. This contention is undermined, however, by the Lease's failure to provide that "time is of the essence" in the performance of this term. In an equity action, [4]

> time of performance will not be considered of the essence of the contract unless it affirmatively appears that the parties regarded it as a material consideration.... "The mere insertion in the contract of a day of its completion does not make such time the essence of the contract, and it will not be implied as essential except where the subject of the sale has a fluctuating value, or where the object of the contract is a commercial enterprise, or the delay in completion would involve one of the parties in a serious loss."
>
> *Lusker v. Tannen,* 90 A.D.2d 118, 124, 456 N.Y.S.2d 354, 357 (1st Dep't 1982) (citations omitted); *compare, e.g., Sparks v. Stich,* 135 A.D.2d 989, 991, 522 N.Y.S.2d 707, 709 (3d Dep't 1987) (in action for breach of contract, "[w]here a definite time of performance is specified in a contract, time is of the essence unless the circumstances affirmatively indicate a contrary intent."). Moreover, the inclusion of a "time-is-of-the-essence" qualification with respect to the "break ground" date in the Amendment of Lease takes considerable force out of Tower's suggestion that no such language was necessary to make the date for obtaining a TCO "of the essence."

Tower's conduct with respect to the March 17, 1992 deadline is further evidence that it intended a failure to obtain a TCO by that date to be a curable default. *See TSS–Seedman's Inc. v. Elota Realty Co.,* 134 A.D.2d 492, 493–94, 521 N.Y.S.2d 277, 278 (2d Dep't 1987) (right to cure may arise from conduct of parties), *aff'd,* 72 N.Y.2d 1024, 534 N.Y.S.2d 925, 531 N.E.2d 646 (1988). In its Notice to Cure served on MHT as of March 18, 1992, Tower stated that "pursuant to paragraph 2 of a certain Non–Disturbance and Attornment Agreement dated July 25, 1990, ... *you may cure such default* [the Landlord's failure to obtain a TCO by March 17, 1992] within thirty (30) days from the date of delivery of this notice to you...." This notice thus affirmatively demonstrates that Tower viewed this failure as curable, even in the ***1250** absence of an explicit cure provision in ¶ 59(A). *Cf. Mann Theatres Corp. v. Mid–Island Shopping Plaza Co.,* 94 A.D.2d 466, 475, 464 N.Y.S.2d 793, 800 (2d Dep't 1983) ("while it is true that the lease contains no provision for cure of a ¶ 11 violation, a cure period was created when the landlord's notice fixed a time to cure and the tenancy interests adopted it"), *aff'd,* 62 N.Y.2d 930, 479 N.Y.S.2d 213, 468 N.E.2d 51 (1984).

While ¶ 44(C) and the Notice to Cure are directed expressly to MHT, Ardmore and BRT, ¶ 44(C) also implies an intent by the parties that the Landlord have a right to cure its failure to obtain a TCO by the appointed date. Such an intent can be inferred because the parameters of the right held by MHT, Ardmore and BRT are derivative of the Landlord's right to cure. For example, ¶ 44(C) provides that Tower will provide an opportunity to cure any act or omission "which is not capable of being remedied by *Owner* ..." and that the "reasonable period for remedying such act ... shall in no event be less than the period to which [the Landlord] would be entitled under this Lease...."

**[3]** Having concluded that the parties intended the Landlord to have a right to cure its failure to obtain a TCO by March 17, 1992 within a reasonable period, it must now be determined what that "reasonable period" was intended to be.

Paragraph 59(A) provides that "if the [Landlord] does not construct the Building and obtain a Temporary Certificate of Occupancy for the Building within three (3) years from the date hereof, for whatever reason, including the [Landlord's] decision to abandon the project, then either party may terminate this Lease by sixty (60) days notice to the other."

It further provides that "[i]f [the Landlord], prior to three (3) years from the date hereof, decides to abandon the project or not to construct the Building and abandons the Ground Lease, then [the Landlord] shall notify [Tower] in writing of such decision and this Lease shall automatically terminate...." The second sentence thus distinguishes one reason for termination —the Landlord's decision to abandon the project—from the others, "whatever" they may be. Whereas termination is automatic in the former case, 60 days' notice is required in the latter.

The intended purpose of the 60–day notice provision is unclear. Tower suggests that the provision "simply gives the parties advance notice so that preparations for the actual termination date can be made. In the case of the Owner, for instance, that would mean the opportunity to find a new tenant during the sixty days, in which case there need be no interruption in rent payments." Tower Post–Trial Brief at 30. However, not only was there no evidence at trial establishing that this was the intention of the parties in adopting the 60–day notice provision, but the Lease as a whole also negates this conclusion. The suggestion that the notice period exists to give the Landlord time to find a new tenant to avoid loss of rent is untenable in light of ¶ 59(C), which provides that Tower's obligation to pay rent does not even commence until at least seven months after Tower receives possession of the premises. Absent any explanation of this period's purpose, reading this provision *in pari materia* with ¶ 44(C), it is reasonable to conclude that the parties intended to treat this period as the "reasonable" cure period. *See Wuertz v. Cowne,* 65 A.D.2d 528, 528–29, 409 N.Y.S.2d 232, 233 (1st Dep't 1978) (where no curing period provided in lease cure period was time between landlord's notice of termination and it effective date). Because the Landlord obtained the building TCO on June 1, 1992, within 60 days of Tower's April 7, 1992 notice of termination, Tower may not terminate the Lease based on the Landlord's failure to obtain the TCO by March 17, 1992.

**B. *Tower has not Waived and is not Estopped From Asserting its Right to Claim a Default Under ¶ 59(A)***

Because the Landlord cured its default under ¶ 59(A), thus precluding termination on this ground, it is unnecessary to consider its affirmative defense that Tower either waived or is estopped from asserting its right to claim default under ¶ 59(A) by virtue ***1251** of Burtis's May 17, 1991 letter to Segal. In any event, the facts do not support the Landlord's assertion of waiver or estoppel.

Burtis wrote the May 17, 1991 letter in response to concern by Segal and Marson about certain design changes requested by Tower in early 1991. In late April 1991, Burtis had informed Segal that Tower wanted to change from escalators to stairways as the principal means of going from the ground floor to the cellar and second floor selling spaces. In the course of discussing this change with Segal, Tower also requested that construction of the passenger elevator be put on hold. At Marson's insistence, on May 15, 1991 Segal requested that Burtis provide a letter accepting on Tower's behalf the financial responsibility for required work incident to these design changes. Tower sent the letter on May 17, 1991. The letter states in full:

> Due to changes in the design for the Tower Records store at 200 East 87th Street, we request that you take the following actions:
>
> 1. Do not pour concrete at the areas in the southwest quadrant of the store as shown in drawing SK–120 provided by Buttrick White & Burtis.
>
> 2. Suspend all work on fabricating and installing the passenger elevator at the rear of the ground floor space.
>
> We acknowledge that taking these actions could have consequences in terms of the project's cost and schedule, and we will work with you to make equitable adjustments.

The last sentence of this letter supplies the putative ammunition for the Landlord's waiver and estoppel arguments.

**[4]** While waiver may be express or implied, *see GDJS Corp. v. 917 Props., Inc.,* 99 A.D.2d 998, 999, 473 N.Y.S.2d 453, 455 (1st Dep't 1984) (waiver may be implied where party's conduct inconsistent with intent to enforce its rights); *T.G.I. East Coast Constr. Corp. v. Fireman's Fund Ins. Co.,* 600 F.Supp. 178, 181 (S.D.N.Y.1985) (contractor waived subcontractor's bonding requirement by knowingly permitting subcontractor to proceed with work unbonded), the intent to waive "must be clearly established and cannot be inferred from doubtful or equivocal acts or language, and the burden of proof is on the person claiming the waiver of the right." *East 56th Plaza, Inc. v. Abrams,* 91 A.D.2d 1129, 1130, 458 N.Y.S.2d 953, 955 (3d Dep't 1983); *Westinghouse Elec. Corp. v. New York City Transit Auth.,* 735 F.Supp. 1205, 1225 (S.D.N.Y.1990) (intention to waive must be clear and unambiguous and "should not be lightly presumed").

