ECF CASE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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FLEET FINANCIAL GROUP, INC.,

Plaintiff,

-against-

THE LESSARD ARCHITECTURAL GROUP INC., a/k/a THE LESSARD ARCHITECTURAL GROUP INC., P.C., LESSARD GROUP INC., LESSARD DESIGN, INC., and L DESIGN GROUP, INC.,

Defendants.

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THE LESSARD ARCHITECTURAL GROUP INC., a/k/a THE LESSARD ARCHITECTURAL GROUP INC. P.C.,

Third-Party Plaintiff,

-against-

RICHARD XIA, JIQING YUE, X & Y DEVELOPMENT GROUP, LLC and SAMUEL DEVELOPMENT GROUP, LLC,

Third-Party Defendants.

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Index No. 700480/12

(Markey, J.)

Return Date: 11/8/12

TP Index No. 12/700480

THE LESSARD ARCHITECTURAL GROUP INC., PC'S AND THE LESSARD GROUP INC.'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF CROSS-MOTION TO AMEND PLEADINGS

Of Counsel:
Martin A. Schwartzberg, Esq.

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PRELIMINARY STATEMENT

Defendants/third-party plaintiff, The Lessard Architectural Group Inc., a/k/a The Lessard Architectural Group Inc., P.C. ("LAG") and Lessard Group Inc. ("LGI") submit this Memorandum of Law (1) in opposition to the motion to dismiss by Fleet Financial Group, Inc. ("Fleet") and third-party defendants X & Y Development Group, LLC ("X & Y"), Richard Xia ("Xia"), Jiqing Yue ("Yue") and Samuel Development Group, LLC ("Samuel Development") and (2) in support of the cross-motion to amend LAG's and LGI's pleadings pursuant to CPLR §3025(b) and RPAPL §1301(3).

As set forth in detail below, the motion to dismiss should be denied on a number of grounds and, instead, LAG should be permitted to amend its pleadings nunc pro tunc to comply with RPAPL §1301.

First, LAG's counterclaims and third-party claims are not barred by RPAPL §1301(3) for several reasons including: (a) Fleet and the third-party defendants stipulated to the instant claims being brought in this venue pursuant to an agreement to voluntarily discontinue a prior action pending in Virginia; (b) LAG did not commence the case at bar, but rather, has asserted its counterclaims and third-party claims in response to this action brought by Fleet; (c) the claims being asserted in this case are different than those raised in the Lien Foreclosure Action; and (d) Virginia not New York law (including RPAPL §1301) applies due to the fact that the choice of law issue was previously fully litigated.

Rather than dismiss the counterclaims and third-party claims, the cross-motion

to amend the pleadings pursuant to CPLR §3025(b) and RPAPL §1301(3) should be granted since the movants cannot establish that they would be prejudiced by the amendment. Amendment should be permitted when, as is the case here, special circumstances exist as detailed below.

Second, LAG's claims for unjust enrichment are not subject to dismissal where LAG is permitted to assert alternative theories of recovery, in this case, breach of contract and unjust enrichment. This is especially the case where the moving parties have denied that a valid contract exists with LAG.

Third, LAG's and LGI's intellectual property claims are not subject to dismissal because they are not preempted by the Federal Copyright Act. Specifically, because the intellectual property rights claims are premised upon the moving parties' contractual obligations concerning LAG's Instruments of Service, the Federal Copyright Act does not bar the claims.

Fourth, LAG's fraudulent inducement of contract claims are not subject to dismissal for several reasons including: (a) the specifically pled intentional misstatements of material facts by Fleet and the third-party defendants establish a valid cause of action for fraud in the inducement, as established by the case law set forth below; (b) the fraudulent inducement claims are not duplicative of LAG's breach of contract claims; (c) the fraudulent inducement claims are not barred by the contract merger clause since well-established case law holds that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing a contract; and (d) the

detailed allegations in the counterclaims and third-party claims provide substantially more than sufficient particularity required by CPLR §3016.

Fifth, LAG's counterclaims and third-party claims for contractual indemnification are not subject to dismissal because the agreement between the parties provides for such claims. The indemnity provision at issue specifically requires that Fleet and the third-party defendants pay LAG its reasonable attorneys' fees for claims arising out of the conduct of others, in this case, the movants' employee and consultant.

