UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BOOTH OIL SITE ADMINISTRATIVE GROUP,

Plaintiff,

-vs-

GEORGE T. BOOTH, JR.
GEORGE T. BOOTH, III
LONSDALE SLATER SCHOFIELD
JOSEPH CHALHOUB
AHSEN YELKIN
BOOTH OIL COMPANY, INC.
SCHOFIELD OIL LIMITED
118958 CANADA LIMITED
SPEEDY OIL SERVICES, INC.
BRESLUBE INDUSTRIES LIMITED
EC HOLDINGS CORP.
KATHERINE ST. PROPERTIES, INC.
now known as Eventures Ltd.
SAFETY-KLEEN CORP.

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OTHER RELIEF

Case No. 98-CV-0696A(S)

I. Standard on Motion to Dismiss

"Generally, on a motion to dismiss pursuant to Rule 12(b)(6), the Court must consider only the complaint, which is deemed to include 'any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" Souter v. Tatro, 2004 U.S. Dist. LEXIS 13743 (W.D.N.Y. June 21, 2004) (citing Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002) (citations and internal quotations omitted)). "Moreover, 'even

where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.'" Id. (citing Chambers, 282 F.3d at 153). "'If a district court wishes to consider additional material, Rule 12(b) requires it to treat the motion as one for summary judgment under Rule 56, giving the party opposing the motion notice and an opportunity to conduct necessary discovery and submit pertinent material.'" Id. (citing Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991); Fed. R. Civ. P. 12(b)). "In deciding a motion to dismiss pursuant to 12(b)(6), the Court... must draw all reasonable inferences in favor of plaintiff and accept as true all factual allegations in the complaint." Pollock v. Ridge, 310 F. Supp. 2d 519, 523 (W.D.N.Y. 2004). "When a court decides a Rule 12(b)(6) motion, all well-pleaded allegations are assumed true and construed in the non-moving party's favor." Lawrence v. Baxter, 2004 U.S. Dist. LEXIS 18022, *4-5 (W.D.N.Y. Aug. 31, 2004) (citing Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 63 (2d Cir. 1997) (citing Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 740 (1976))). But see In re Corning Secs. Litig., 2004 U.S. Dist. LEXIS 8741, *16 (W.D.N.Y. April 9, 2004) ("However, . . . 'conclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss.'") (citing Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995) (citing In re Am. Express Co. Shareholder Litig., 39 F.3d 395, 400-01 n.3 (2d Cir. 1994))). In the context of a motion to dismiss under Rule 12(b)(6), "the issue is not whether plaintiff ultimately will prevail but whether she is entitled to offer evidence to support her claims." Pollock, supra, at 523 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512

(2002) (reaffirming the simplified notice pleading requirement of Fed. R. Civ. P. 8 that relies on the rules of discovery and motions for summary judgment to define factual issues and dispose of unmeritorious claims)). "A court may dismiss an action pursuant to Rule 12(b)(6) only if 'it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.'" Annodeus, Inc. v. Ciarkowski, 2004 U.S. Dist. LEXIS 18494, *8-9 (S.D.N.Y. Sept. 16, 2004) (citing Jaghory v. N.Y. State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997) (citations omitted)). "Under the standard set forth in Rule 8, Fed. R. Civ. P., 'a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Id. (citing Swierkiewicz, supra, at 514). "A complaint is sufficient if it gives 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Pollock, supra, at 523 (quoting Phelps v. Kapnolas, 308 F.3d 180, 186 (2d Cir. 2002) (quoting Swierkiewicz, supra, at 512)).

II. Standard on Motion for Summary Judgment

The appropriate standard of review for a motion for summary judgment is provided in detail in Doe v. CIGNA Life Ins. Co., 304 F. Supp. 2d 477 (W.D.N.Y. 2004). Doe states:

> Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is warranted where the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' FED. R. CIV. P. 56(c). A 'genuine issue' exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Ford v. Reynolds, 316 F.3d 351, 354 (2d Cir. 2003). A fact is 'material' if it 'might affect the outcome of the suit under governing law.' Anderson, 477 U.S. at 248. In a case where the non-moving party bears the ultimate burden of proof at trial, the movant may satisfy its burden by pointing to the absence of evidence supporting an essential element of the non-moving party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

> When deciding a motion for summary judgment, a court must view the evidence and the inferences drawn from the evidence 'in the light most favorable to the party opposing the motion.' Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970). 'Only when reasonable minds could not differ as to the import of evidence is summary judgment proper.' Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). The function of the court is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson, 477 U.S. at 249.
>
> Summary judgment is not appropriate if 'there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party.' Ford, 316 F.3d at 354. However, the party against whom summary judgment is sought 'must do more than simply show that there is some metaphysical doubt as to the material facts . . . . The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.' Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002).

304 F. Supp. 2d 477, 481-82.

Summary judgment may be denied by the court if further discovery is needed:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

U.S.C.S. Fed. Rules Civ. Pro. R 56 (f).

However, even though a continuance may be granted, there must be a good reason to deny a motion of summary judgment due to the need for further discovery. "While Fed R. Civ. P. 56(f) permits a continuance on a motion for summary judgment to permit the nonmovant to conduct discovery, 'Rule 56(f) cannot be relied upon to defeat a summary judgment motion where the result of a continuance to obtain further information would be wholly speculative.'" Daewoo Int'l (Am.) Corp. Creditor Trust v. SSTS America Corp., 2003 U.S. Dist. LEXIS 9802

(S.D.N.Y. 2003) (quoting Contemporary Mission v. United States Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981)).

Under New York law, "because the statute of limitations is an affirmative defense, the defendant bears the burden of establishing by prima facie proof that the limitations period expired since the plaintiff's claims accrued." Overall v. Estate of Klotz, 52 F.3d 398 (2d Cir. 1995). Once that burden is met by the defendants, "the burden then shifts to the plaintiffs to establish that the limitations period should be tolled, or that some exception to the limitations. rule should apply." Lessord v. GE, 258 F. Supp. 2d 209 (W.D.N.Y. 2002)

III. BOSAG has the Capacity to Sue Under the New York General Association Law and Is Not Required to File a Certificate of Designation

BOSAG has the capacity to sue under Federal Rule of Civil Procedure Rule (FRCP) 17(b) and New York General Associations Law (NYGAL) section 12. Rule 17(b) states:

> Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

Fed. R. Civ. P. 17(b) (2004). Section 12 states:

> An action . . . may be maintained by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action . . . , by reason of their interest or ownership therein, either jointly or in common.

N.Y. Gen. Ass'ns Law § 12 (Consol. 2004).

The Northern District of New York recently interpreted Rule 17(b)'s phrase "no such capacity." Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, 250 F. Supp. 2d 48 (N.D.N.Y. 2003). The court held,

> [t]his lawsuit is in the Northern District of New York, so the applicable law is New York. Therefore only if New York State law does not grant plaintiff capacity to sue, and plaintiff is seeking redress for the alleged violation of a federal right, does Fed. R. Civ. P. 17(b)(1) allow suit to proceed in plaintiff's name.

Id. at 60-62. The court goes on to explain that under section 12 of the General Associations Law, an unincorporated association:

> is afforded the capacity to sue through its president or treasurer . . . because the statutory provision is generally viewed as a pleading and procedural aid and not as denying a right of action to an association lacking officers bearing such titles. [S]uit can be brought in the name of an officer who is the functional equivalent of a president or treasurer.

Id. (citations and internal quotation marks omitted). The court found that plaintiff's filing of the action in the common name of the unincorporated association alone and not through its president, treasurer or officer who executes equivalent functions, constituted "a pleading defect which [was] not fatal and [could] be corrected." Id.

Other courts have similarly held that the failure to sue on behalf of the association's president, treasurer or other similar officer is an irregularity in the pleadings that may be corrected or disregarded in the absence of prejudice to the defendant. See Locke Assocs., Inc. v. Found. for the Support of the United Nations, 173 Misc. 2d 502, 504 n.3, 661 N.Y.S. 2d 691, 692 n.3 (Civ. Ct. New York City 1997) (holding that "an action should be brought in the name of the officer as a representative of the association, rather than in the name of the association only.

Where, as here, the defect is nonprejudicial, it is not fatal, and can be corrected"); Stephentown Concerned Citizens v. Herrick, 223 A.D. 2d 862, 864 n.1, 636 N.Y.S. 2d 470, 471 n.1 (3d Dep't 1996) (holding that "[t]his petitioner is an unincorporated association which may only sue through its president or treasurer. Here, it sued in its association name alone. Such a defect is, however, not jurisdictional and, given that the respondents have failed to show any prejudice, the court may disregard any irregularity in the pleading") (citations omitted); Gianunzio v. Kelly, 90 A.D.2d 623, 624, 456 N.Y.S.2d 227, 228 (3d Dep't 1982) (holding that "[a]ssuming, arguendo, that plaintiffs were required to plead their legal status as treasurer and unincorporated association, defendant has failed to establish that he has been prejudiced by plaintiffs' omission. In the absence of such prejudice, the court may disregard any irregularities in this pleading"); Miller v. Student Ass'n of State Univ. of N.Y., 75 A.D.2d 843, 427 N.Y.S.2d 860 (2d Dep't 1980) (holding that "the failure to designate the president in his representative capacity as the defendant is an irregularity which may be corrected in the absence of prejudice to a right of any party"). In the present motion, the defendants have failed to allege any prejudice they have suffered as a result of the alleged procedural defect and the court is free to allow the technical defect to be corrected or to disregard it entirely.

Defendants' suggestion that section 18(4) of the NYGAL requires that the action be dismissed similarly lacks merit. New York General Associations Law section 18 states:

> The term "association" as used in this article, is defined in section two, subdivision four, of this chapter.

N.Y. Gen. Assn's Law §18(1) (Consol. 2004). Section two, subdivision four states:

> The term "association," as used in article four of this chapter [Section 18 is contained in chapter four], means a joint stock association or a business trust as defined in this section.