**[5]** Neither the May 17, 1991 letter nor any conduct by Tower constitutes the clear and unambiguous expression of intent necessary to act as a waiver of Tower's right to assert the March 17, 1992 deadline. The letter dealt with two very specific design changes and nowhere raised the subject of the building TCO. It is undisputed that that subject never arose during the discussions leading up to the writing of the letter. While the letter does acknowledge that the requested changes may cause delay in the "project" and represents that Tower would "work with you to make equitable adjustments," presumably including schedules, this statement is simply too vague and ambiguous to effect a waiver of the March 17, 1992 deadline. For instance, the "project" referred to could very well be the work on Tower's own space rather than the Building as a whole, and "equitable adjustments" could refer to any number of things wholly exclusive of the TCO deadline. It is particularly implausible to imply any intent to waive the TCO deadline into this ambiguous phrase since the requested changes would have no effect on the construction of the Building as a whole and thus on the ability of the Landlord to obtain a building TCO.

**[6]** **[7]** The Landlord also asserts that Tower waived its right to assert the deadline by its conduct by (1) failing to raise the deadline with the Landlord or to insist on compliance after it became apparent that the Landlord would not obtain the TCO by March 17, 1992 and (2) continuing to submit plans and design changes for its space. As for the first contention, this conduct does ***1252** not constitute a waiver as Tower was under no obligation to remind the Landlord constantly of its obligations under the Lease. Likewise, the conduct at issue in the second contention cannot be construed to effect a waiver because the changes requested by Tower either had no effect on the ability of the Landlord to obtain the TCO or did not cause the delay in applying for the TCO. If anything, Tower's conduct indicates that it understood the TCO deadline to be in effect. By letter of October 16, 1991 to Segal, for instance, Robert Liner raised the subject of the TCO and stated that Tower "reserves any and all rights under the Lease, and expects the [Landlord] to timely comply with all of is obligations."

**[8]** The Landlord's estoppel argument is also without merit. Though the parties disagree as to whether the appropriate doctrine to be applied is equitable estoppel or promissory estoppel, this distinction is without importance here because the Landlord has failed to establish reliance, an element of both types of estoppel. *See, e.g., Ripple's of Clearview, Inc. v. Le Havre Assocs.,* 88 A.D.2d 120, 122–23, 452 N.Y.S.2d 447, 449 (2d Dep't 1982) (elements of promissory estoppel are: clear and unambiguous promise; reasonable and foreseeable reliance by the party to whom promise made; and injury sustained by party asserting estoppel by reason of his reliance); *Central Fed. Sav. FSB v. Laurels Sullivan County Estates Corp.,* 145 A.D.2d 1, 6, 537 N.Y.S.2d 642, 644–45 (2d Dep't 1989) (to prove equitable estoppel, party invoking doctrine must show that it detrimentally relied on misrepresentation or conduct "in excusable ignorance of the true facts").

The facts at trial fail to establish that the Landlord relied on any representation, omission or conduct by Tower in delaying its application for a building TCO. To the contrary, Segal's October 1, 1991 letter to Tower's attorney, written a good four and one-half months after the supposedly crucial May 17, 1991 letter, amply demonstrates the *absence* of any such reliance. That letter states that "[w]e anticipate ... that an initial TCO for the residential space will be obtained by February 1, 1992," one and one-half months ahead of the contractual deadline.

Neither does Tower's continued submission of plans and drawings reflecting changes to its space effect an estoppel. The proof at trial established that it was not any act of Tower that caused the delay in filing the TCO application, but the Landlord's own actions in failing to obtain a construction loan until the end of July 1990 and the delay of the execution of necessary work, both relating to and independent of Tower's changes. It was not necessary for the Landlord to submit Tower's plans to the Building Department to obtain a building TCO because the Landlord did not have to get a TCO covering the commercial space by March 17, 1992, just for the Building. Thus, it was of no consequence to the TCO that Tower did not submit its final plans to the Landlord until late January 1992.

### C. *Tower has not Established that the Landlord Repudiated the Lease*

**[9]** As an affirmative defense and counterclaim, Tower asserts that the Landlord has anticipatorily breached the Lease by failing to give Tower "possession of the demised premises for the purpose of construction of Tenant's Work upon substantial completion of Owner's Work set forth in Article 46." Lease ¶ 59(B). Specifically, Tower contends that the Landlord breached the Lease by (1) constructing first- and second-floor ceiling heights of less than 13 feet slab to slab;

(2) failing to construct second floor space of approximately 11,850 square feet +/-5%; (3) failing to construct a service vestibule "substantially in accordance with the plans attached [at Exhibit A];" and (4) making inevitable the transmission of impact noise from the Dalton gymnasium to the second-floor selling space in breach of the covenant of quiet enjoyment. [5] Tower argues that the Landlord ***1253** has breached or repudiated the Lease because it is now impossible for the Landlord to perform its contractual obligations.

### 1. Tower is Estopped from Asserting Breach on these Grounds

Tower has been informed about the ceiling-height, square-footage and potential noise situations since October of 1990 when Burtis received Ciardullo's initial drawings. Similarly, it has known about the changes in the service vestibule since at least September of 1991. Despite voicing some dissatisfaction about variations from the Lease, however, Tower has never given the Landlord any indication that it would not proceed with the project on this basis. Thus, the Landlord has constructed the Building, including many customized alterations requested by Tower, in reliance on Tower's apparent willingness to go forward on the basis of the Ciardullo plans.

Tower's conduct thus clearly manifested an acceptance of these conditions, upon which the Landlord relied to its detriment in constructing the Building. *See Central Fed. Sav.,* 145 A.D.2d at 6, 537 N.Y.S.2d at 644–45. Tower is therefore estopped from asserting a defense of anticipatory breach on these grounds.

### 2. The Proof Does not Support a Finding of Anticipatory Repudiation by the Landlord

**[10]** **[11]** Even if Tower were not estopped from asserting an anticipatory breach on the grounds claimed, the proof does not support this counterclaim. As articulated by the New York State Court of Appeals:

> The doctrine of anticipatory breach is applicable to bilateral contracts which contemplate some future performance by the nonbreaching party. Pursuant to this doctrine, a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach.... [T]he doctrine relieves the repudiating party of its obligation of future performance and entitles that party to recover the present value of its damages from the repudiating party's breach of the total contract.

*American List Corp. v. U.S. News & World Report, Inc.,* 75 N.Y.2d 38, 44, 550 N.Y.S.2d 590, 593–94, 549 N.E.2d 1161, 1164–65 (1989) (citing *Long Island R.R. Co. v. Northville Indus. Corp.,* 41 N.Y.2d 455, 463–64, 393 N.Y.S.2d 925, 930, 362 N.E.2d 558, 563 (1977)). A party repudiates the contract where it manifests an intention not to perform a contractual duty, either by words or by conduct. Where a "promisor so conducts himself as to make the substantial performance of his promise impossible, this is a repudiation of his promise and has the same legal effect as would a repudiation in words." 4 *Corbin on Contracts* § 984, at 949 (1951 ed.).

The criteria for substantial completion are set forth in Paragraph 59(B) of the Lease:

> Tenant shall receive possession of the demised premises for the purpose of construction of Tenant's Work upon substantial completion of Owner's Work set forth in Article 46. The terms "substantial completion" shall be deemed to mean that the stage of the progress of Owner's Work which shall enable Tenant 1) to hook up with the basic electrical, plumbing and condenser systems installed by Owner as part of Owner's Work; b) to commence its use or occupancy of the demised premises for its normal business purposes, including commencement of Tenant's Work, without material interference by reason of the completion of unfinished details of Owner's Work, (provided the completion of same does not interfere with Tenant's construction and/or operation of its business, interfere with, block or obstruct store entrances or exists, freight areas, Tenant's windows or signs) or of such

> additional construction as the case may be; c) to have elevator service to all four floors of Tenant's space by the use of at least one of the elevators allocated specifically to Tenant and designated herein as part of Owner's Work and d) when the demised ***1254** premises are completely enclosed weathertight.