STATEMENT OF FACTS[1]

Fleet, allegedly on its own behalf and as the agent of third-party defendant X & Y, retained LAG to provide architectural and related design services for the development of a project involving a multiple-story complex, including condominiums, an apartment hotel, a community facilities tower, and a below-grade parking structure located on a 0.74-acre parcel fronting Union Street with a narrow alley opening to Bowne Street, Flushing, New York (alternatively the "Property" and the "Project"). LAG negotiated and reached a series of oral and written agreements with the owner of Fleet and X & Y, i.e., Xia, to provide the services relating to the Project. Some of those agreements were memorialized in writing, including a contract drafted in 2008,

[1] The facts contained herein are from the Counterclaims and Third-Party Complaint (the allegations in both are essentially identical). Where indicated, and due to the extent of the fraud committed by the movants, other information has been obtained by LAG from third-party sources and investigators. On a motion to dismiss a counterclaim/third-party complaint, the Court must accept the facts as alleged in that pleading as true (see, Point I of the Memorandum of Law).

subject to a series of amendments and addenda through 2008 and 2009. In the Virginia predecessor lawsuit of this case,[2] Fleet, X & Y and Xia have denied that all of these oral and written agreements were agreed to by them and they have also at times denied that any contract existed between some of them and LAG.

During the negotiations of the agreements and during performance by LAG of its services, Xia represented that he was the Owner of the Property, that Fleet was the Owner of the Property, and that Xia was the Owner of Fleet. Months after LAG began performance of its services, LAG and Xia entered into a contract based upon Xia's representations that Fleet was the Owner of the Property and that Xia was the Owner of Fleet. Accordingly, the contract executed by Xia stated that Fleet was the Owner.

Months prior to Xia's execution of any written agreements despite repeated requests by LAG, LAG in good faith began to perform architectural and design services as requested by Xia. Eventually Xia signed one such contract; however, he did not sign the various amendments and addenda that reflected the changes to the contract that he made to the parties' agreements. Prior to completion of LAG's services, LAG was forced to terminate its services due to Fleet's non-payment of long-outstanding invoices for fees.

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[2] This case is the continuation of lawsuit between and among the same parties in Virginia which had been filed there pursuant to a mandatory forum selection clause in one of the contracts. Those proceedings were voluntarily non-suited (dismissed without prejudice) pursuant to an agreement among the parties that provided **at the instant moving parties' insistence** that the claims would be re-asserted in this Honorable Court. See, Exhibit "N" to the moving papers, the agreement to non-suit the Virginia Action.

Subsequent to LAG's termination of the contract and prior its institution of legal proceedings to collect payment for its services, LAG learned that Fleet was not the Owner of the Property, as had been fraudulently represented by Xia, but instead an un-capitalized sham entity. Thus, when LAG first brought suit in Virginia pursuant to the contract's mandatory Virginia forum selection and choice of law clause, LAG set forth claims against Xia's sham entity Fleet, but also Xia and Yue as well as X & Y and their other entity Samuel Development, Inc. (the latter three having been the source of the minor payments made to LAG for its Project-related services).

The amounts owed to LAG by Fleet, Xia, Yue, X & Y and Samuel Development total $880,452.63. In addition, pursuant to §§1.3.86 and 1.3.87 of the contract, LAG is entitled to lost profits in the amount of $176,016.51. Still further amounts are owed to LAG by Fleet and the third-party defendants as explained in the discussions below.