N.Y. Gen. Assn's Law § 2(4) (Consol. 2004). Section two subdivision one states:

> The term "joint stock association" includes every incorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation or business trust.

N.Y. Gen. Assn's Law § 2(1) (Consol. 2004). Section two, subdivision two states:

> The term "business trust" means any association operating a business under a written instrument or declaration of trust, the beneficial interest under which is divided into shares represented by certificates.

N.Y. Gen. Ass'ns Law § 2(2) (Consol. 2004). The Booth Oil Site Administrative Group is an unincorporated association and is not a "joint stock association" or a "business trust". BOSAG does not have "written articles of association and capital stock divided into shares" and it does not operate "a business under a written instrument or declaration of trust, the beneficial interest under which is divided into shares represented by certificates." N.Y. Gen. Ass'ns Law § 2(1)(2) (Consol. 2004). New York's General Associations Law section 18(4) states:

> Any association doing business within this state without having filed the certificate of designation prescribed by this section shall not maintain any action or special proceeding in this state unless and until such association has filed the certificate of designation prescribed by this section and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without having filed the certificate of designation prescribed by this section. This prohibition shall apply to any successor in interest of such association. The failure of an association to file the certificate of designation prescribed by this section shall not impair the validity of any contract or act of the association or the right of any other party to the contract to maintain any action or special proceeding thereon, and shall not prevent the association from defending any action or special proceeding in this state.

N.Y. Gen. Assn's Law § 18(4) (Consol. 2004).

When construing section 18(4) of the New York's General Associations Law, courts have required a certificate of designation only for "joint stock associations" or "business trusts." See Formula One Constructors Ass'n v. Watkins Glen Grand Prix Corp., 110 Misc. 2d 247, 441 N.Y.S.2d 864 (Sup. Ct. N.Y. Schuyler County 1981) (holding that "[f]iling of such a certificate is required under section 18 of article 4 of the General Associations Law only of such 'associations' as consist of a 'joint stock association' or a 'business trust.'" The court then holds that doing business in New York "in itself would not require compliance with section 18 of the General Associations Law . . . because of the informal status under which it operates"); Denmark Cheese Ass'n v. Hazard Adver. Co., Inc., 33 A.D.2d 761, 305 N.Y.S.2d 1019 (1st Dep't 1969) (holding that because the plaintiff was neither a "joint stock association" nor a "business trust", as defined in subdivisions 1 and 2 of section 2 of the NYGAL, dismissal for lack of filing a certificate was inappropriate). With the benefit of these definitions, it becomes clear that section 18 of the NYGAL does not apply to the Booth Oil Site Administration Group. The Group is therefore not required to file a "certificate of designation" and is not prevented from maintaining an action for failing to file one.

Relevant case law does not support either contention made by the defendants under the NYGAL. New York's General Association Law does not provide grounds for dismissal of plaintiff's Amended Compliant.

IV. The Date of Commencement of the Action for Purposes of the Statute of Limitations is the Date of Filing of the Motion to Amend Consistent with FRCP Rule 3

The Second Circuit's holding in Rothman v. Gregor controls the date of commencement of the action for purposes of the statute of limitations. 220 F.3d 81 (2d Cir. 2000). The court holds:

> When a plaintiff seeks to add a new defendant in an existing action, the date of the filing of the motion to amend constitutes the date the action was commenced for statute of limitations purposes.

Rothman v. Gregor, 220 F.3d 81, 96 (2d Cir. 2000) (citing Northwestern Nat'l Ins. Co. v. Alberts, 769 F. Supp. 498, 510 (S.D.N.Y. 1991) (citing Derdiarian v. Futterman Corp., 36 F.R.D. 192, 194 (S.D.N.Y. 1964)). The rule described in defendants' memorandum of law to the contrary is the New York rule and is not the rule applied by the Federal Courts in the Second Circuit. See also Longo v. Pa. Elec. Co., 618 F. Supp.87, 89 (W.D. Pa. 1985) (holding "timely filing of [the] Motion to Amend and not the final court approval was sufficient to meet the requirement of Fed. R. Civ. P. 3 that 'a civil action is commenced by the filing of a complaint with the court'").

Defendants reference no specific prejudice engendered by the four-month period between the decision and the filing and service of the amended complaint.

V. BOSAG Has Standing to Pursue Its Breach of Fiduciary Duty Claims

A. Federal Rule of Civil Procedure 18(b) Affords BOSAG the Right to Pursue its Common Law Breach of Fiduciary Duty Claim in Federal Court Together with its Underlying CERCLA Claims

Defendants cite Credit Agricole for the proposition that a plaintiff without a judgment does not have standing to pursue a common law breach of fiduciary duty cause of action. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 550, 708 N.Y.S.2d 26, 31 (2000)

("[W]e have followed the general rule that a simple contract creditor may not invoke the [trust fund] doctrine to reach transferred assets before exhausting legal remedies by obtaining judgment on the debt and having execution returned unsatisfied"). Credit Agricole cites Grupo Mexicano for its main proposition. Credit Agricole, 94 N.Y.2d at 546, 708 N.Y.S.2d at 29 ("a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of the debtor, and therefore could not interfere with the debtor's use of that property") (quoting Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, 527 U.S. 308, 319-20 (1999)).

The Supreme Court in Grupo Mexicano addressed FRCP Rule 18(b) and its potential impact on these issues in spite of the failure of the parties in that case to raise the issue. The Court explained:

> We note that none of the parties or amici specifically raised the applicability to this case of Federal Rule of Civil Procedure 18(b), which states:
>
> > Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.
>
> Because the Rule was neither mentioned by the lower courts nor briefed by the parties, we decline to consider its application to the present case. We note, however, that it says nothing about preliminary relief, and specifically reserves substantive rights (as did the Rules Enabling Act, see 28 U.S.C. § 2072(b)). Several States have adopted the Uniform Fraudulent Conveyance Act (or its successor the Uniform Fraudulent Transfers Act), which has been interpreted as conferring on a nonjudgment creditor the right to bring a fraudulent conveyance claim . . . . Insofar as Rule 18(b) applies to such an action, the state statute eliminating the need for a judgment may have altered the common-law rule that a general contract creditor has no interest in his debtor's property. Because this case does not involve a claim of fraudulent conveyance, we express no opinion on the point.

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 323-24 (1999).

The Supreme Court in Grupo Mexicano acknowledges, without directly addressing, the tension between Rule 18(b) and the state common law exhaustion of remedies requirement in the context of a "creditor's bill" action. The Seventh Circuit in the Huntress case addressed this issue directly:

> [I]n view of Rule 18(b), there is no longer any necessity of first obtaining judgment, but that a plaintiff may pursue his demand for establishment of his debt and his suit to subject property in the hands of others to his demand in equity in one suit without further formality. We adhere to this rule . . .
>
> [T]he position that the Illinois rule, that a judgment must be obtained and an execution returned unsatisfied before a suit in the nature of a creditor's bill can be maintained, is a substantive rule of property . . . is clearly in error. Rule 18(b) of the Federal Rules of Civil Procedure is procedural in character and defines the remedy in federal courts. It involves not the substantive rights of the parties, but merely the form of procedure which plaintiff is permitted to invoke.

Huntress v. Estate of Huntress, 235 F.2d 205, 207-8 (7th Cir. 1956).

In Midwest Financial Acceptance Corporation v. Se-Fish Associates, 2000 WL 743993 (W.D.N.Y.) the Court explains:

> By its terms, FRCvP 18(b) allows a court to consider a party's principal and contingent claims notwithstanding that the latter will accrue, if at all, only upon the resolution of the former. In this sense, the rule "accelerates" the contingent claim very much the same way FRCvP 14 permits a defendant to join a third-party defendant who is potentially responsible for indemnity or contribution even though the defendant itself has not yet been held liable to the plaintiff. See ibid. That this was the intended scope of FRCvP 18(b) is clarified by the Advisory Committee Notes which provide that the rule "is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions * * *."
>
> The Rules allow joinder in such a case as the present; indeed in order to prevent costly, slow multiplicitous litigation (with the danger of inconsistent results), they

> demand it. . . . [U]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.

Midwest Financial Acceptance Corporation v. Se-Fish Associates, 2000 WL 743993, (W.D.N.Y.)

B. Federal Procedural Rules Trump State Procedural Rules

The proper analysis requires a determination as to whether the prior judgment requirement is procedural or substantive. Where the prior judgment is procedural, it is overcome by a conflicting Federal Rule. The Rules of Decision Act, 28 U.S.C. Section 1652, requires a district court to apply the law of the several states except where the Constitution or other acts of Congress require otherwise:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. Sec. 1652; See also Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938); Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

Since the adoption of the Federal Rules of Civil Procedure in 1938, the federal practice of conformity with relevant state procedure was replaced by a system of uniform federal procedure. Mayer v. Quy Van Nguyen (In re Quy Van Nguyen), 211 F.3d 105, 108 (4th Cir. 2000). Most federal procedural law derives from the Federal Rules of Civil Procedure, and insofar as those rules apply to a question before a district court, the court will generally follow them. Hanna v. Plumer, 380 U.S. 460 (1965). "When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory

Committee, [the United States Supreme Court], and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[1] Id. at 471. "Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules." Id. at 473; Unterschuetz v. Rice, 2001 U.S. Dist. LEXIS 20990, *5 (N.D. Ill. December 14, 2001) (holding that the Federal Rules of Civil Procedure take precedence when applicable). "[I]t has been more than clear since the Erie decision, that the federal courts have an interest in procedural uniformity which requires that federal rather than state laws of procedure be applied in this court." Louis Dreyfus Corp. v. Cook Indus., Inc., 505 F. Supp. 4, 5-6 (S.D.N.Y. 1980).