The Landlord notified Tower on January 23, 1992 that its space was substantially complete. By letter dated January 30, 1992, Tower rejected January 30, 1992 as the date of substantial completion based upon:

1. The Owner's continued failure to demonstrate that the demised premises are zoned for retail use as required by the Lease.

2. The Owner's failure to construct and deliver the premises as required by the Lease.

3. The Owner's failure to comply with the terms of substantial completion as defined in the Lease.

4. The Owner's failure to respond to our letter of December 27, 1991 [quoting the letter of Robert F. Liner dated January 30, 1992].

Items 1 and 4 are not in issue here.

***The Landlord Substantially Complied with ¶ 46(4)***

Paragraph 46(4) provides that the "store space shall have 13 foot ceilings (slab to slab) on the street level and the second floor level...." Tower asserts that the Landlord has breached the Lease because the as-built ceiling heights on these floors is 12 feet, 6 inches slab to slab and, in some places on the second floor, 12 feet, 4 inches slab to slab.

Measuring a height from "slab to slab" means measuring from the top surface of one floor to the top surface of the floor above. The actual height from floor to ceiling is the slab-to-slab height reduced by the thickness of whatever structure separates the floors and any hung ceiling below that structure. The Lease anticipated a concrete construction, in which concrete slabs approximately 10 inches thick would be used for the street level and second floor. Accounting for the thickness of these slabs, therefore, the ceiling heights on the first and second floors would have been 12 feet, 2 inches.

**[12]** Despite the 6 to 8 inch differential between the anticipated slab-to-slab ceiling height and the as-built slab-to-slab ceiling height on the first and second floors, the effect on the floor-to-ceiling height is insubstantial. The structural ceiling contained in the present steel construction is 5 ¼ inches of concrete and metal deck. Thus, the floor-to-ceiling height is 12 feet, ¾ inch in most places on the street level and second floor and 12 feet, ¼ inch in some places on the second floor. In actuality, then, the as-built floor-to-ceiling height varies from that anticipated by the Lease and depicted in the Emery Roth drawings by only one and one-quarter to one and three-quarters of an inch. At the point of the beams, there is a differential of approximately two to four inches. I conclude that this is a *de minimis* differential which does not render substantial performance of the contract objectively impossible.

***Square Footage is Subject to Arbitration***

Paragraph 46(3) of the Lease requires the Landlord to provide Tower with "approximately 11,850 square feet of second level store space, all +/-5% and such space shall be in accordance with the plan attached [at Exhibit A]." The Emery Roth drawings for the Building showed 11,456 square feet for the second floor, which was within 3.3% of the 11,850 square feet called for in the Lease. The first drawings by Ciardullo showed only 10,493 square feet on the second floor, a shortfall of 11.5%. The actual amount of space allocated to Tower on the second floor is now 10,600 square feet, which is 10.5% less than that called for in ¶ 46(3). Tower claims that the Landlord's failure to provide it with the second-floor square footage provided in the Lease amounts to an actual eviction that suspends Tower's obligation to pay rent.

Paragraph 61(B) of the Lease precludes Tower from litigating the square footage issue. That paragraph provides in relevant part that "[i]n the event the parties cannot agree upon the 'square footage of store space' then the determination thereof shall be submitted to arbitration before the American Arbitration Association in the City of New York...." This provision is ***1255** applicable to the present dispute over the square footage of the second floor. [6] However, Tower argues that the Landlord has waived its right to invoke arbitration by fully litigating the square footage issue without ever making a motion to compel arbitration.

**[13]** **[14]** Under New York law, although "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate," *Sherrill v. Grayco Builders,* 64 N.Y.2d 261, 273,

486 N.Y.S.2d 159, 163, 475 N.E.2d 772, 776 (1985), a contractual right to arbitrate may be waived or abandoned if the party invoking arbitration "manifest[s] a preference 'clearly inconsistent with [his] later claim that the parties were obligated to settle their differences by arbitration." *Id.* (citation omitted). A manifestation of such intent may be found where that party affirmatively seeks the benefits of litigation, or, in the case of a defendant, "affirmatively accept[s] the judicial forum." *See id.* at 272, 486 N.Y.S. at 164, 475 N.E.2d at 777; *De Sapio v. Kohlmeyer,* 35 N.Y.2d 402, 405, 362 N.Y.S.2d 843, 846, 321 N.E.2d 770, 772 (1974); *Riggi v. Wade Lupe Constr. Co.,* 176 A.D.2d 1177, 575 N.Y.S.2d 613, 615 (3d Dep't 1991). "Affirmative acceptance of the judicial forum" giving rise to a forfeiture of the right to arbitrate has been found where the party seeking arbitration has aggressively engaged in litigation, whether in the form of pretrial motions or discovery, for an extensive period of time prior to making a demand for arbitration. *See, e.g., Sherrill,* 64 N.Y.2d at 270–72, 486 N.Y.S.2d at 162–64, 475 N.E.2d at 774–776; (defendant actively participated in litigation for over three years prior to making an arbitration demand, during which time extensive discovery took place, and continued litigative efforts after making demand); *Nishio v. E.F. Hutton & Co.,* 168 A.D.2d 224, 224, 562 N.Y.S.2d 112 (1st Dep't 1990) (defendant waited over one year to seek a stay during which time he interposed answer with counterclaims and sought discovery).[7] Contesting the merits through the judicial process has been held to be an affirmative acceptance that waives a right to a later stay of the action. *See De Sapio,* 35 N.Y.2d at 405, 362 N.Y.S.2d at 846, 321 N.E.2d at 772.

**[15]** The Landlord did participate in discovery regarding the square footage issue and did defend against Tower's square footage claims at trial. Nevertheless, the procedural posture and expedited nature of this case distinguish it from those in which a waiver has been found. This case was originally brought by the Landlord as a declaratory judgment action relating solely to Tower's termination of the Lease pursuant to ¶ 59(A)'s TCO requirement. The square footage issue did not come up until ***1256** May 8, 1992 when Tower filed its answer and counterclaims. Although this court ordered discovery to take place as to the square footage issue, this was over the Landlord's objection of May 13, 1992. On May 29, 1992, the Landlord submitted its Reply to Counterclaims, in which it raised ¶ 61(B)'s arbitration clause as an affirmative defense. At trial, which took place over a one-week period in the beginning of June, the square footage issue was litigated. Thus, the Landlord's participation in the litigation over the square footage issue was neither "aggressive" or "extensive," as implicitly defined by the cases cited above. The subject was put in issue less than one month prior to trial, and then only over objection by the Landlord. Under these circumstances, the Landlord's interposition of ¶ 61(B) as an affirmative defense in its Reply negates the conclusion that it "affirmative[ly] accept [ed] ... the judicial forum"; the Landlord was essentially trapped into litigating this claim.

**[16]** As the New York Court of Appeals has stated, "where urgent need to preserve the status quo requires some immediate action which cannot await the appointment of arbitrators, waiver will not occur where plaintiff 'moves in court for protective relief in order to preserve the status quo while at the same time exercising its right under the contract to demand arbitration.' " *Sherrill,* 64 N.Y.2d at 273, 486 N.Y.S.2d at 163, 475 N.E.2d at 776.

**[17]** Even if the Landlord had waived its right to demand arbitration on this issue, however, the shortfall in square footage would not constitute an anticipatory repudiation of the Lease. Paragraph 61(B) specifically provides that the remedy for such an occurrence is a rent-reduction proportionate to the difference between the actual and projected square footage. Thus, the Landlord's conduct does not render substantial performance of the Lease impossible.