Fleet, Xia, Yue, X & Y and Samuel Development, through their deliberate, intentional and fraudulent schemes and intentional misrepresentations to LAG, devised and implemented a scheme by which LAG would provide services without the means to be paid or collect a judgment from Fleet, Xia, Yue, X & Y and Samuel Development. Xia's and his joint tortfeasors' scheme was to use the corporate existence of the sham entities, including Fleet, to induce LAG to enter into the contract and later defraud LAG and achieve the inequitable result of Fleet's, Xia's, Yue's, X & Y's and Samuel Development's enjoying the benefits of LAG's services, without any of them being liable and/or able to pay for such services. As set forth in

greater detail in the Counterclaim and Third-Party Complaint, all of the well-recognized indicia of fraudulent sham entities and alter ego liability were present among Fleet and third-party defendants including the maintenance of virtually no corporate documents and the observation of virtually no corporate formalities; the sharing of controlling and managing members, corporate managers and officers (Xia and his wife, chief financial officer Yue); the comingling of assets, office space and facilities (all owned by Xia and Yue), the sharing of an employee and/or consultant (Xi Wang - "Wang" of yet another sham entity "Fleet Architects"); Xia's and his wife/chief financial officer Yue's engaging in undocumented and sham loans and other transactions between and among Fleet, X & Y, and themselves; the parties' sharing mailing addresses for their business dealings, namely, their home and office space owned by Xia and his wife Yue and, at times, phantom addresses.

Upon information and belief (including, but not limited to, information from documents obtained by LAG from third-party sources and investigators), discovery in this case will reveal that the fraudulent scheme was and remains so pervasive that when Xia has been asked who were or are the officers, directors and employees of Fleet and/or X & Y, all he would state was that he could not remember. It bears noting that Xia has made his intentional misrepresentations to extract services and monies for Fleet, X & Y and their projects when soliciting services and monies not just from LAG but from others including, as public documents have revealed, when soliciting funding for the development of the Project through the sham Fleet entity.

In summary, the motion to dismiss is part of a pattern of a scheme by the moving parties to engage in procedural machinations to prolong and postpone LAG's ability to collect for its unpaid for services while the moving parties continue to divest and deplete their assets in order to render themselves judgment-proof. LAG and LGI respectfully request that the motion to dismiss be denied, and that LAG and LGI be permitted to proceed with their claims against the moving parties.

PROCEDURAL HISTORY

On or about June 25, 2010, LAG commenced an action in the Circuit Court of the County of Fairfax in Virginia against Fleet, Xia, Yue, X & Y, and Samuel Development (the "Virginia Action") pursuant to the mandatory Virginia forum selection and choice of law provision found within the one executed contract.[3] The Virginia Complaint alleged causes of action against those defendants for breach of contract, open account, unjust enrichment and breach of intellectual property rights.

On or about December 8, 2009, LAG filed a Mechanic's Lien with the Queens County Clerk's Office to preserve its mechanic's lien rights against the Property. Fleet filed a Demand Pursuant to Lien Law §59 in Supreme Court, Queens County, requiring that LAG commence an action on or before September 27, 2010 to foreclose its Mechanic's Lien or risk dismissal of the Mechanic's Lien.[4] In accordance with the Demand, LAG commenced a lien foreclosure action in Supreme Court,

[3] A copy of the Complaint from the Virginia Action is annexed to the affirmation of Martin Schwartzberg (the "Schwartzberg Aff.") as Exhibit "A".
[4] A copy of the Demand is annexed to the Schwartzberg Aff. as Exhibit "B".

Queens County, on or about September 27, 2010 by filing a Complaint (the "Lien Foreclosure Action").[5]

In the Virginia Action, Fleet filed a motion to dismiss claiming that the Virginia forum and choice of law selection clause in the contract was unenforceable, and therefore, that LAG's Complaint should be dismissed.[6] Notably, the motion did not seek to transfer the venue of the Virginia Action to New York, stay the Virginia Action or consolidate the lawsuit with the Lien Foreclosure Action. Rather, as further discussed below, Fleet and its alter egos were trying to have it both ways: the dismissal of both of LAG's lawsuits or, at a minimum, protracting those lawsuits while the defendants' assets were and continue to be spun off into new sham entities created and controlled by Xia and Yue. The current motion to dismiss in this lawsuit is yet another example of their strategy and should be seen for what it is: yet another in a series of motions designed to protract the proceedings while Xia and his confederates continue to drain the assets of Fleet and the third-party defendants (as set forth in LAG's pleadings).