The adoption of the CPLR and its merger of legal and equitable jurisdiction did not eliminate the historical requirement in New York that legal remedies be exhausted prior to pursuing equitable remedies in their support. That requirement is rooted in the former separation of courts of equity and courts of law. Federal Courts, on the other hand, have abandoned the common law exhaustion of remedies requirement in favor of a procedure that requires litigants to pursue all available remedies in one action. The New York State common law exhaustion of remedies requirement rooted in the historic separation of courts of equity and courts of law can

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[1]The Rules Enabling Act, 28 U.S.C. Sec. 2072 provides:

(a) The Supreme Court shall have the power to prescribe by general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

only be described as procedural in this context and is therefore overcome by the procedure described in FRCP Rules 2 and 18(b).

C. Breach of Fiduciary Duty Cause of Action Under Section 720 of the New York Business Corporation Law

The statutory prior judgment requirement of section 720 of the New York Business Corporation Law requires a closer analysis, as certain statutory prior judgment requirements have been found to be more than merely procedural rules rooted in the state common law exhaustion of remedies requirement.

A review of the treatment of certain insurance company direct action statutes is useful in this regard. The Richards case, for example, represents a finding that a statutory prior judgment requirement in legislation authorizing a direct action by an injured third party against an alleged tortfeasor's insurer is substantive and therefore is not overcome by the operation of Rule 18(b). Richards v. Select Ins. Co., 40 F. Supp. 2d 163 (S.D.N.Y. 1999). Section 3420(a) of the New York State Insurance Law

> requires that insurance policies issued or delivered in the state contain provisions specifically authorizing direct actions brought under the terms of the policy against an insurer by an allegedly injured party to be instituted only when a judgment against the insured person has remained unsatisfied for 30 days from the date of service of notice of entry of judgment.

N.Y. Ins. Law § 3420(a)(2) (Consol. 2004). Federal courts faced with the question of whether a direct action under New York's direct action statute, section 3420(a)(2), can be maintained prior to entry of a judgment have reached different conclusions. The majority of the federal courts in New York have found that section 3420 is "substantive in character because [it] create[s] a right of action against the insurer." Richards v. Select Ins. Co., 40 F. Supp. 2d 163, 167 (S.D.N.Y.

1999). See also Nationwide Mut. Fire Ins. Co. v. Rankin, 2000 U.S. Dist. LEXIS 20035, 11 (W.D.N.Y. November 6, 2000); NAP, Inc. v. Shuttletex, Inc., 112 F. Supp. 2d 369 (S.D.N.Y. 2000); Fed. Ins. Co. v. Kingsbury Props., Ltd., 1992 U.S. Dist. LEXIS 16126 (S.D.N.Y. Oct. 21, 1992).

In Metro. Cas. Ins. Co. v. Union Indem. Co., 141 Misc. 792, 253 N.Y.S. 324 (Sup. Ct. Monroe County 1929), the court found that section 3420's predecessor was in derogation of the common law and must be strictly construed. See also Royal Indem. Co. v. Travelers Ins. Co., 244 A.D. 582, 280 N.Y.S. 485 (1st Dep't 1935); Clarendon Place Corp. v. Landmark Ins. Co., 182 A.D.2d 6; 587 N.Y.S.2d 311 (1st Dep't 1992). The common law required privity of contract which allowed only the insured to sue the insurance company on the basis of the insurance contract. Jackson v. Citizens Cas. Co., 277 N.Y. 385, 14 N.E.2d 446 (1938). The injured third party who would benefit from the insurance proceeds was considered a stranger to the contract with no rights as against the insurance company. Id. Similarly, the Second Circuit has held that Connecticut's statute allowing a direct action against an insurance company is substantive because it established a cause of action against a defendant where such a right did not previously exist. State Trading Corp. v. Assurance Foreningen Skuld, 921 F.2d 409 (2d Cir.1990). These cases provide examples of legislation that is not simply a codification of state common law procedural rules rooted in the historic separation of courts of equity and courts of law but of substantive departures from the common law.

In de Bruyne v. Clay, an insured's direct action case, the court held that "under the plain meaning of Rule 18(b), a contingent claim for a declaratory judgment may be joined in a federal

court action of the principle claim. de Bruyne v. Clay, 1997 U.S. Dist. LEXIS 12224, 5, 1997 WL 471039 (S.D.N.Y. August 15, 1997). While this case takes a minority view on this issue it provides a useful illustration of the analysis implicated by Rule 18(b).

In the Panex case, the Court found that certain legislation abrogating or limiting the common law could not be described as merely procedural. New York v. Panex Indus., 1997 U.S. Dist. LEXIS 15860, 45 Env't Rep. Cas. (BNA) 1892 (W.D.N.Y. October 2, 1997). The court held that Delaware General Corporation Law section 325(b) controlled an action against former shareholders. Section 325(b) provides:

> No suit shall be brought against any officer, director or stockholder for any debt of a corporation of which he is an officer, director or stockholder, until judgment be obtained therefore against the corporation and execution thereon be returned unsatisfied.

Del. Code Ann., tit. 8, § 325(b) (2004); Panex at *7. Section 278 of Delaware General Corporate Law provides that a corporation has the capacity to be sued during the three-year period following its dissolution. Del. Code Ann., tit. 8, § 278; Panex at *9. These statutes abrogate the common law trust fund doctrine by limiting its former application. While the court in Panex did not address the impact of Rule 18(b) under these circumstances, the argument that the legislation is substantive is strengthened by its divergence from the common law. The prior judgment rules at work in these statutes are not easily described as mere codifications of common law exhaustion of remedies procedures.

D. Section 720 of the BCL and its Prior Judgment Requirement Are Procedural Codifications of the Common Law Prior Judgment Rule Rooted in the Historic Separation of Courts of Equity and Courts of Law

The legislation at issue under New York Business Corporation Law (NYBCL) section 720 is an extension of the common law which preserves the operation of the common law in section 720(c). Unlike section 3420 of the New York Insurance Law or sections 278 and 325(b) of the Delaware General Corporation Law, section 720 of the NYBCL is not in derogation or abrogation of the common law but is explicitly an extension of the common law. Section 720(c) provides: "This section shall not affect any liability otherwise imposed by law upon any director or officer." N.Y. Bus. Corp. Law § 720(c) (2004); Superintendent of Ins. v. Freedman, 443 F. Supp. 628, 1997 U.S. Dist. LEXIS 12439 (S.D.N.Y. 1977), aff'd without opinion, Appeal of Freedman, 594 F.2d 852, 1978 U.S. App. LEXIS 7015 (2d Cir. 1978) ("It should be noted initially that the statutory embodiment of fiduciary principles in section 720 is explicitly an extension of the common law and not a limit on it. See id. section 720(c); Rappoport v. Schneider, 29 N.Y.2d. 396, 328 N.Y.S.2d 431, 278 N.E.2d 642 (1972)."); see also Pereira v. Centel Corp. (In re Argo Communications Corp.), 134 B.R. 776, 789, 1991 Bankr. LEXIS 1936 (Bankr. S.D.N.Y. 1991) ("Section 720 states that 'an action may be brought against one or more directors of a corporation to procure a judgment' for violation of fiduciary duties. It should be noted, however, that the statutory embodiment of fiduciary principles in section 720 is explicitly an extension of the common law and not a limit on it."); Platt Corp. v. Platt, 21 A.D.2d 116, 249 N.Y.S.2d 75 (1st Dep't 1964), aff'd, 15 N.Y.2d 705, 204 N.E.2d 495 (1965) ("[T]he statutory remedies for [derelictions in duty by the directors, officers, agents or employees of the corporation] are in extension, and not in exclusion, of existing remedies, statutory, equitable or at common law.").

Section 60 of the New York General Corporation Law, (the predecessor to section 720 of the New York Business Corporation Law), made reference to a "creditor" as having standing to pursue relief under the statute and not to a "judgment creditor." A "creditor" pursuing an action under sections 60 and 61 was nevertheless required to exhaust its remedies by obtaining a judgment and having it returned unsatisfied before commencing its action under sections 60 and 61. Buttles v. Smith, 281 N.Y. 226, 236, 22 N.E.2d 350, 353 (1939) ("Where an action is brought under section 60 of the General Corporation Law or section 15 of the Stock Corporation Law, no cause of action accrues to a creditor, with certain exceptions which need not be considered here since none of them have been alluded to by respondents, until judgment has been obtained and execution returned unsatisfied").

In light of the above, it is difficult to describe the prior judgment rule of NYBCL section 720 as anything other than a codification of the common law prior judgment requirement rooted in the common law exhaustion of remedies procedure. Since BOSAG has demonstrated that it has standing to maintain a common law breach of fiduciary duty claim, it should also be allowed to maintain a cause of action under section 720 of the NYBCL.

E. No Substantive Rights Will Be Violated

In Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. 527 U.S. 308 (1999), the case cited in Credit Agricole, the Court explained:

> The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property.

Grupo Mexicano at 319-20 (certain citations omitted). The substantive aspect of the common law exhaustion of remedies requirement is also articulated in Credit Agricole. "[A] general creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor prior to obtaining a judgment." Rule 18(b) states "the court shall grant relief in that action only in accordance with the substantive rights of the parties." Fed. R. Civ. P. 18(b) (2004). Since relief is contingent upon the substantive rights of the parties under Rule 18(b), no substantive rule is violated by the Federal Procedure. The plaintiff will only interfere with defendants' property if and when this court grants judgment establishing liability. Plaintiff seeks a judgment on its contribution action claim and will in turn seek to enforce its rights under the causes of action for violations of the Liquidating Plan, fraudulent conveyance and breach of fiduciary duty. BOSAG will seek to enforce these rights only to the extent of the judgment on the CERCLA contribution claim. No substantive rule will be violated. Instead of litigating the two causes of action in two actions between the same parties, one followed by the other, as in state court, those two causes of action will be litigated simultaneously in federal court in one action.

The Coleman case states that plaintiff does not have standing to pursue a cause of action under section 720 without a judgment. Coleman v. Golkin, Bomback & Co., 562 F.2d 166, 168 (2d Cir. 1977). That is certainly true under state law. The issues raised by the present case are whether plaintiff's pursuit of a common law cause of action or plaintiff's reference to Rule 18(b) would have supported a different analysis in that case.