***Service Vestibule***

**[18]** Paragraph 46(10) of the Lease requires the Landlord to construct a service vestibule for a service elevator. The Lease does not explicitly set forth in words the dimensions for the service vestibule, nor does Exhibit A to the Lease delineate the square footage of the service vestibule. Therefore, although Tower now argues that it was very important that the service vestibule be large enough for certain delivery and storage purposes, it never made the dimensions of this area a term of the Lease. Although the vestibule as constructed may be unfit for its intended use, it does not constitute an anticipatory repudiation of the Lease.

***Claim Relating to Noise from the Dalton Gymnasia is Premature***

**[19]** When the Building's construction was changed from concrete to steel, the slab thickness of the floor between the Dalton gymnasia and the second floor of the Tower space was reduced from ten inches of concrete to 5 ¼ inches of concrete and steel deck. According to Tower, due to this change, the

"impact noise" created by such things as bouncing balls and running feet will breach the covenant of quiet enjoyment contained in ¶ 22 of the Lease, which provides that: "Owner covenants and agrees with Tenant that upon Tenant paying rent and additional rent and observing and performing all the terms, covenants and conditions ... Tenant may peaceably and quietly enjoy the premises hereby demised...."

Although experts for parties testified that transmission of some impact noise is inevitable under the present construction, this claim is premature. First, as of this date, neither Tower nor Dalton is occupying its space; the gymnasia floors have not been installed; and no actual tests have been performed at the premises taking into consideration a finished floor and constantly playing music. As reported by the Landlord's expert, it is highly doubtful that a "real problem will occur," given the acoustical "insensitivity" of the Tower space. Thus, there is no evidence at this time establishing the extent to which impact noise will be perceived in the Tower space, if at all. Second, Tower does not yet ***1257** have the right to invoke ¶ 22's covenant of quiet enjoyment, which is triggered "upon Tenant paying rent and additional rent and observing terms, covenants and conditions...." Because Tower has not commenced performance of these obligations, ¶ 22 does not apply.

## CONCLUSION

Upon the findings and conclusions set forth above, judgment will be entered granting the relief sought in the complaint, with costs. Tower's counterclaim and affirmative defenses will be dismissed. Submit judgments on notice.

It is so ordered.

Footnotes

1 The Lease was actually entered into by Tower and Zemnor. As of July 26, 1990, Zemnor assigned its interests in the Lease and the ground lease to the Landlord.

2 Although Burtis testified that a "hung ceiling" would reduce the ceiling heights even further, it was not established precisely how thick this construction would be. Furthermore, Tower did not establish that such a construction would not have been necessary under the construction contemplated by Exhibit A.

3 Given that the document itself and the parties' conduct are sufficiently demonstrative of the intent of the parties as to the curability of a failure to meet the March 17, 1992 deadline, it is unnecessary to turn to "principles of last resort" such as the rule that a contract may be construed adversely to the party that drafted it. *See, e.g., Record Club of America, Inc. v. United Artists Records, Inc.,* 890 F.2d 1264, 1271 (2d Cir.1989); 3 *Corbin on Contracts* § 559, at 262 (1960 ed.). In any event, application of this principle would serve no purpose since the drafting of the Lease was a collaborative effort between skilled counsel for both parties. *See Atlanta Ctr. Ltd. v. Hilton Hotels Corp.,* 848 F.2d 146, 148 n. 5 (11th Cir.1988).

4 Both the Landlord's action for declaratory judgment and Tower's counterclaim for rescission based on ¶ 59(A) sound in equity.

5 In its Post–Trial Brief Tower also asserts that the Landlord has breached ¶ 64(A) of the Lease. However, as this claim has never been made a part of the pleadings in this case, it is not properly before the court.

6 Tower argues that ¶ 61(B) applies only to disputes over the *overall* square footage of the Tower space and not to disputes, such as this one, over the square footage of individual floors. However, ¶ 61(B) provides no basis for such an interpretation. The term "square footage of store space" is defined in that paragraph to include "square footage on ground floor, second floor, basement and sub-basement levels." Were Tower's interpretation of this paragraph to be accepted, one would have to rewrite that definition to state "square footage of store space means the *total* of the square footage on he ground floor, second floor, basement and sub-basement levels."

7 Under federal law, not applicable here, there is a strong presumption in favor of arbitration and waiver of arbitration " 'is not to be lightly inferred.' " *Rush v. Oppenheimer & Co.,* 779 F.2d 885, 887 (2d Cir.1985) (citation omitted). Waiver may be inferred, nevertheless, in certain circumstances where "a party ... engages in 'protracted litigation' that results in prejudice to the opposing party." *Kramer v. Hammond,* 943 F.2d 176, 179 (2d Cir.1991) (quoting *Com–Tech Assoc. v. Computer Assoc.,* 938 F.2d 1574, 1576 (2d Cir.1991)). "Prejudice" can be found "when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay and expense." *Id.* (finding prejudice where suit commenced four years prior to invocation of arbitration clause and extensive pretrial litigation had taken place) (citing *Com–Tech,* 938 F.2d at 1576; *Rush,* 779 F.2d at 887–88); *see Rush,* 779 F.2d at 887 (finding of waiver not warranted where, prior to invoking arbitration clause, defendant extensively involved in litigation over eight months in the form of discovery, bringing a motion to dismiss and posing affirmative defenses). This type of prejudice is to be measured "contextually," considering the extent of the delay, the degree of litigation that has preceded the invocation of the arbitration clause, and the resulting burdens and expenses. *Id.*

**End of Document**

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

# EXHIBIT I

301 A.D.2d 70, 747 N.Y.S.2d 468, 2002 N.Y. Slip Op. 06674

Computer Possibilities Unlimited, Inc., Appellant,
v.
Mobil Oil Corporation, Respondent.

Supreme Court, Appellate Division,
First Department, New York
September 26, 2002

CITE TITLE AS: Computer Possibilities Unlimited v Mobil Oil Corp.

## SUMMARY

Appeal from an order and judgment of the Supreme Court (Herman Cahn, J.), entered January 12, 2001 and February 7, 2002 in New York County, which granted defendant's motion for summary judgment and dismissed the complaint.

## HEADNOTE

Contracts
Breach or Performance of Contract
Repudiation--Waiver

Plaintiff, which entered into a contract with defendant oil company to offer its computer software product to defendant's service station franchisees at prices not exceeding those specified in the agreement in return for defendant's agreement to “exclusively endorse” plaintiff's product, repudiated its pricing obligations under the agreement by entering into a distribution agreement with a nonparty to the endorsement agreement in which it transferred complete control over pricing of its product. The execution of the intervening agreement immediately discharged all of defendant's remaining obligations under the endorsement agreement, regardless of whether the prices charged defendant's dealers for plaintiff's product conformed to the requirements of the endorsement agreement. Consequently, nothing defendant did after the execution of the intervening agreement, including its termination of the endorsement agreement five months later, is actionable as a breach of contract. In any event, since the intervening agreement was executed more than six years prior to the commencement of this action, any claims based on breaches of the endorsement agreement defendant may have committed prior to plaintiff's repudiation are time-barred (*see* CPLR 213 [2]). Furthermore, defendant's failure to terminate the endorsement agreement immediately after learning of plaintiff's execution of the intervening agreement did not constitute a waiver of plaintiff's repudiation where plaintiff concealed the fact that it had divested itself of any “direct control” over pricing.

## TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Contracts §§ 719, 729, 730, 737-740; Limitation of Actions § 134.

Carmody-Wait 2d, Limitation of Actions § 13:126.

McKinney's, CPLR 213 (2).

NY Jur 2d, Contracts §§ 430, 443-446, 448; Limitations and Laches §§ 66, 67, 145, 148.

## ANNOTATION REFERENCES

See ALR Index under Limitation of Actions; Renunciation and Repudiation. ***71**

## APPEARANCES OF COUNSEL

*Jennifer R. Scullion* of counsel (*David N. Ellenhorn* on the brief; *Solomon, Zauderer, Ellenhorn, Frischer & Sharp,* attorneys), for appellant.
*Douglas M. Garrou* of counsel (*Jeffrey W. Gutchess* on the brief; *Hunton & Williams,* attorneys), for respondent.