Fleet's motion to dismiss the Virginia Action was denied. Fleet thereafter filed a motion for reconsideration requesting that the Virginia Court reconsider its denial of the motion.[7] By Order dated December 16, 2010, the Virginia Court denied the

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[5] The Complaint is annexed to the motion to dismiss as Exhibit "H".
[6] Copies of the Virginia Action's Fleet motion to dismiss and LAG's opposition thereto are annexed to the Schwartzberg Aff. as Exhibit "C".
[7] Copies of the motion for reconsideration and LAG's opposition papers in the Virginia Action are annexed to the Schwartzberg Aff. as Exhibit "D".

motion for reconsideration.[8] Then, in the Virginia Action, Xia had his Virginia counsel file numerous other motions, then a counterclaim in the name of Fleet, and then still further motions and other procedural obstacles to discovery. Eventually, the parties entered into an agreement whereby the Virginia claims would be voluntarily non-suited and, **at the moving parties' insistence**, reasserted in New York notwithstanding the forum selection clause.[9] The Counterclaims and Third-Party Complaint were filed in this court at the insistence of the moving parties; LAG had an absolute right to re-assert its non-suited claims in Virginia but acquiesced to the moving parties' demand for this forum.

During the same period with aforesaid motions practice in Virginia, X & Y served a motion to cancel the Notice of Pendency relative to the Lien Foreclosure Action. Among other grounds, X & Y argued that LAG had failed to comply with RPAPL §1301. The trial court granted X & Y's motion and canceled the Notice of Pendency.[10] LAG appealed the trial court's decision whereupon the Second Department reversed the dismissal, reinstated the Notice of Pendency, and found that the Lien Foreclosure Action had not been commenced in bad faith.[11]

It bears noting that during the Virginia Action, LAG moved to stay the Lien Foreclosure Action in this Court pending the outcome of the Virginia Action, arguing that the cases were in ways duplicative and that judicial efficiency and the parties'

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[8] A copy of the Order is annexed to the Schwartzberg Aff. as Exhibit "E".
[9] A copy of the agreement is annexed to the moving papers as Exhibit "N".
[10] The trial court's decision is annexed to the moving papers as Exhibit "K".
[11] The Second Department's decision is annexed to the moving papers as Exhibit "L".

resources would be preserved by such a stay. Ironically, given the arguments in the pending motion to dismiss, Xia and his various entities vigorously opposed LAG's motion for a stay of the Lien Foreclosure Action whereupon the motion to stay was denied.

As noted above, the parties chose to voluntarily discontinue the Virginia Action subject to the moving parties' insistence that all the claims be re-asserted in this Court rather than Virginia. The moving parties were the first to have re-assert their Virginia claims in this court, whereupon LAG re-asserted its claims in the form of counterclaims and third-party claims .[12] The major procedural difference between the Virginia Action and this case is that now Fleet is serving as the plaintiff and LAG is the defendant, plaintiff on the counterclaim, and third-party plaintiff. Xia, Yue, X & Y and Samuel Development are named as third-party defendants rather than defendants.

Fleet, not LAG, commenced this action against the named defendants[13] in the Supreme Court, Queens County, alleging claims for breach of contract, fraud in the inducement, negligent misrepresentation and professional negligence.[14] LAG as well as two other defendants filed Answers to the Complaint. The fourth defendant – L Design Inc. – filed a motion to dismiss whereupon Fleet voluntarily dismissed its claims against L Design.

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[12] In addition to the parties' re-asserted Virginia contract and quasi-contract claims, the pleadings contain New York tort claims and a Counterclaim by LGI.
[13] The "non-LAG defendants" (Lessard Group Inc., Lessard Design Inc. and L Design Inc.) were not parties to the Virginia Action.
[14] A copy of the Complaint is annexed to the moving papers as Exhibit "A".

With its Answer, LAG asserted Counterclaims including LAG's Counterclaims for breach of contract, unjust enrichment, breach of intellectual property rights, intentional misrepresentation and fraud, and indemnification.[15] LAG's contract and quasi-contract claims are the same as those asserted in the Virginia Action which Xia (through Fleet and X & Y) bargained to have brought in this Court. Also pursuant to Xia's agreement on behalf of the moving parties, LAG brought in this case a third-party action against Xia, Yue, X & Y and Samuel Development, asserting the same contract and quasi-contract claims asserted in the Virginia Action.[16] LAG's claims now include New York tort claims. The allegations contained in LAG's Counterclaims and Third-Party Complaint are essentially identical, seeking to hold Fleet and the third-party defendants all responsible for their breaches, misrepresentations and fraudulent inducements and schemes.