Certain defendants here would have this Court hold that plaintiff is limited to a section 720 cause of action and cannot pursue a common law breach of fiduciary duty cause of action in spite of the fact that section 720(c) explicitly preserves other remedies. Rubenstein v. Berch, 261 A.D. 265, 25 N.Y.S.2d 202 (2d Dep't 1941) (holding that other similar remedies were not necessarily exclusive and did not supersede or abolish relief by creditors' bill).

Plaintiff does not believe it must choose between the common law cause of action and the statutory cause of action under section 720 of the NYBCL but believes BOSAG can pursue both in the current action.

If the Court were to strictly follow the Coleman case, plaintiff's cause of action would accrue once judgment was obtained and execution was returned unsatisfied. Buttles v. Smith, 281 N.Y. at 236, 22 N.E.2d at 353. At that time, plaintiff could pursue causes of action under section 720. The statute of limitations applicable to those causes of action would accrue and begin to run upon the return of execution unsatisfied and all of plaintiff's statutory breach of fiduciary duty, accounting, and fraudulent conveyance claims would be timely. Id.

A finding that plaintiff does have standing to pursue breach of fiduciary duty claims under the common law and/or section 720 in this action is consistent with the authorities cited above and this Court's decision on the motion to amend.

F. Other Factors that Distinguish Credit Agricole from this Case

There are a number of other factors which set this case apart from Credit Agricole and Grupo Mexicano. These cases concerned a legal claim for money damages and the attempt to invoke equity to support the legal claim with an injunction prior to obtaining a judgment. This

case does not involve a cause of action at law for money damages, but an equitable action for contribution and enforcement of the Liquidating Plan and the trust set forth therein. Grupo Mexicano 527 U.S. at 324-25 ("The preliminary relief available in a suit seeking equitable relief has nothing to do with the preliminary relief available in a creditor's bill seeking equitable assistance in the collection of a debt"). In Grupo Mexicano, the Court explained: "[t]he creditor [in First National] . . . asserted an equitable lien on the property, which presents a different case from that of the unsecured creditor." Grupo Mexicano 527 U.S. at 325-26. The Court continued: "a preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." Id. at 326-27. The State common law exhaustion of remedies requirement can be overcome even in State court where exhaustion would be futile. In this case, the defendant corporation Booth Oil has indicated that it has only $450,000 and that this amount will not be sufficient to satisfy the plaintiff's judgment. The use of the Credit Agricole case, a state court decision on an application for an injunction in support of a contractual money damages claim, as a source of procedural rules applicable to this case raises more issues than it resolves.

VI. Booth Oil's Environmental Creditors are Beneficiaries of the Trust Established by the Confirmed Liquidating Plan of Reorganization

The Coleman court explained:

> It is our opinion that the Nominee Agreement created a trust. A trust is defined as a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts § 2 (1959). The legal title to the option was in the corporation; the equitable title was in Coleman. By the agreement, the corporation

> undertook equitable duties with respect to Coleman's interest in the option. The three elements necessary to the existence of a trust were present, i.e. a designated beneficiary, a designated trustee, and an identifiable property.

Coleman at 168-69. The Second Circuit directed the lower court "to determine what part if any of the 10% of the stock subject to Coleman's rights was ultimately received by [defendant], and to enter judgment against him for that difference between the option price and the selling price of that part of the stock." Coleman at 170.

The confirmed Liquidating Plan satisfies the three elements necessary to establish the existence of a trust. The designated beneficiaries are the environmental creditors, the Pension Benefit Guarantee Corporation and certain taxing authorities defined in the Liquidating Plan. We believe that with the passage of time, the only remaining viable claims are the PBGC claim and the BOSAG claim. Debts to taxing authorities have been satisfied and those to other environmental creditors are likely barred by applicable statutes of limitations. The designated trustee is Booth Oil Company, Inc. The identifiable property is "surplus accounts receivable" of which we believe there has been at least $3 million and potentially significantly more based on our review of the Booth Oil Company, Inc. tax returns. The legal title to "surplus accounts receivable" is in Booth Oil and the equitable title is in the contingency fund beneficiaries (i.e., the members of BOSAG among others). By proposing the Liquidating Plan for confirmation by the Bankruptcy Court, Booth Oil and its officers, directors and controlling shareholders undertook equitable duties with respect to the environmental creditors' interest in the proceeds of the contingency fund.

VII. State Law Causes of Action are in Large Part Duplicative of Federal Cause of Action for Enforcement of Liquidating Plan

(And the Trust Set Forth Therein)

The discussion of the state law causes of action are in large part duplicative of the federal causes of action for enforcement of the confirmed Liquidating Plan of Reorganization and the trust set forth therein. The fraudulent conveyance, breach of fiduciary duty and accounting causes of action under state law are supported under federal law by sections 1141 and 1142 of the Bankruptcy Code, which give effect to a confirmed plan, as well as the Plan itself.

A confirmed plan is interpreted based on corporate and contract principles, as this court stated in its decision on the motion to amend. A confirmed plan is not, however, a simple contract. In re Hillard Dev. Corp., 238 B.R. 857 at 871-72 (Bankr. S.D. Fla. 1999) ("Although a confirmed plan of reorganization is often compared to a contract (a traditional creature of state law), and although some courts describe it as such, this court nevertheless concludes that a Chapter 11 plan confirmation order, and obligations arising thereunder, are necessarily federal in character"). The confirmed plan is not created through the mutual exchange of consideration by parties in privity of contract dealing voluntarily at arms length, but by operation of the Bankruptcy Code. The court is not required to ignore this distinction and inflexibly apply state contract law but should allow its determination to be informed both by provisions of the Bankruptcy Code and the cases construing those provisions. Id. at 872 ("Although many courts construe the terms of a plan in accordance with state contract interpretation principles, reorganization plans, by virtue of the orders confirming them, are regarded as judgments of the federal courts") (emphasis in original) see also Canusa Corp. v. A&R Lobosco, Inc., 986 F. Supp. 723 (E.D.N.Y. 1997) (holding that in cases of doubt or ambiguity, contract must be

construed most strongly against party who prepared it and favorably to party who had no voice in selection of language).

VIII. Statute of Limitations Applicable to the Breach of Fiduciary Duty Cause of Action and the Applicable Tolling Provisions

The six-year statute of limitations applicable to allegations of breach of fiduciary duty is applied in this court's decision. A question that remains to be resolved is whether that limitations period is tolled between the date of the alleged fiduciary misconduct and the date the fiduciary relationship is openly repudiated or otherwise ended. Recently the Second Circuit applied New York law to adopt this approach.

In Westchester Religious Ins. v. Kamerman, the Court held:

> [T]his is an action for breach of a fiduciary relationship (citation omitted). Accordingly, the applicable statutory period is six years, which period does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated (citations omitted). Since defendants served as officers of plaintiff, a non-profit corporation, until August 29, 1990, this action commenced in January 1996 is timely. Moreover, since defendants cannot have been said to have openly repudiated their fiduciary obligations prior to leaving their positions of trust in 1990, the statutory period did not begin to run in defendants' favor until that time (citations omitted). Accordingly, since the statutory period was tolled between the alleged fiduciary misconduct and August 29, 1990, the alleged misconduct antedating August 29, 1990 falls within the permissible temporal scope of the accounting being sought.

262 A.D.2d 131; 691 N.Y.S.2d 502 (1st Dep't 1999).

The Third Department affirmed this approach a year later in In re Estate of Rodken, 270 A.D.2d 784, 785, 705 N.Y.S.2d 429, 430 (3d Dep't 2000). The Court held, "it is well settled that 'a claim [of this nature] will not be deemed to accrue until there is either an open repudiation of

the fiduciary obligation or a judicial settlement of the [fiduciary's] account." Id., 705 N.Y.S.2d at 430 (quoting Matter of Winne, 232 A.D.2d 956, 957-58 (1996)).

The Second Circuit adopted this approach to breach of fiduciary duty issues in Golden Pacific Bancorp. v. Fed. Deposit Ins. Corp., 273 F.3d 509 (2d Cir. 2001). The Second Circuit states,

> [t]he statute of limitations in New York for claims of unjust enrichment, breach of fiduciary duty, corporate waste, and for an accounting is generally six years . . . . Under New York law, the limitations period for claims arising out of a fiduciary relationship does not commence 'until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated.' Westchester Religious Inst. v. Kamerman, 262 A.D.2d 131, 691 N.Y.S.2d 502, 503 (1st Dep't 1999); accord 196 Owners Corp. v. Hampton Mgmt. Co., 227 A.D.2d 296, 642 N.Y.S.2d 316, 316 (1st Dep't 1996); Bd. of Educ. v. Thompson Constr. Corp., 111 A.D.2d 497, 488 N.Y.S.2d 880, 882 (3 Dep't 1985). In such cases, the 'statutory period [is] tolled between the alleged fiduciary misconduct' and the date on which the fiduciary relationship is openly repudiated or otherwise ended, so that any misconduct alleged before that end date 'falls within the permissible temporal scope.' Kamerman, 692 N.Y.S.2d at 503 . . . . The reason for such a tolling is that the beneficiary should be entitled to rely upon a fiduciary's skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit.

Id. at 581-19.

In Steele v. Anderson, the court again quoted Kamerman while tolling the relevant statute of limitations. 2004 U.S. Dist. LEXIS 136 at * 2-3 (N.D.N.Y. January 8, 2004). The court states, "[b]ecause the fiduciary relationship does not appear to have been openly repudiated or otherwise ended prior to April 2000, the statute of limitations did not begin to run until that date." Id. at *4.

The courts also posit rules governing the "repudiation" of a fiduciary relationship. In In re Estate of Barabash, the court states, "[t]he law requires proof of a repudiation by the fiduciary

which is clear and made known to the beneficiaries." 31 N.Y.2d 76, 80, 334 N.Y.S.2d 890 (1972). Also, in In re Behr, the court holds,

> [f]or a trustee to invoke a Statute of Limitations defense, a mere lapse of time is insufficient without proof of an open repudiation [citation omitted]. When measured from the date of a repudiation, the trustee must establish that the repudiation was clear and made known to the beneficiaries [citation omitted]. Where there is any doubt on the record as to the conclusive applicability of a Statute of Limitations defense, the motion to dismiss the proceeding should be denied [citation omitted] and the proceeding should go forward.