## OPINION OF THE COURT

Friedman, J.

The parties to this action entered into a contract requiring plaintiff, a software company, to offer its product to defendant's franchisees at prices not exceeding those specified in the agreement. This appeal requires us to determine whether plaintiff repudiated this contract by secretly entering into an agreement with a third-party distributor that gave the distributor complete control over the prices to be charged for the product. We hold that such conduct constituted a repudiation of plaintiff's contract with defendant. We further hold, given that plaintiff kept its repudiation secret from defendant, that defendant did not lose its right to elect to treat its contractual obligations as discharged by the repudiation even though it continued to treat the contract as in effect for five months after the

repudiation occurred. Accordingly, since anything defendant did after the repudiation is not actionable as a breach, and any claim based on defendant's alleged breaches prior to the repudiation is time-barred, Supreme Court correctly granted defendant summary judgment dismissing the complaint.

## FACTS

### *The Parties*

Plaintiff Computer Possibilities Unlimited, Inc. (CPU), a closely held New York corporation, is the developer and owner of "Servistat," a computer software product that performs "back-office" data management functions for automobile service stations, such as inventory and accounting.

Defendant Mobil Oil Corporation (Mobil), a New York corporation, sells petroleum-based products to the public through a nationwide network of service stations. While many of these stations are directly owned by Mobil, approximately 3,200 Mobil stations are owned and operated by independent franchisees, who exercise a large measure of autonomy in running their businesses. Only the stations operated by franchisees (hereinafter dealers) are pertinent to this action. ***72**

### *The Endorsement Agreement*

In 1990, Mobil undertook to identify a back-office computer software package to endorse for purchase by its dealers. To that end, in August 1990, Mobil issued a request for proposals to several software vendors, including CPU. CPU submitted a proposal to Mobil in September 1990. In December 1990, Mobil announced that it had selected CPU's Servistat product as the software it intended to endorse. Thereafter, Mobil and CPU entered into an Endorsement Agreement, dated January 30, 1991.

The Endorsement Agreement provided that it would be in effect for three years, from January 30, 1991 to January 30, 1994. The opening recitations stated that both parties recognized that, notwithstanding Mobil's endorsement of Servistat, Mobil dealers "operate as independent businesses and exercise sole discretion as to what, if any, data management system the dealer utilizes [*sic*]," and that Mobil was not representing to CPU that the endorsement would result in any number of subscriptions.

The Endorsement Agreement required Mobil, among other things, to "exclusively endorse" Servistat for use by Mobil dealers. In return, CPU agreed to offer to sell Servistat to Mobil dealers "at prices not to exceed" those specified in the Endorsement Agreement. The Agreement set forth maximum prices for the first year, subject to adjustment for inflation in subsequent years, based on the assumption of "minimum sales of 400 units in the first year, and a smaller but substantial number of sales in succeeding years of the Agreement." The Agreement further provided that, if less than 300 units were sold during the first nine months, the maximum prices set forth by the Agreement would be adjusted upward by not more than 20%.

### *CPU's Difficulties in Selling Servistat to Mobil Dealers*

It is undisputed that CPU met with little initial success in marketing Servistat to Mobil dealers. In fact, nine months after the Endorsement Agreement went into effect, less than 50 sales had been made--far less than the number on which the Agreement's prices had been based. The parties dispute the reason for these disappointing results.

CPU contends that, at the time of contracting, the parties had understood Mobil's obligation to "exclusively endorse" Servistat to include having its Sales and Business Consultants (SBCs), who provide advice to Mobil dealers, promote Servistat ***73** in the course of their regular contact with the dealers and pass on "sales leads" to CPU. CPU attributes the low sales figures for Servistat to Mobil's failure to support Servistat through such efforts of its SBCs, as well as to certain other alleged breaches of the Agreement by Mobil.

For its part, Mobil denies that it had any obligation to require its SBCs to promote Servistat or to provide CPU with sales leads, pointing out that no such obligation was expressly set forth in the Endorsement Agreement, which contained a merger clause. It is Mobil's position that the Endorsement Agreement made the marketing of Servistat CPU's responsibility, and required Mobil to assist CPU's marketing efforts only to the limited extent expressly spelled out in the Agreement. Mobil attributes the poor sales figures for Servistat to the dealers' unanticipated lack of interest in computerizing the back-office operations of their cash businesses, among other factors.

### *CPU's October 1991 Marketing Agreement With MicroSource*

On or about October 29, 1991, CPU entered into a Software Marketing and Distribution Agreement with nonparty MicroSource Technologies, Inc. (MicroSource). Under the MicroSource Agreement, MicroSource was appointed as the exclusive distributor of Servistat in the United States and Canada, with the exception of the New York City and Philadelphia areas.

As here pertinent, the MicroSource Agreement provided that MicroSource, not CPU, would control the prices customers would be charged for Servistat, and did not require MicroSource to adhere to the pricing limits set forth in the Endorsement Agreement. Specifically, section 9 (d) of the MicroSource Agreement provided:

"*PRICES AND TERMS; TRIAL SALES. ...*

"d. Although CPU may publish a suggested resale price list, *MICROSOURCE and Subdistributors have the right to determine their own resale prices, and CPU will not require that any particular price be charged ....*" (Emphasis added.)

In addition, the pricing schedule to the MicroSource Agreement provided special pricing to be applicable "to the extent MicroSource, *in its sole discretion,* elects to honor the CPU special pricing arrangement with Mobil ..." (emphasis added).

At his deposition, Harry Stern, CPU's president, admitted that, by signing the MicroSource Agreement, CPU had "lost control over the Mobil pricing" of Servistat. Similarly, Kenneth ***74** Bender, a MicroSource vice-president, confirmed in an affidavit that, for sales to Mobil dealers subsequent to those MicroSource had obtained at an October 1991 convention, "it was left to MicroSource's discretion whether to honor ... the special pricing arrangements agreed to by CPU and Mobil."

***CPU's Representations to Mobil***

***Concerning the MicroSource Agreement***

While the MicroSource Agreement was being negotiated, Mobil executive Joan Nowak sent CPU's Harry Stern a letter, dated October 22, 1991, stating, among other things, the following:

"It is our understanding that [MicroSource] has been selected to assist in the sale, training, and installation of software programs. The contract you arrange with [MicroSource] should ensure compliance with your contract with Mobil. You have agreed to forward to me for my records a copy of said contract."

Stern responded to Nowak by letter dated November 5, 1991 (after the date of the MicroSource Agreement), stating in pertinent part:

"Although I agreed to consider sending you a copy of the [MicroSource] contract, I find I cannot do so. The contract contains 29 pages of detailed, confidential trade information which I cannot release. I am happy to discuss with you those sections of the contract which impact the Mobil-CPU relationship.

"For example, the contract contains provision for Mobil pricing ...."

Stern's November 5, 1991 letter did not disclose that, by entering into the MicroSource Agreement, CPU had given MicroSource complete control over pricing. It appears that Mobil did not receive a copy of the MicroSource Agreement, or otherwise learn of that Agreement's provisions giving MicroSource unfettered control over pricing, until after Mobil terminated the Endorsement Agreement in March 1992.

***Mobil's Termination of the Endorsement Agreement***

After entering into the MicroSource Agreement, CPU made a number of overtures to Mobil proposing that the Endorsement Agreement be renegotiated to increase the maximum prices that Mobil dealers could be charged for Servistat. CPU justified these requests on the ground that the "cost of sale is so ***75** much higher than anticipated, we simply can't afford to sell at the prices permitted by the [A]greement." In all these discussions, it is undisputed that CPU kept silent about the fact that CPU had already surrendered control over the pricing of its product by entering into the MicroSource Agreement.