In addition to LAG's claims, LGI also counterclaimed against Fleet, asserting a claim for breach of intellectual property rights and seeking preliminary and permanent injunctive relief.

ARGUMENT

POINT I
STANDARD OF REVIEW ON A MOTION TO DISMISS

On a motion to dismiss pursuant to CPLR §3211, the Court must accept the facts as alleged in the Complaint (here, the Counterclaim and Third-Party Complaint)

[15] A copy of LAG's Answer is annexed to the moving papers as Exhibit "C".
[16] A copy of the Third-Party Complaint is annexed to the moving papers as Exhibit "D".

as true, accord the (counter/third-party) plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976); Collins v. Telcoa International Corp., 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dep't 2001); Hirschhorn v. Hirschhorn, 194 A.D.2d 768, 599 N.Y.S.2d 613 (2d Dep't 1993) ("On a motion to dismiss a complaint for failure to state a cause of action, the Court must examine the four corners of the [counterclaim/third-party] complaint and give the [counter/third-party] plaintiff the benefit of every possible favorable inference."). Whether a (counter/third-party) plaintiff can ultimately establish its allegations is not part of the calculus to determine a motion to dismiss. EBC, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005). Further, any deficiencies in the Complaint/Counterclaim/Third-Party Complaint may be amplified in supplemental pleadings and other evidence. AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 808 N.Y.S.2d 573 (2005).

Based upon the exacting standard set forth above, it is respectfully submitted that the counterclaims and third-party claims of LAG cannot be dismissed as a matter of law. As detailed below, LAG has set forth valid claims in detailed pleadings which require denial of the pending motion to dismiss in its entirety.

POINT II

LAG'S COUNTERCLAIMS AND THIRD-PARTY CLAIMS ARE NOT BARRED BY RPAPL §1301(3)

LAG sets forth below several independent arguments as to why the Court is asked to deny movants' motion to dismiss LAG's breach of contract claims due to an alleged violation of RPAPL §1301(3). See discussion infra in Sections II.B-D. But preliminarily, LAG by its cross-motion respectfully requests the Court's permission pursuant to RPAPL §1301(3) to bring its claims. See discussion infra in Section II.A. By the Court's granting of LAG's cross-motion, LAG respectfully suggests that the movants' RPAPL §1301(3) argument will thereby be rendered moot, and the case can then expeditiously proceed to have the merits addressed and resolved.

A. LAG's Cross-Motion Should Be Granted Since Special Circumstances Exist

By its cross-motion, LAG seeks this Court's permission pursuant to CPLR §3025(b) and RPAPL §1301(3) to amend its pleadings and assert its counterclaims and third-party claims nunc pro tunc. It is respectfully submitted that the cross-motion should be granted because LAG's claims do not run afoul of the policies underlying RPAPL §1301(3), particularly given that Fleet and the third-party defendants were clearly aware and in fact insisted that LAG reassert the claims made in the Virginia Action in this New York Court as demonstrated by their non-suit agreement which provided, inter alia, as follows:

> 1. Lessard agrees that it will not re-file Lessard's nonsuited claims from Fairfax County, Virginia, Circuit Court Civil Action Number 2010-9087 against Fleet and X & Y in the Courts of the Commonwealth of Virginia or Virginia's federal courts. To the extent Lessard intends to re-file its nonsuited claims or similar claims against Fleet and X & Y, Lessard agrees that it will do so in the state courts of New York, and that such claims shall be filed within six (6) months from October 28, 2011, or in the event Lessard's claims are filed as a counterclaim to any action filed against Lessard by Fleet or X & Y, within such time as is allowed under the rules of the applicable court for the filing of such counterclaims, whichever is later. Fleet and X & Y agree that if Lessard files its nonsuited claims or similar claims in a New York state court, neither Fleet nor X & Y shall seek removal of the claims to federal court.[17]