191 A.D.2d 431, 594 N.Y.S.2d 314, 315 (2d Dep't 1993).

IX. The Statute of Limitations Implications of the Prior Judgment Rule

In the Buttles case, the New York Court of Appeals analyzed the statute of limitations implications of the prior judgment requirement. Buttles v. Smith, 281 N.Y.226, 22 N.E.2d 350 (1939). The Court explained:

> Where an action is brought under section 60 of the General Corporation Law or section 15 of the Stock Corporation Law, no cause of action accrues to a creditor, with certain exceptions which need not be considered here since none of them have been alluded to by respondents, until judgment has been obtained and execution returned unsatisfied (Levy v. Paramount Publix Corp., 265 N.Y. 629), and any statute of limitations did not commence to run until the cause of action accrued to the creditor (Shepard Co. v. Taylor Publishing Co., 234 N.Y. 465).

Buttles, 281 N.Y. at 236. The Court continues:

> As to the causes of action set up under article 10 of the Debtor and Creditor Law, different rules apply. Under that statute it is not essential that the creditor first procure judgment and the return of an unsatisfied execution before he may maintain the action (American Surety Co. v. Conner, 251 N.Y. 1). The statute is remedial and he might sue individually before or after the maturity of his claim to set aside the transfer without the necessity of sequestration proceedings (American Surety Co. v. Conner, supra). His time to sue should not be extended by the proceedings to obtain judgment thereon and subsequent sequestration of assets.

Id. Therefore, to the extent that causes of action pursuant to section 720 of the NYBCL are premature, the statute of limitations on those causes of action has not begun to run.

The more practical view is that the prior judgment requirement in the common law as well as that contained in section 720 itself are both procedural as are the resulting accrual rules. The correct resolution of these issues is a holding that allows the common law breach of fiduciary duty cause of action or even the BCL section 720 breach of fiduciary duty cause of action to proceed in this court and to apply the six year statute of limitations applicable to breach of fiduciary duty causes of actions as modified by the Second Circuit's Golden Pacific tolling rule.

X. The Statute of Limitations Period for Breach of Fiduciary Duty Under State Law, Its Tolling Rules and the Discovery Accrual Rule Under Federal Law Should Be Applied to the Causes of Action For Enforcement of the Liquidating Plan (and the Trust Established Therein)

The Hillard case provides the standard for determining the appropriate statute of limitations to apply to a cause of action for enforcement of a Liquidating Plan:

> Encountering a statute of limitations void such as that in section 1142, courts "do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source, either federal or state law. DelCostello, 562 U.S. at 158, 103 S. Ct. at 2287.
>
> Conceptually, before the court determines to "borrow" a limitations period, it must decide whether the rights that [plaintiff] asserts have a federal or state law origin. If their rights are federal in character, the court "borrows" a limitation period; if the rights have their origin in state law, the court must directly apply state law as the "rule of decision."

In re Hillard Dev. Corp., 238 B.R. 857, 871-72 (Bankr. S.D. Fla. 1999). The court describes the task as "to determine the essential nature of the claim under federal law and then focus on the

period applicable to such a claim under the most analogous state law claim." Id. at 873. The court explains, "a limitation period is interrelated with tolling questions, . . . when borrowing state limitations periods, courts should not 'unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." Id. at 875.

The court further explains:

> Because the court views [plaintiff's] causes of action as arising under the Confirmation Order (which confirmed the first plan) and therefore federal in character, the federal rule of accrual applies, irrespective of which limitation period applies. See Vigman v. Community Nat'l Bank & Trust Co., 635 F.2d 455, 458-59 (5th Cir. 1981); [citation omitted] A federal court will only borrow as much state law as is necessary to fill in the gaps in the federal law and, because there is an established federal rule for accrual, there is no need to borrow Florida's accrual rules. . . . The general federal rule for accrual is that a cause of action accrues the moment the plaintiff knows or has reason to know of the injury that is the basis of the complaint. This is known as the "discovery rule," and it generally applies to federal claims where Congress has not provided a statute of limitations. See White v. Mercury Marine, Div. Of Brunswick, Inc., 129 F.3d 1428, 1435 (11th Cir. 1997).

Id. at 875-76.

Under the Hillard analysis, the six year breach of fiduciary duty statute of limitations would be the most appropriate limitations period to apply. Both the Golden Pacific Bancorp tolling rule and the federal discovery accrual rule should apply to causes of action for violation of the terms of the Liquidating Plan.

XI. Fraudulent Conveyance Cause of Action Under Sections 273 and 276 of the New York Debtor and Credit Law

The New York State rule, which has also been applied at the federal level, is that a fraudulent conveyance claim requires evidence that the named defendant did more than simply "participate" in some fashion in the transaction at issue. Schofield Memo. at p. 13. The

defendant must have been either a transferee of the assets at issue or a beneficiary of the conveyance. Schofield Memo. at p. 13.

"[U]nder New York law, a creditor may recover money damages against parties who participate in the fraudulent transfer and are either transferees of the assets or beneficiaries of the conveyance." RTC Mortgage Trust 1995-S/N1 v. Sopher, 31 Fed. Appx. 37, 38 (2d Cir. 2002) (citing Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158, 1172 (2d Cir. 1993) (applying New York law); FDIC v. Porco, 75 N.Y.2d 840, 842, 552 N.Y.S.2d 910, 911-12 (1990); Contractors Cas. & Sur. Co. v. I.E.A. Elec. Corp., 181 Misc. 2d 469, 472, 693 N.Y.S.2d 915, 917 (Sup. Ct. N.Y. County 1999)).

In the case of Rohm & Haas v. Capuano, 301 F. Supp. 2d 156 (D.R.I. 2004), the court explained:

> [M]ost courts have been reluctant to extend the reach of fraudulent conveyance actions so as to include parties that are only participants in a fraudulent transfer. See e.g., Lowell Staats Mining Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271, 1276 n.1 (10th Cir. 1989) ("'Courts have generally held as to fraudulent conveyances that a person who assists another to procure one, is not liable in tort to the insolvent's creditors'" (internal citation omitted)); Mack v. Newton, 737 F.2d 1343, 1361 (5th Cir. 1984) (holding that Texas law, like the Bankruptcy Act, does not allow fraudulent transfer actions against one who is not, at least indirectly, a transferee or recipient of the fraudulently transferred property) [emphasis added]; Thomson Kernaghan & Co. v. Global Intellicom, Inc., 1999 U.S. Dist. LEXIS 13723, No. 99 CIV. 3005 (DLC), 1999 WL 717250 *2 (S.D.N.Y. Sept. 14, 1999) (holding that "a fraudulent conveyance claim may not be maintained against 'parties who . . . were neither transferees of the assets nor beneficiaries of the conveyance'" (internal citation omitted)); see generally Howard J. Steinberg, Liability of Participants in Fraudulent Transfers, 2 Bankr. Litig. § 14.9 (Dec. 2003) (noting that courts have been hesitant to develop theories of recovery against those who assist in making fraudulent transfers).

301 F. Supp. 2d 156 at 161.

This case is similar to Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158 (2d Cir.), cert. denied, 126 L. Ed. 2d 334, 114 S. Ct. 385 (1993) and RTC Mortgage Trust 1995-S/N1 v. Sopher, 171 F. Supp. 2d 192 (S.D.N.Y. 2001). In Stochastic, an attorney was held liable under the New York Debtor and Creditor Law for his participation in and masterminding of fraudulent transfers. Citing FDIC v. Porco, supra, the Second Circuit upheld the attorney's liability on the basis of the district court's explicit finding that the attorney "used some of the transferred assets to pay his legal fees and personal expenses, and intended ultimately to cheat the [plaintiffs] out of the [transferred property] for his personal benefit." Stochastic, 995 F.2d at 1172.

Similarly, this case is comparable to Stochastic because Lonsdale Schofield and Joseph Chalhoub, like the attorney in Stochastic, participated in and benefitted from the series of fraudulent transactions which stripped BOCI of its assets with the intent and purpose of delaying, hindering, and/or defrauding BOCI's creditors. Therefore, as in Stochastic, the facts alleged in the Amended Complaint suggest participation and benefit to Lonsdale Schofield and Joseph Chalhoub and are therefore sufficient to render them personally liable for the fraudulently transferred assets that should have been placed in the Contingency Fund for the benefit of the environmental creditors, specifically Plaintiff BOSAG.

In RTC Mortgage Trust, Sopher, the sole shareholder of Sopher & Co., sought to transfer substantially all of Sopher & Co.'s assets in order to frustrate collection efforts. Sopher actively participated in planning and executing the transaction, and plainly benefitted from the transaction. By operation of the transfer, Sopher removed millions of dollars of assets from Sopher & Co. and, thereby, was able to continue his real estate brokerage business until it was

sold for $1,500,000. Sopher also benefitted from the transaction because it prevented (or at least forestalled) circumstances that required repayment of the loan advanced to him by Sopher & Co. Sopher was found liable in money damages up to the value of the Judgment, but limited to the extent of the value of the assets transferred by Sopher & Co. to Sopher Realty. Sopher's individual liability was not contested on appeal. See RTC Mortgage Trust 1995-S/N1 v. Sopher, 31 Fed. Appx. 37, 38 (2d Cir. 2002).

Lonsdale Schofield and Joseph Chalhoub, like the shareholder in RTC, participated in and benefitted from the series of fraudulent transactions which stripped BOCI of its assets with the intent and purpose of delaying, hindering, and/or defrauding BOCI's creditors. Therefore, as in RTC, the facts alleged in the Amended Complaint suggest participation and a benefit to Lonsdale Schofield and Joseph Chalhoub, sufficient to render them personally liable for the fraudulently transferred assets that should have been placed in the Contingency Fund for the benefit of the environmental creditors.