Ultimately, Mobil responded to CPU's assertions that it could not afford to comply with the Endorsement Agreement's pricing provisions by unilaterally terminating the contract. In a letter to CPU's Stern, dated March 27, 1992, Mobil executive V.B. Betette stated:

"[I]t is apparent to me that you have reached the conclusion that CPU cannot achieve its business objectives within the contractual boundaries of our Endorsement Agreement. Having come to this point, I believe it is better to terminate the Endorsement Agreement rather than to continue to devote

further time and effort at building justification for failure of the Agreement to produce the results both of our companies intended."

Among other things, Betette's letter observed: "You advise that prices for products and services fixed by the cannot be honored. The contract was entered into by Mobil with a firm expectation that such prices would be honored."

CPU contends, based on internal Mobil correspondence and deposition testimony, that Mobil's termination of the Agreement was motivated, not by any of CPU's alleged defaults, but by a desire to placate certain Mobil executives and influential Mobil dealers who believed that giving Mobil's exclusive endorsement to a single software vendor had been a mistake. CPU also argues that Mobil's termination of the Endorsement Agreement was itself a breach of the contract, since the termination did not comply with section V (B) of the Agreement, providing that the contract could be terminated on grounds of default only upon written notice to the defaulting party and that party's failure to cure the default within 30 days thereafter.

***This Litigation***

After receiving the March 1992 letter terminating the Endorsement Agreement, CPU initially elected to try to continue to work with Mobil, albeit without an exclusive endorsement arrangement, in the hope of making sales to Mobil ***76** dealers. In 1997, however, CPU decided to sue Mobil for its termination of the Endorsement Agreement and other alleged breaches of that contract. This action for breach of contract was commenced by CPU against Mobil on December 15, 1997. Thus, the December 1997 commencement of this action was within the six-year limitation period applicable to an action for breach of contract (*see* CPLR 213 [2]) if one measures from the date of Mobil's termination of the Endorsement Agreement (March 27, 1992). The action was, however, commenced more than six years after the date on which CPU entered into the MicroSource Agreement (October 29, 1991).

After discovery, Mobil moved for summary judgment dismissing the complaint, arguing, inter alia, that CPU's entry into the MicroSource Agreement, by virtue of its transfer of control over pricing from CPU to MicroSource, constituted a repudiation of the Endorsement Agreement and thus discharged all of Mobil's obligations under the Endorsement Agreement from the date of the MicroSource Agreement forward. Therefore, Mobil argued, as a matter of law, none of its alleged breaches of the Endorsement Agreement on or after October 29, 1991 (including the termination of the Agreement) was actionable, and any claim based on earlier alleged breaches of the contract was time-barred as of December 1997, when this action was commenced.

In response to the foregoing argument, CPU took the position that it had not repudiated the Endorsement Agreement by entering into the MicroSource Agreement. CPU observed that, notwithstanding that the MicroSource Agreement gave MicroSource control over pricing, it was always possible for MicroSource to choose to abide by the pricing provided by the Endorsement Agreement in its sales to Mobil dealers. In fact, CPU pointed out, MicroSource never departed from the Endorsement Agreement's pricing in any sale to a Mobil dealer prior to Mobil's termination of the Endorsement Agreement. CPU further argued, inter alia, that, notwithstanding any effect the execution of the MicroSource Agreement might potentially have had as a repudiation, the Endorsement Agreement remained in effect thereafter because Mobil did not promptly elect to terminate it on that ground. Therefore, CPU argued, its claim for total breach based on Mobil's termination of the Endorsement Agreement in March 1992, as well as its claim for any breaches in Mobil's performance in the interval between December 15, 1991 and the termination of the Endorsement Agreement, were timely when this action was commenced on December 15, 1997. ***77**

The IAS court granted Mobil's motion for summary judgment. Among other things, the court essentially agreed with Mobil's arguments on the issues of repudiation, discharge and the statute of limitations. This appeal by CPU followed, and we now affirm.

**ANALYSIS**

***Whether CPU Repudiated the Endorsement Agreement***

The first issue to emerge is whether CPU repudiated the Endorsement Agreement by entering into the MicroSource Agreement. A party's repudiation, or anticipatory breach, of its future obligations under a bilateral contract, such as the Endorsement Agreement, may take the form "either [of] 'a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach' or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach'" (*Norcon Power Partners v Niagara Mohawk Power Corp.,* 92 NY2d 458,

463, quoting Restatement [Second] of Contracts § 250). Besides giving the nonrepudiating party an immediate right to sue for damages for total breach (*id.*), a repudiation discharges the nonrepudiating party's obligations to render performance in the future (*see e.g. American List Corp. v U.S. News & World Report,* 75 NY2d 38, 44; *Pitcher v Benderson-Wainberg Assoc. II,* 277 AD2d 586, 587, *lv dismissed* 96 NY2d 792; *Dembeck v Hassler,* 248 AD2d 148, 149, *lv denied* 92 NY2d 805; *Duke Media Sales v Jakel Corp.,* 215 AD2d 237, 238; Restatement [Second] of Contracts § 253 [2]; 2 Farnsworth, Contracts § 8.20, at 527 [2d ed]).

Furthermore, it has long been the law that a party repudiates a contract "where [that] party, before the time of performance arrives, puts it out of his power to keep his contract" (*Union Ins. Co. of Philadelphia v Central Trust Co. of N.Y.,* 157 NY 633, 643; *see also Lovell v St. Louis Mut. Life Ins. Co.,* 111 US 264, 274; *Pennsylvania Steel Co. v New York City Ry. Co.,* 198 F 721, 743 [2d Cir]; *Drake v Hodgson,* 192 App Div 676, 684; 22A NY Jur 2d, Contracts § 447 [1996 rev ed]). Stated otherwise, a party repudiates a contract when it "voluntar[il]y disable[s] itself from complying" with its contractual obligations (*Goodman Mfg. Co. L.P. v Raytheon Co.,* 1999 WL 681382, *8, 1999 US Dist LEXIS 13418, *23 [SD NY, Aug. 31, 1999, 98 Civ 2774] [holding that plaintiffs stated a claim for repudiation of a noncompete covenant by alleging that defendant had sold a subsidiary, which defendant had promised not to permit to ***78** compete with plaintiffs, to a third party not bound by the covenant]).

In this case, CPU clearly did "put[ ] it out of [its] power" (*Union Ins. Co. of Philadelphia,* 157 NY at 643) to offer Servistat to Mobil dealers at prices not exceeding the maximum prices under the Endorsement Agreement. By its plain terms, the MicroSource Agreement transferred from CPU to MicroSource the power to determine the prices at which the Servistat product would be sold, and expressly provided that MicroSource, "in its sole discretion," would determine whether or not to honor the price provisions of the Endorsement Agreement. Even though the prices MicroSource charged Mobil dealers for Servistat happened to conform to the requirements of the Endorsement Agreement, this was not the result of CPU's performance of its obligations under the Endorsement Agreement, because CPU (as it admits in its brief) had divested itself of any "direct control" over the prices charged for the product. In short, the Endorsement Agreement obligated CPU to *ensure* that Mobil dealers were charged prices not exceeding specified levels for Servistat, and the MicroSource Agreement made it impossible for CPU to perform that obligation.

As the IAS court recognized, the Restatement (Second) of Contracts (the Restatement) offers an illustration demonstrating that a party to a contract is deemed to have repudiated the contract by giving a nonparty to the contract the power to determine whether the party's contractual obligations will be fulfilled--precisely what CPU did by entering into the MicroSource Agreement. The Restatement's illustration is based on a hypothetical contract, made on April 1, by which A agrees to sell and B to buy land, with closing to occur on July 30. The illustration posits that "A says nothing to B on May 1, but on that date he contracts to sell the land to C. *A's making of the contract with C is a repudiation*" (Restatement § 250, Comment *c,* Illustration 5 [emphasis added]; *see also James v Burchell,* 82 NY 108, 112 [purchaser of land "was not bound to proceed and complete the contract" after the vendors "had parted with their title by a conveyance to a stranger"]; 2 Farnsworth, Contracts § 8.21, at 539). Thus, in the Restatement's illustration, the possibility that C might voluntarily decide to honor A's contract to convey the land to B does not prevent A's intervening contract with C from constituting a repudiation. Here, by analogy, MicroSource's voluntary election to honor the Endorsement Agreement's pricing provisions--a course taken by MicroSource as a matter of choice, not pursuant to ***79** any contractual obligation, and which MicroSource could have abandoned at any time--does not change the fact that CPU had repudiated the Endorsement Agreement by giving MicroSource the power to ignore that Agreement in setting the prices Mobil dealers would be charged for Servistat.