The Second Department has consistently held that leave to amend a pleading shall be freely granted by a court in the absence of prejudice or surprise resulting directly from the delay in seeking leave unless the proposed amendment is palpably insufficient or devoid of merit. Seidman v. Industrial Recycling Properties, Inc., 83 A.D.3d 1040, 922 N.Y.S.2d 451 (2d Dep't 2011); Guinta's Meat Farms, Inc. v. Pina Constr. Corp., 80 A.D.3d 558, 914 N.Y.S.2d 641 (2d Dep't 2011); Bennett v. Long Is. Jewish Med. Ctr., 51 A.D.3d 959, 859 N.Y.S.2d 470 (2d Dep't 2008). As demonstrated above, Fleet and the third-party defendants cannot claim that they are surprised by the proposed amendment since LAG's claims were previously asserted in Virginia with the understanding, pursuant to the non-suit agreement, that the claims would be reasserted in New York. Moreover, the movants cannot claim any prejudice since the request for leave to amend has been asserted during the pleadings stage of

[17] The full agreement is annexed to the moving papers as Exhibit "N".

this litigation before Fleet or the third-party defendants have served any responsive pleadings.

With regard to RPAPL §1301(3), permission will be granted to institute a separate action on the debt where special circumstances are present. Rainbow Venture Associates, L.P. v. Parc Vendome Associates, Ltd., 221 A.D.2d 164, 633 N.Y.S.2d 478 (1st Dep't 1995); Citibank, N.A. v. Covenant Ins. Co., 150 Misc.2d 129, 567 N.Y.S.2d 983 (Sup. Ct. Rockland County 1991). It is respectfully submitted that the special circumstances present in the case at bar should allow LAG to assert its counterclaims and third-party claims nunc pro tunc.

In Rainbow Venture, supra, the Appellate Division held that "special circumstances" were present where the refusal to allow the proposed second action would effectively have prevented the plaintiff from pursuing its claims, some of which were asserted against parties not named in the foreclosure proceeding and "would enable alleged tortfeasors to escape any responsibility for their wrongs." The Appellate Division further noted that the foreclosure proceeding involved different questions of fact, law and proof than the proposed second action and, therefore, the second action was not duplicative of the foreclosure action contrary to RPAPL §1301(3).

"Special circumstances" exist here because, as in Rainbow Venture, LAG's claims face statute of limitations issues if it is forced to await the outcome of the Lien Foreclosure Action and leave to amend pursuant to RPAPL §1301(3) is not granted

nunc pro tunc. Specifically, the non-suit agreement arguably contemplates LAG bringing its claims within six months of the non-suit or else those claims would be time-barred.

In Citibank, supra, the Court granted leave nunc pro tunc to allow a mortgagee to sue an insurer on a fire insurance policy issued on a mortgaged property while a prior action to foreclose upon the property was pending. In finding that special circumstances were present, the Court noted that different contractual interests and parties were involved and that if the second action were not permitted, the mortgagee might not obtain a full recovery.

Applying the holdings of Rainbow Venture and Citibank to the facts of the case at bar, "special circumstances" exist to allow LAG's amendment of its pleadings to comply with RPAPL §1301(3). Specifically, not only does dismissal risk a statute of limitations issue as discussed above, LAG seeks to assert claims against non-parties to the Lien Foreclosure Action, namely Fleet, Xia, Yue and Samuel Development. Likewise, denial of permission for leave to pursue LAG's claims and/or the requested amendment would result in the injustice of the alleged tortfeasors' escaping liability for their fraudulent conduct, another set of "special circumstances" recognized by the above-cited cases. Moreover, as detailed in Section C(2) below, the claims to be asserted involve different claims than those asserted in the Lien Foreclosure Action, again, another set of "special circumstances" recognized by the above-cited cases as justifying the granting leave to pursue this action pursuant to RPAPL §1301(3) and/or the amendment of the pleadings. Moreover, the case at bar seeks damages beyond

those sought in the Lien Foreclosure Action, i.e., lost profits, providing a further recognized set of "special circumstances" which justify granting leave to pursue this action pursuant to RPAPL §1301(3) and/or the amendment of the pleadings.