A. The Accounting Cause of Action is Established as a Matter of Law

On December 28, 1989 Booth Oil's Liquidating Plan of Reorganization was confirmed. The fiduciary duty owed by Booth Oil and its officers and directors which had evolved over time beginning with its descent into insolvency in 1983 would change once again. The fiduciary duty which was a product of the constructive trust imposed by the common law had been transformed into an express trust under the Bankruptcy Code on June 6, 1985 when Booth Oil filed for bankruptcy. That statutory express trust was exchanged for an express trust created by the language of the Liquidating Plan and its requirement that any surplus be preserved in a

contingency fund for the benefit, among others, of the environmental creditors. See Clarkson Co. v. Shaheen 660 F.2d 506, 512 (2d Cir. 1977); 11 U.S.C. § 1107; 11 U.S.C. § 1141. While this can and should be understood as a contractual express trust, that contract arises out of the operation of Bankruptcy Code sections 1141 and 1142 and the confirmed plan itself and not out of traditional contract principles. See 8-1141 Collier on Bankruptcy ¶ 1141.02 (15th ed. rev. 2004) ("an order confirming a plan is a judgment in rem in the sense that it is a determination of the rights and liabilities created by the plan, binding upon all parties in interest").

The plaintiff's right to an accounting arises out of the plan itself and the trust created by the clear terms of the plan. A right of a creditor set out in a plan that required a payment of a specific amount to that creditor would operate as a simple contract right. A right as a beneficiary of the surplus created by operations conducted subsequent to confirmation but prior to final dissolution is a beneficial interest in an express contractual trust.

Such a right gives rise to a duty to account to the trust beneficiaries. In this case, such an accounting was to be provided to the Bankruptcy Court in the form of a Final Report. See Status Report attached to Final Decree (attached to the Am. Compl. at tab 7) at 7 ("Upon permit transfer and payment of the pension liabilities described in Item VII, a Final Report will be submitted and a motion for final decree closing the case will be made by Booth"). This "Final Report" would have been the equivalent of the Final Accounting provided by an executor of an estate in a probate matter. See In re Estate of Rodken, 270 A.D.2d 784, 785; 705 N.Y.S.2d 429, 430; (3d Dep't 2000)] ("a claim [of this nature] will not be deemed to accrue until there is either an open repudiation of the fiduciary obligation or a judicial settlement of the fiduciary's

account"). The Bankruptcy Court's final decree was a withdrawal of its jurisdiction; it did not represent a judicial settlement of the fiduciary's account. Booth Oil's obligation to account to the beneficiaries of the trust was not satisfied or otherwise terminated, the relationship was not ended and the obligation was not openly repudiated. See Golden Pacific Bancorp v. FDIC, 273 F.3d 509 (2d Cir. 2001).

Booth Oil has a duty to account to plaintiff and that duty continues to this day. Booth Oil's failure to carry out its duties under the plan over the last 15 years should not inure to its benefit or excuse its failure.

Ultimately the Liquidating Plan is a court order and Booth Oil is required to comply with the Plan. The same tolling principles that prevent this result in the breach of fiduciary duty context should prevent it in the accounting context.

The accounting cause of action should not be dismissed, but instead summary judgment on the accounting cause of action should be granted to plaintiff as the accounting obligation is set forth as a matter of law under the clear terms of the Liquidating Plan.

B. The CERCLA and Navigation Law Causes of Action Are Properly Pled and Should Not Be Dismissed on Summary Judgment Because They Are Sufficiently Supported and Relevant Discovery is Not Complete

As is more fully described in plaintiff's earlier submissions in opposition to defendant's motion for summary judgment, there is sufficient evidence to defeat a motion for summary judgment against Joseph Chalhoub, Breslube Industries Limited, Speedy Oil and Schofield Oil Limited under CERCLA and the Navigation Law.

In addition, discovery was interrupted by the necessity of the motion to amend the complaint. This court has ordered additional time to complete the deposition of Joseph Chalhoub and several other depositions will also likely be necessary before the close of discovery. Lonsdale Schofield and David Peel will likely be able to provide some additional information. Mary Brandys Fiordaliso or Mary Lynn, referenced in the Rule 26 disclosures, may also be able to provide useful information.

The information available shows Ahsen Yelkin working at the Site and Joseph Chalhoub providing direction relative to that work including decisions relating to Booth Oil's unwillingness to do certain work.

During the 1983 time period as described in the affidavit submitted herewith, Booth Oil applied for a permit to store used oil in Tank 60 at the Robinson Street facility. That tank contained approximately 225,000 gallons of oil. Defendants Schofield Oil, Speedy Oil, and Breslube Industries Limited, each of whom delivered oil to Booth Oil in 1983, claim that none of those 225,000 gallons was theirs. Defendants have not explained whose oil was in Tank 60, but only that their oil was not in Tank 60.

Petroleum discharges from what appears to have been diesel storage tanks at the Site have caused BOSAG to incur an additional $300,000 in costs this year. If the entire Booth Oil operations at this point are managed by Joseph Chalhoub and Lonsdale Schofield, the corporation's only officers and directors, it is difficult to place responsibility for the most recent costs associated with the Site on other Booth Oil employees. Some representative of Booth Oil failed to properly close the underground storage tanks that were recently found to be leaking.

Some representative of Booth Oil decided that it was appropriate to abandon the contaminated facility.

This court should not dismiss the CERCLA and Navigation Law causes of actions against Joseph Chalhoub, Lonsdale Schofield, Ahsen Yelkin, Breslube Industries Limited and Speedy Oil.

C. Payments of at least $530,000 to Ahsen Yelkin and EC Holdings Corp. between September 4, 1991 and October 29, 1992 Give Rise to Causes of Action for Violations of the Confirmed Liquidating Plan Against Booth Oil, George T. Booth III, Joseph Chalhoub, Lonsdale Schofield, EC Holdings Corp., and Ahsen Yelkin; for payment from EC Holdings Corp. on the Demand Note Itself; for Fraudulent Conveyance Under Section 276 of the New York Debtor and Creditor Law Against Ahsen Yelkin and EC Holdings Corp.; and for Breach of Fiduciary Duty Against George T. Booth III, Joseph Chalhoub, and Lonsdale Schofield.

(1) Causes of Action for Violation of the Liquidating Plan Against Booth Oil, George T. Booth III, EC Holdings Corp., and Ahsen Yelkin

The first cause of action implicated by a transfer of funds from Booth Oil is the cause of action alleging violation of the terms of the Liquidating Plan. The Plan requires surplus, if any, to be placed in a contingency fund for the benefit, among others, of the environmental creditors. "Surplus accounts receivable" as described in the Plan are amounts exceeding costs associated with operations in the regular course of business.

Certain transfers give rise to questions of fact as to whether the transfer constituted a payment in the regular course of business. For example, Ahsen Yelkin may claim that the payment to him of $150,000 in two checks on September 4, 1991, after he received $98,000 between January and August of 1991, is simply a payment for services. While a $248,000 payment to an employee and officer of a bankrupt corporation which is in liquidation requires an

explanation, a reasonable explanation may be possible and a motion for summary judgment relative to such a transfer is not appropriate prior to the completion of discovery. On the other hand, loans of $300,000 and/or $150,000 to a recently established corporation secured not by a personal guarantee and other resources providing reasonable security, but by future compensation due from Booth Oil, the lender, to Ahsen Yelkin, the borrower corporation's president and an employee and/or officer of Booth Oil, the liquidating bankrupt, is unreasonable as a matter of law. First of all, a loan indicates funds available that are not necessary to operations. An unconventional loan to an employee and/or officer which is not likely to be paid back and cannot be described as prudent indicates that the amount is surplus. Surplus amounts are not the property of the corporation to do with as it pleases under the Plan, but the property of the trust created by the Liquidating Plan. A loan to a corporation given in exchange for a promissory note at an interest rate of 4.84% is an investment unrelated to the business of the liquidating corporation Booth Oil. Under these circumstances, Booth Oil, the trustee of the contingency fund established by the Liquidating Plan, is investing funds in a way that is not prudent and is inconsistent with its fiduciary obligation to preserve those funds for the benefit of, among others, its environmental creditors.

This court should find that the loan in the amount of $300,000 to EC Holdings Corp. referenced in a Promissory Note dated August 3, 1992 and disbursed in two payments in the amount of $150,000 on September 4, 1992 and October 29, 1992 were transferred in violation of the Liquidating Plan as a matter of law.

Consistent with that finding and the binding effect of the Liquidating Plan, this Court should order George T. Booth III, Ahsen Yelkin, and EC Holdings Corp. to make restitution to Booth Oil in order that those funds can be placed, with interest, in the Contingency Fund maintained by Booth Oil. The federal discovery accrual rule and the tolling described in the Golden Pacific Bancorp case make this cause of action timely as to Ahsen Yelkin and EC Holdings Corp.

While Joseph Chalhoub and Lonsdale Schofield are liable for failure to know or learn of and attempt to recover those funds, that is a question that probably cannot be decided on summary judgment prior to the completion of discovery. This cause of action is timely, however, and should not be dismissed as against Lonsdale Schofield or Joseph Chalhoub, based on the tolling of the statute of limitations required by the Golden Pacific Bancorp case and upon the discovery accrual rule applicable to federal causes of action. Since Chalhoub and Schofield remain officers, directors and controlling shareholders of Booth Oil, the limitations period is tolled.

(2) Causes of Action for Fraudulent Conveyance Against Ahsen Yelkin and EC Holdings Corp.