In arguing that it did not necessarily repudiate the Endorsement Agreement by executing the MicroSource Agreement, CPU relies heavily on this Court's decision in *Rachmani Corp. v 9 E. 96th St. Apt. Corp.* (211 AD2d 262). *Rachmani,* however, presented a scenario precisely the reverse of the instant case. In *Rachmani,* the broker that sought to recover commissions under its exclusive agency agreement had never repudiated that agreement, but the seller arguably had done so by ceasing to use the broker's services before the closing of the subject cooperative offering. Thus, assuming that the seller had repudiated the agency agreement (a question that we had no need to answer in *Rachmani*), the broker had the option to wait to sue until the repudiating party refused to perform by paying commissions at the closing, whereupon the statute of limitations commenced to run. Here,

by contrast, CPU, the party that repudiated the Endorsement Agreement by entering into the MicroSource Agreement, now seeks to enforce the same contract it repudiated by suing Mobil for its subsequent termination of that contract.

Given that CPU repudiated the Endorsement Agreement by entering into the MicroSource Agreement in October 1991, the execution of the MicroSource Agreement immediately discharged all of Mobil's remaining obligations under the Endorsement Agreement (*see American List Corp.,* 75 NY2d at 44). Therefore, as a matter of law, nothing Mobil did after the execution of the MicroSource Agreement--including its termination of the Endorsement Agreement in March 1992--is actionable as a breach of contract, even if the contract technically remained in effect until Mobil finally terminated it.* Moreover, because the MicroSource Agreement was executed more than six years before this action was commenced, the action is time-barred ***80** to the extent it is based on any breaches of the Endorsement Agreement Mobil allegedly committed prior to the execution of the MicroSource Agreement (*see* CPLR 213 [2]). Thus, the IAS court correctly granted Mobil summary judgment dismissing the complaint in its entirety.

***Whether Mobil Elected to Disregard CPU's Repudiation***

CPU argues, in the alternative, that, even if its execution of the MicroSource Agreement constituted a repudiation of the Endorsement Agreement, Mobil waived, or elected to disregard, that repudiation by continuing to treat the Endorsement Agreement as in force for about five months after the repudiation. The short answer to this contention is that Mobil could not waive a repudiation that CPU kept secret from Mobil until after Mobil terminated the Endorsement Agreement. None of the decisions CPU cites in support of this argument requires us to reward CPU for its lack of candor by penalizing Mobil for failing to react immediately to a repudiation of which it was unaware.

It is true, of course, that, where one party to a contract repudiates its obligations thereunder, the other party may either treat the contract as terminated or, alternatively, affirm the contract, and, if the latter option is chosen, the nonrepudiating party is deemed to remain obligated to perform under the contract (*see e.g. Strasbourger v Leerburger,* 233 NY 55, 59; *Rubber Trading Co. v Manhattan Rubber Mfg. Co.,* 221 NY 120, 126; *Hadfield v Colter,* 188 App Div 563, 577; 22A NY Jur 2d, Contracts §§ 448-451). In order to be deemed to have made such an election, however, the nonrepudiating party must have had knowledge of the repudiation, since "[e]lection presupposes knowledge, or at least the omission to fulfill some duty of inquiry from which knowledge would have followed" (*Richard v Credit Suisse,* 242 NY 346, 352; *see also* Restatement § 246 [1]; 13 Williston, Contracts § 39:34, at 650-652 [4th ed]). Thus, a party loses an affirmative defense of excuse for breaching a contract only where the party continues to carry out the contract "in spite of a *known* excuse" for nonperformance (*Thuman v Clawson & Wilson Co.,* 211 App Div 507, 510 [emphasis added]).

Nor, if the issue is viewed as one of waiver, can the right to defend on the ground of the other party's repudiation be waived without knowledge of the repudiation. It is fundamental that "[w]aiver requires the voluntary and intentional abandonment of a *known* right which, but for the waiver, would have been enforceable" ( ***81** *General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.,* 85 NY2d 232, 236 [emphasis added]; *see also United Commodities-Greece v Fidelity Intl. Bank,* 64 NY2d 449, 457; 13 Williston, Contracts § 39:22, at 591-592; 8 Corbin, Contracts § 40.11, at 562-563 [1999 rev ed]).

In this case, without knowing of CPU's repudiation, Mobil obviously could not have known that it had a right to treat its future obligations under the Endorsement Agreement as discharged by that repudiation. So long as Mobil remained ignorant of its right to deem its obligations under the Endorsement Agreement to be discharged, it could not waive that right. By the same token, without knowledge of CPU's repudiation, Mobil could not make an election whether or not to keep the Endorsement Agreement alive in the face of that repudiation.

Although CPU emphasizes that Mobil was aware that CPU had entered into a distribution agreement with MicroSource, the uncontroverted evidence establishes that Mobil did not know, at any time prior to its termination of the Endorsement Agreement in March 1992, of the provisions of the MicroSource Agreement that rendered it a repudiation of CPU's pricing obligations under the Endorsement Agreement. Indeed, the evidence shows that, in response to Mobil's inquiries about the MicroSource Agreement, CPU specifically concealed from Mobil the provisions of the MicroSource Agreement that gave MicroSource complete control over the price at which Servistat would be offered. As previously discussed, Stern of CPU, in his November 5, 1991 letter to Mobil, backed out of his agreement to provide

Mobil with a copy of the MicroSource Agreement, but stated that CPU would "discuss with [Mobil] those sections of the [MicroSource Agreement] which impact the Mobil-CPU relationship," including what Stern misleadingly referred to as a "provision for Mobil pricing." In opposing Mobil's motion for summary judgment, CPU failed to present any evidence that, at any time prior to Mobil's termination of the Endorsement Agreement in March 1992, it disclosed to Mobil the fact that the MicroSource Agreement gave MicroSource unfettered power to determine pricing for Servistat. Thus, no triable issue exists as to whether Mobil knew that its obligations under the Endorsement Agreement were excused during the period from October 1991 to March 1992. Plainly, Mobil had no such knowledge at that time.

CPU cites only one case in which a defendant was held to have lost its right to assert the plaintiff's repudiation as an affirmative defense, notwithstanding the defendant's ignorance of the repudiation. Contrary to CPU's contentions, however, ***82** that 83-year-old decision (*Rosenthal Paper Co. v National Folding Box & Paper Co.,* 226 NY 313) does not stand for the illogical proposition that a party to a contract waives any right to invoke the other party's secret repudiation as a defense unless the nonrepudiating party acts immediately after the repudiation. Rather, *Rosenthal* holds that, where one party repudiates an agreement by rendering itself incapable of performing an essential duty owed thereunder, and keeps the repudiation secret from the other party for the remainder of the term of the contract, the other party's right to terminate survives until the contract expires by its terms, but no longer. It is clear from the opinion in *Rosenthal* that it was crucial to the Court of Appeals' decision that the defendant, the licensee of a patent, had continued to use the patent from the time of the licensor's repudiation of his contractual obligation to protect the patent from infringement (which the licensor did by secretly assigning the patent to the plaintiff, a third party) until the expiration of the term of the license agreement (*see id.* at 323-324). Thus, *Rosenthal* is of no assistance to CPU in this case, since Mobil terminated the Endorsement Agreement nearly two years before the Agreement, by its terms, would have expired.

*Rosenthal* is further distinguishable from this case in that, according to the *Rosenthal* decision, the original licensor under the license agreement at issue, who had repudiated the license agreement by assigning the licensed patent to a third party, "did not violate a legal obligation or duty in keeping [the assignment] unknown to the [licensee]" (*id.* at 325). Here, by contrast, when Mobil reminded CPU that its arrangement with MicroSource "should ensure compliance with your contract with Mobil" and requested that CPU honor its prior agreement to send Mobil a copy of the MicroSource Agreement to verify such compliance, CPU not only refused to send Mobil a copy of the contract, it misleadingly represented that the MicroSource Agreement contained a "provision for Mobil pricing." In thus responding to Mobil's reasonable inquiry with, at best, a half-truth, CPU arguably made a fraudulent misrepresentation of fact (*see Junius Constr. Corp. v Cohen,* 257 NY 393, 400; *Banque Indosuez v Barclays Bank,* 181 AD2d 447), and certainly breached the covenant of good faith and fair dealing that is implied by law in all contracts (*see* Restatement § 205).

**CONCLUSION**

To recapitulate, we hold that CPU repudiated its pricing obligations under the Endorsement Agreement by entering ***83** into the MicroSource Agreement, which divested CPU of its power to fulfill those obligations; that Mobil's subsequent termination of the Endorsement Agreement is not actionable as a breach of contract by reason of the discharge of Mobil's contractual obligations that resulted from CPU's repudiation; and that any claims based on breaches of the Endorsement Agreement Mobil may have committed prior to CPU's repudiation are barred by the statute of limitations. Further, Mobil's failure to terminate the Endorsement Agreement immediately after CPU's repudiation did not constitute an election to go forward with the contract notwithstanding the repudiation, since it is undisputed that Mobil had no knowledge of the repudiation at the relevant time. Since the foregoing is sufficient to require us to affirm the grant of Mobil's motion for summary judgment dismissing the complaint, it is unnecessary for us to reach Mobil's other arguments for affirmance.

Accordingly, the judgment of the Supreme Court, New York County (Herman Cahn, J.), entered February 7, 2001, which dismissed the complaint, pursuant to an order, same court and Justice, entered January 12, 2001, granting Mobil's motion for summary judgment dismissing the complaint, should be affirmed, without costs. The appeal from the aforesaid order should be dismissed, without costs, as subsumed in the appeal from the judgment.

Buckley, J.P., Ellerin, Lerner and Rubin, JJ., concur.

Judgment, Supreme Court, New York County, entered February 7, 2001, affirmed, without costs, and appeal from

order, same court, entered January 12, 2001, dismissed, without costs, as subsumed in the appeal from the judgment. ***84**

Copr. (c) 2014, Secretary of State, State of New York

Footnotes

* CPU's argument that the Agreement remained in effect until terminated, even if correct, does nothing to advance its position on this appeal. Since it is CPU, not Mobil, that first repudiated the Endorsement Agreement, all that would follow from the Agreement's remaining in effect after CPU's secret repudiation is that the parties would have remained potentially liable for any breaches of the Agreement solely in the event Mobil ultimately elected to keep the Agreement alive notwithstanding the repudiation. Since Mobil has not exercised this option, the fact that the Agreement technically survived CPU's repudiation for five months has no significance for this appeal.

**End of Document** © 2014 Thomson Reuters. No claim to original U.S. Government Works.

# EXHIBIT J

277 A.D.2d 586, 715 N.Y.S.2d 104, 2000 N.Y. Slip Op. 09301

Jeff J. Pitcher et al., Doing Business as Spiedie Shack, Respondents-Appellants,
v.
Benderson-Wainberg Associates II, Limited Partnership, Appellant-Respondent.

Supreme Court, Appellate Division, Third Department, New York
(November 2, 2000)

CITE TITLE AS: Pitcher v Benderson-Wainberg Assoc. II, Ltd. Partnership

Carpinello, J.

Cross appeals from an order of the Supreme Court (Dawson, J.), entered July 26, 1999 in Clinton County, which, *inter alia,* partially granted plaintiffs' motion for summary judgment.

By lease dated November 30, 1995, plaintiffs, as tenants, and defendant, as landlord, entered into a 5 1/2-year lease for approximately 1,500 square feet of commercial space in which plaintiffs intended to operate a sandwich shop in defendant's shopping center located in Clinton County. Apparently, the shop did not actually open for business until March 1, 1996. Notwithstanding plaintiffs' best efforts as restauranteurs, which required them to work an average of 80 to 100 hours a week, the business did not generate sufficient profits for them to receive any income. Accordingly, in September 1996 and October 1996 plaintiffs' counsel wrote to defendant and its counsel, respectively, seeking a negotiated termination of the lease and advising that plaintiffs "must cease operations by November 1."

After these efforts at compromise were rejected by defendant, plaintiffs advertised their restaurant equipment and supplies for sale both in the local newspaper and on signs posted in the shop windows. By October 30, 1996, the business was ***587** closed and considerable equipment, including the soda equipment, the menu sign, tables, chairs and the cash register, as well as all perishable food, had been removed from the premises or sold. The phone had also been disconnected. As a result, on that date, defendant's representative changed the locks on the premises. Plaintiffs subsequently filed suit claiming wrongful eviction and seeking money damages for, *inter alia,* the value of leasehold improvements and equipment left on the premises and allegedly converted by defendant after the lockout. Defendant answered and counterclaimed for rent due for the remainder of the lease term. At issue on this appeal is Supreme Court's order granting plaintiffs partial relief on their motion for summary judgment and denying defendant's cross motion for summary judgment. Both sides appeal.

Our analysis begins with the question of whether the doctrine of anticipatory breach can be applied under the circumstances of this case. Defendant argues that plaintiffs' conduct constituted an anticipatory breach of the lease justifying the lockout. Plaintiffs counter that this doctrine "does not apply to executed leases," a position adopted by Supreme Court based on its construction of the Court of Appeals decision in *Long Is. R. R. Co. v Northville Indus. Corp.* (41 NY2d 455). Unlike Supreme Court, we do not read that case as barring the doctrine's application to the lease at hand. More specifically, we disagree with Supreme Court's conclusion that by delivering the premises to plaintiffs, defendant had "fully performed" its obligations under the lease and therefore the parties did not have mutually interdependent obligations as required for application of the doctrine.

To the contrary, the subject lease imposed continuing obligations on defendant beyond simply making the premises available to plaintiffs at the beginning of the lease term, including continuing obligations on defendant's part to repair the structural components of the building and to maintain the common areas of the shopping center, obligations clearly interdependent with plaintiffs' obligations to operate the business for which the premises had been leased consistent with defendant's plans for a fully integrated retail shopping center. Thus, we find that the lease did in fact contain the requisite mutually interdependent contractual obligations such that the doctrine of anticipatory breach should not have been rejected as a matter of law. Since the effect of an anticipatory breach by one party to a contract is the discharge of the other party from its legal obligations (*see, id.,* at 463; 13 Lord, Williston on Contracts § 39:37, at 663 [4th ed]; ***588** 22A NY Jur 2d, Contracts, § 450, at 137-138), and because the record reveals that plaintiffs' conduct indicated an "unequivocal intent to forego performance of [their] obligations under [the] contract" (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.,* 211 AD2d 262, 266), Supreme Court erred in granting plaintiffs' motion for summary judgment on their first and third causes of action and in dismissing defendant's counterclaim. Plaintiffs' wrongful eviction cause

of action should have been dismissed and defendant's cross motion granted, noting, however, that a hearing on damages is nevertheless warranted.

Cardona, P. J., Crew III, Spain and Graffeo, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as granted plaintiffs' motion for summary judgment on their first and third causes of action and as denied defendant's cross motion for summary judgment on its counterclaim; plaintiffs' motion denied and defendant's cross motion granted to the extent stated, and matter remitted to the Supreme Court for a determination of damages to be awarded on said counterclaim; and, as so modified, affirmed.

Copr. (c) 2014, Secretary of State, State of New York

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

# EXHIBIT K

Exhibit K: http://www.ictsd.org/bridges-news/biores/news/wto-panel-provisionally-rules-against-eu-moratorium-on-biotech-approvals