These transfers also give rise to causes of action for fraudulent conveyance under section 276 of the New York Debtor and Creditor Law against George T. Booth III, Ahsen Yelkin, and EC Holdings Corp. These transfers totaling at least $530,000 were made for less than fair consideration at a time when Booth Oil was an insolvent corporation in Liquidation pursuant to a confirmed Liquidating Plan. Although the corporation was making significant profits, the fact remains that Booth Oil did not make any payment on approximately $1.5 million in unsecured

debts and approximately $5 million in secured debts apart from a $1 million payment from Speedy Oil for Booth Oil's operating assets. As a liquidating Chapter 11 bankrupt which would not operate subsequent to consummation of its Liquidating Plan, Booth Oil did not receive a discharge of its debts. If Booth Oil, for example, sold the Booth Oil property tomorrow for $20 million, it would be required to repay all of its creditors and obtain permission from the Court before making any distribution to its equity security holders. Under the terms of the Plan, the equity security holders are not permitted to receive any distribution based on their shares. The suggestion that the profits Booth Oil earned subsequent to confirmation rendered it solvent amounts to a refusal to acknowledge the implications of the bankruptcy filing and the confirmed Plan.

Ahsen Yelkin and EC Holdings Corp. intended to delay, hinder, or defraud the creditors of Booth Oil when they caused this "loan" to be made. There was not a single payment on the loan over the years. Ahsen Yelkin and EC Holdings Corp., Ahsen Yelkin's corporation, knew about the bankruptcy of Booth Oil. Ahsen Yelkin has since dissolved EC Holdings Corp., while his business Everclear Inc., a wastewater treatment business, appears to be prospering. Letters from George T. Booth III and Ahsen Yelkin placed unusual limitations on recourse against them relative to the EC Holdings note, limiting Booth Oil to recovery from assets distributable to George T. Booth III on liquidation of Booth Oil and, in the case of Ahsen Yelkin, to future compensation from Booth Oil. Based on these circumstances described in detail in the Amended Complaint, Ahsen Yelkin and EC Holdings Corp. should be held liable for intentional fraudulent conveyances in connection with these transactions. Ahsen Yelkin and EC Holdings were

beneficiaries of these conveyances. EC Holdings Corp. as it received payments from Booth Oil loaned some of those funds to Ahsen Yelkin. See Letter of Richard H. Wetter dated May 3, 1994 (requesting copies of promissory note from EC Holdings to Booth Oil and two promissory notes dated April 1, 1993 and November 4, 1993 for $50,000 each running from Ahsen Yelkin to EC Holdings Corp.).

Plaintiff did not learn of these transfers and their fraudulent nature until sometime after December 20, 1999. They became the focus of inquiry after May 24, 2001 when Ahsen Yelkin adjourned his deposition to confer with his attorney concerning one of the promissory notes. George T. Booth III testified at his deposition on June 19-20, 2000 that the loans were authorized by Joseph Chalhoub but were not repaid. Therefore, the intentional fraudulent conveyance causes of action against Ahsen Yelkin and EC Holdings Corp. were timely commenced on December 19, 2001.

(3) Causes of Action for Breach of Fiduciary Duty Against George T. Booth III, Joseph Chalhoub, and Lonsdale Schofield

The breach of fiduciary duty causes of action are tolled consistent with the Golden Pacific Bancorp case and are therefore timely as against George T. Booth III, who was an officer and director of Booth Oil until on or about October 7, 1994, and against whom action was commenced on or about November 5, 1998, less than six years later.

Both Joseph Chalhoub and Lonsdale Schofield remain officers, directors, and controlling shareholders of Booth Oil to this day and therefore the statute of limitations under Golden Pacific Bancorp has been tolled since the dates of these transfers, and the causes of action against them for breach of fiduciary duty are timely. Joseph Chalhoub and Lonsdale Schofield

breached their fiduciary duty to the contingency fund beneficiaries by failing to learn of and/or recover the proceeds of these fraudulent conveyances.

D. April 20, 1993 Transfer of $150,000 from Booth Oil to EC Holdings Gives Rise to Causes of Action for Violation of the Confirmed Liquidating Plan Against Booth Oil, George T. Booth III, Ahsen Yelkin, and EC Holdings Corp.; for Payment on the Demand Note Against EC Holdings Corp.; for Fraudulent Conveyance Under Section 276 of the New York Debtor and Creditor Law Against EC Holdings Corp and Ahsen Yelkin; and for Breach of Fiduciary Duty Against Booth Oil, George T. Booth III, Joseph Chalhoub, and Lonsdale Schofield.

(1) Causes of Action for Violation of the Liquidating Plan Against Booth Oil and George T. Booth III, Ahsen Yelkin, and EC Holdings Corp.

Booth Oil, George T. Booth III, Ahsen Yelkin, and EC Holdings Corp. violated the confirmed Liquidating Plan in connection with the April 20, 1993 transfer of $150,000 to EC Holdings Corp. Action against George T. Booth III and Booth Oil was commenced on November 5, 1998, within six years of the transfer. This was another diversion of funds that were surplus of Booth Oil for the reasons articulated above in connection with the two earlier $150,000 transfers to EC Holdings Corp. The three transfers of $150,000 violated the Liquidating Plan as a matter of law.

EC Holdings Corp. is bound by the terms of the Liquidating Plan as are all other parties in interest. EC Holdings Corp. through its President, Ahsen Yelkin, knew of the bankruptcy and took Booth Oil property subject to the terms of the Liquidating Plan. Ahsen Yelkin is similarly bound by the Liquidating Plan and is liable for receiving Booth Oil funds from EC Holdings (at least $100,000). The violation of the Liquidating Plan causes of action are timely, based on the federal discovery accrual rule.

EC Holdings Corp. is also liable on the Note itself as a matter of law.

(2) Causes of Action for Fraudulent Conveyance Under Section 276 of the Debtor and Creditor Law Against EC Holdings and Ahsen Yelkin

This transfer also gives rise to the liability of EC Holdings Corp. and Ahsen Yelkin under section 276 of the New York Debtor and Creditor Law. Each defendant knew of the bankruptcy and intended to use it to delay, hinder, or defraud creditors of Booth Oil.

(3) Causes of Action for Breach of Fiduciary Duty Against Booth Oil, George T. Booth III, Joseph Chalhoub, and Lonsdale Schofield

This transfer also supports a cause of action for breach of fiduciary duty against Booth Oil, George T. Booth III, Joseph Chalhoub, and Lonsdale Schofield. Booth Oil and George T. Booth III owed a fiduciary duty to the contingency fund beneficiaries which they breached by failing to preserve this $150,000. They were each sued within six years of the transfer. This transfer, like those to EC Holdings described above, is not only sufficiently pled but supports a finding as a matter of law that Booth Oil and George T. Booth III breached their fiduciary duty.

This cause of action is also sufficiently pled against Joseph Chalhoub and Lonsdale Schofield. The six-year statute of limitations applicable to this cause of action is tolled as to each until they leave their current positions as directors and officers of Booth Oil. Chalhoub and Schofield should have learned of or taken action to recover these amounts. Their failure to take reasonable action in this regard constitutes a breach of their fiduciary duty to the contingency fund beneficiaries.

E. August 15, 1994 Transfer from Booth Oil of $300,000 to Katherine Street Properties, Inc. Gives Rise to Causes of Action for Violation of the Liquidating Plan Against Booth Oil, George T. Booth III, and Katherine Street Properties, Inc.; for Fraudulent Conveyance Under Section 276 of the

New York Debtor and Creditor Law Against Katherine Street Properties, Inc. and Under Sections 273 and 276 Against George T. Booth III; and for Breach of Fiduciary Duty Against George T. Booth III, Joseph Chalhoub and Lonsdale Schofield

(1) Causes of Action for Violation of the Liquidating Plan Against Booth Oil, George T. Booth III, and Katherine Street Properties, Inc.

As articulated above, the August 15, 1994 transfer of $300,000 to Katherine Street Properties, Inc. constituted a violation of the terms of the Liquidating Plan and the trust set forth therein against Booth Oil and George T. Booth III. Each of these defendants were sued within six years of the transfer.

Katherine Street Properties Inc. was an insider of, was bound by, and violated the terms of the Liquidating Plan and should be held liable for this violation as a matter of law. The discovery accrual rule applicable to federal actions in federal court makes this cause of action timely as it was commenced within two years' of discovery subsequent to December 19, 1999.

(2) Causes of Action for Fraudulent Conveyance Under Section 276 of the New York Debtor and Creditor Law Against Katherine Street Properties, Inc. and Under Sections 273 and 276 Against Booth Oil and George T. Booth III

The August 15, 1994 transfer also constituted a fraudulent conveyance against Katherine Street Properties, Inc. under section 276 of the New York Debtor and Creditor Law, based upon the discovery accrual rule of the applicable statute of limitations (i.e. two years from discovery of the fraud). See CPLR § § 203(g) and 213(8). As an indirect beneficiary of the transfer, George T. Booth III is liable for the fraudulent conveyance under both sections 273 and 276 of the New York Debtor and Creditor Law. Action was commenced against George T. Booth III within six years of the conveyance and is therefore timely.

(3) Causes of Action for Breach of Fiduciary Duty Against George T. Booth III, Joseph Chalhoub and Lonsdale Schofield

The August 15, 1994 transfer gives rise to a cause of action for breach of fiduciary duty against George T. Booth III that is timely as it was brought within six years of the transfer.

Joseph Chalhoub and Lonsdale Schofield are also liable for breach of fiduciary duty in connection with this transfer and for failing to take action to recover it. Action was commenced against Joseph Chalhoub within six years of the transfer and is therefore timely. The statute of limitations relative to breach of fiduciary duty in this context is tolled until the relationship and its attendant burdens are terminated, repudiated, or otherwise satisfied or ended. Golden Pacific Bancorp. Therefore, although the action against Lonsdale Schofield was commenced more than six years after the transfer, it is timely.

F. October 7, 1994 Payment by Booth Oil of $275,000 to George T. Booth III in Redemption of All of George T. Booth III's Booth Oil Stock, Release of George T. Booth III from Liabilities to Booth Oil, and Payment to George T. Booth III of $400,000 from Safety-Kleen as an Alleged Consulting Agreement All Give Rise to Causes of Action for Violation of the Liquidating Plan Against Booth Oil, George T. Booth III, Joseph Chalhoub and Lonsdale Schofield; for Fraudulent Conveyance Under Sections 273 and 276 of the New York Debtor and Creditor Law Against George T. Booth III, Joseph Chalhoub and Lonsdale Schofield; and for Breach of Fiduciary Duty Against Booth Oil, Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III.

(1) Causes of Action for Violation of the Liquidating Plan Against George T. Booth III, Joseph Chalhoub, Lonsdale Schofield, and Booth Oil

The payment of $275,000 to George T. Booth III constituted a violation of the Liquidating Plan on several levels. The first violation arises out of the failure to place what can only be described as surplus funds in the contingency fund. This $275,000 cannot be described as funds paid out in the ordinary course of business as employee compensation or for raw

materials. A redemption is the opposite of funds necessary to and used in the ordinary course of business. If the funds were necessary to the operation of the business, the business could not afford to pay them out to a shareholder. This amount should have been placed in the contingency fund for the benefit of creditors. Since Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III all agreed to make this payment to an equity security holder in exchange for his shares, they should be prevented from taking the position now that this was not a payment of surplus. In any event, the failure to place this amount in the contingency fund constituted a violation of the Liquidating Plan and the payment of this amount to an equity security holder constituted a separate violation of the Plan. The Liquidating Plan requires that surplus be placed in the contingency fund and that there be no distribution to equity security holders. Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III all participated in and ratified the decision to make this payment to George T. Booth III. Therefore, this transfer not only gives rise to a properly-pled cause of action for violation of the Liquidating Plan but should cause this Court to make a finding as a matter of law on this motion that this payment of $275,000 violated the Liquidating Plan and that Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III should be held jointly liable to pay restitution to Booth Oil Company, Inc. of that $275,000, plus interest from October 7, 1994, and this Court should, in turn, direct Booth Oil to pay that amount to plaintiff consistent with the terms of the Liquidating Plan.

The action for violation of the Liquidating Plan was commenced against Joseph Chalhoub, George T. Booth III, and Booth Oil within six years of the transfer. The tolling described in the Golden Pacific Bancorp case makes this cause of action timely as against

Lonsdale Schofield. Furthermore, the accrual of a statute of limitations in a federal action does not occur until the plaintiff knew or should have known of the cause of action. The federal accrual rule provides an independent basis for a finding that this cause of action is timely

Similarly, the payment by Safety-Kleen to George T. Booth III constituted a payment for his shares of Booth Oil stock and amounted to a payment from Safety-Kleen for assets of Booth Oil. That payment should have been preserved for the benefit of the contingency fund beneficiaries under the Liquidating Plan and constitutes a violation of the Liquidating Plan's prohibition against payments to equity security holders.

(2) Causes of Action for Fraudulent Conveyance Under Sections 273 and 276 of the New York Debtor and Creditor Law Against George T. Booth III

This payment to George T. Booth III was a fraudulent transfer under both sections 273 and 276 of the New York Debtor and Creditor Law. It was commenced within six years of the transfer. Joseph Chalhoub and Lonsdale Schofield were beneficiaries of this payment as described in detail below and are therefore liable under section 276 of the Debtor and Creditor Law. Joseph Chalhoub is liable under section 273 of the Debtor and Creditor Law in connection with these transfers. Action was commenced against Joseph Chalhoub within six years of the payment.

(3) Causes of Action for Breach of Fiduciary Duty Against Booth Oil, Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III

These transfers also constitute actionable breaches of fiduciary duty, based upon the waste of corporate assets they represent. Action related to these transfers was commenced against Booth Oil, Joseph Chalhoub, and George T. Booth III within six years of the transfers.

The tolling described in Golden Pacific Bancorp and the federal discovery accrual rule make the action associated with these transfers timely as against Lonsdale Schofield in connection with the payments on October 7, 1994 of $175,000 and October 7, 1995 of $125,000. The action was commenced against Lonsdale Schofield within six years of the payment to George T. Booth III of $100,000 on October 7, 1996.

G. June 30, 1996 Transfer of Permit From Booth Oil to Safety-Kleen Corp. Gives Rise to Causes of Action for Violation of the Liquidating Plan Against Booth Oil, Joseph Chalhoub, Lonsdale Schofield, George T. Booth III, and Safety Kleen Corp.; for Fraudulent Conveyance Against Safety-Kleen Corp., Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III; and for Breach of Fiduciary Duty Against Booth Oil, Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III.

(1) Causes of Action for Violation of the Liquidating Plan Against Booth Oil, Joseph Chalhoub, Lonsdale Schofield, George T. Booth III, and Safety Kleen Corp.

The transaction that occurred on October 7, 1994 arose out of negotiations between Safety-Kleen Corp. and Federal and State authorities that resulted in an agreement that (1) Safety-Kleen Corp. would make a Federal civil forfeiture of $1.9 million, (2) NYSDEC would approve a transfer of the Permit to Operate the Katherine Street Facility from Booth Oil to Safety-Kleen Corp., (3) the current management of Booth Oil, including George T. Booth III and Ahsen Yelkin, would be removed from their positions at the Booth Oil Katherine Street facility, and (4) Booth Oil would plea to a charge in State court of violating hazardous waste handling laws and would pay a State fine of $100,000.

George T. Booth, III was not satisfied with the way the negotiations went and refused to agree to the proposed plea that arose out of those negotiations. Instead of approving the plea, he

commenced an action against Booth Oil, Joseph Chalhoub, and Lonsdale Schofield, claiming that Booth Oil was not guilty of any crime, let alone a felony that would prevent Booth Oil from operating the Katherine Street facility, and that Booth Oil was, in effect, committing corporate suicide for the benefit of Safety-Kleen Corp. Joseph Chalhoub and Lonsdale Schofield had sold their oil rerefining assets (Breslube Enterprises) to Safety-Kleen Corp. except for certain assets associated with Booth Oil which were deemed to be saddled with liability from the Robinson Street facility to be purchased by Safety-Kleen. Joseph Chalhoub and Lonsdale Schofield, through certain corporations, divided approximately $10 million in cash and Safety-Kleen stock as a result of the sale to Safety-Kleen of the assets of Breslube Enterprises. Joseph Chalhoub's company, Breslube Industries Limited, deposited $6.7 million in proceeds from the sale of Safety-Kleen stock in March 1998.

While Joseph Chalhoub was Safety-Kleen's Chief Financial Officer and Lonsdale Schofield was an employee of Safety-Kleen, George T. Booth III did not feel well represented in the negotiations being conducted by counsel for Safety-Kleen. When he objected and filed suit he was paid a large settlement. George T. Booth III was released from liability associated with more than $750,000 in improper loans from Booth Oil and was paid an additional $675,000, for a total of at least $1.425 million.

The only interested parties who had less of a voice in the negotiations that led to the transfer of the permits to operate the Katherine Street facility than George T. Booth III were the contingency fund beneficiaries. The permit which caused Safety-Kleen to pay $1.9 million and

Booth Oil to pay $1.425 million plus a $100,000 penalty was transferred to Safety-Kleen with no payment whatsoever to Booth Oil or the contingency fund beneficiaries.

The transfer of the permit without any consideration to Booth Oil for the benefit of its creditors was a violation of the terms and spirit of the Plan.

The failure to liquidate this valuable asset in such as way as to confer a benefit upon the contingency fund beneficiaries was a violation of the Liquidating Plan by Booth Oil, George T. Booth III, Joseph Chalhoub, Lonsdale Schofield, and Safety Kleen Corp.

This action was commenced within six years of the transfer as well as within six years of the agreement that made the transfer possible as against Booth Oil, Joseph Chalhoub, and George T. Booth III. It was commenced within six years of the transfer as against Lonsdale Schofield. The tolling of the statute of limitations described in Golden Pacific Bancorp should be applied to prevent a current director and officer of Booth Oil from raising the statute of limitations to defeat the right of a Booth Oil creditor under the Plan. The federal discovery accrual rule provides an independent basis for timeliness.

(2) Causes of Action for Fraudulent Conveyance Against Safety-Kleen Corp., Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III

The transfer of the permit with no consideration whatsoever to Booth Oil also constitutes a fraudulent conveyance under sections 273 and 276 of the New York Debtor and Creditor Law against Safety-Kleen Corp., Booth Oil, and Joseph Chalhoub. Action against these defendants was brought within six years of the transfer as well as within six years of the agreement that gave rise to the transfer, and is therefore timely. With respect to Lonsdale Schofield, the action was brought within six years of the transfer. Plaintiff is also entitled to the benefit of the two-

year discovery accrual under section 276 and as plaintiff did not discover the fraudulent conveyance or its fraudulent intent more than two years before December 20, 2001.

The benefit derived from this transaction is not limited to Safety-Kleen Corp. which received the permit in exchange for a payment of $1.9 million to the federal government and $400,000 to George T. Booth III, or to George T. Booth III who received value of approximately $1.425 million out of this transaction. Joseph Chalhoub was able to sell his shares of Safety-Kleen in March 1998 for $6.7 million. It is likely, although it will need to be explored in discovery, that the value of Lonsdale Schofield's interest in Safety-Kleen, based on his shares of Safety Kleen Corp. (he and Joseph Chalhoub divided approximately $10 million in connection with the sale of Breslube Enterprises in 1987 to Safety Kleen Corp.), increased as a result of the transaction, or that there was some specific incentive passed along to Lonsdale Schofield and Joseph Chalhoub from Safety-Kleen as a result of the successful transfer.

(3) Causes of Action for Breach of Fiduciary Duty Against Booth Oil, Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III

This transfer also represents a breach of fiduciary duty by Booth Oil, George T. Booth III, Joseph Chalhoub, and Lonsdale Schofield. Each of these defendants except for Lonsdale Schofield were named in the action commenced within six years of the transfer as well as within six years of the agreement that gave rise to the transfer. Lonsdale Schofield was named within six years of the transfer, and the cause of action against him should benefit from the tolling of the statute described in Golden Pacific Bancorp.

Dated: September 30, 2004
Buffalo, New York

/s ______________________________

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