The movants cannot claim that they were prejudiced or surprised by the assertion of the counterclaims and third-party claims. Indeed, given their agreement that the claims be brought in this court, the movants' objections under RPAPL §1301(3) cannot be said to protect them from vexatious litigation. The moving parties' argument merely promotes form over substance and constitutes a non-substantive, purely procedural tactic to delay this suit. Thus, leave to proceed with suit pursuant to RPAPL §1301(3) is justified. Moreover, since LAG's request to amend, if deemed by the Court to be necessary to conform with the procedural aspects of RPAPL §1301(3), is being made during the pleading stage of this action, Fleet and the third-party defendants should not be heard to claim that they are somehow prejudiced in any way by the proposed amendment. It is therefore respectfully submitted that the cross-motion to amend should be granted.[18] Moreover, LAG's cross-motion renders movants' RPAPL §1301(3) argument in their motion to dismiss moot.

[18] A copy of LAG's proposed Amended Answer with Counterclaims is annexed to the Schwartzberg Aff. as Exhibit "F"; LGI's proposed Amended Answer with Counterclaims is annexed to the Schwartzberg Aff. as Exhibit "G"; and LAG's proposed Amended Third-Party Complaint is annexed to the Schwartzberg Aff. as Exhibit "H".

B. The Parties Have Stipulated To The Instant Claims Being Brought In This Case

The moving parties insisted that LAG re-assert the Virginia claims in New York as part of their agreement to non-suit the Virginia claims. LAG agreed to do so and relied on the moving parties' good faith agreement. The moving parties now argue that the claims should be dismissed because they allegedly should not have been brought in this court. Despite LAG's justifiable reliance on the moving parties' agreement, the moving parties appear to have entered into that agreement in bad faith and should be estopped from making their argument to LAG's detriment.

Compounding the moving parties' disingenuity, it bears emphasizing that they chose the forum, initiated this lawsuit relating to the same transaction and occurrence, and did so with full knowledge of LAG's related claims and agreement to re-assert them as part of the moving parties' case. Indeed, Plaintiff Fleet, **not** LAG, chose to file this lawsuit. Fleet at no point sought to intervene in LAG's Lien Foreclosure Action.[19] The moving parties' counsel, **not** LAG, insisted that LAG bring its non-suited claims from the Virginia Action be brought to this court.[20] Indeed, the Appellate Division focused on the fact that LAG's actions were not made in bad faith. Given that here, LAG re-asserted the self-same causes of action based on the

[19] Fleet was not a necessary party to the lien foreclosure. Also, Fleet was not named as a party defendant to the Lien Foreclosure Action given the contract's mandatory forum selection provision.
[20] LAG has the absolute right to re-assert its non-suited Virginia claims in Virginia, but agreed to re-assert them in this Court at the insistence of the moving parties.

insisted upon agreement of the moving parties, it is inconceivable how anyone could argue that LAG acted in bad faith much less in a manner inconsistent with the moving parties' wishes and agreement. Indeed, the Appellate Division rejected the moving parties' previous RPAPL §1301(3) argument where there was no bad faith by LAG. The moving parties must be estopped from such an argument given LAG's justifiable reliance thereon.

Notwithstanding that LAG has brought its compulsory claims and in the forum of the moving parties' choosing, the moving parties seek dismissal of LAG's claims. Their current argument to this Court is, in effect, that they are somehow prejudiced by LAG's counterclaims and third-party claims having been brought in this Court pursuant to their written agreement to do so. Their argument is, to put it mildly, disingenuous and should be rejected. Fleet and its alter egos are once again postponing progress on LAG's claims while they continue their depletion of their assets to render themselves judgment proof.

C. LAG's Claims Are Not Barred By RPAPL §1301

Contrary to the movants' contentions, neither LAG's first, second and fourth counterclaims nor LAG's first, second and fourth causes of action in the Third-Party Complaint are barred by RPAPL §1301. Three independent principles contradict Fleet's argument, namely, RPAPL §1301 is inapplicable where, as here, (1) the non-moving party did not commence the action; (2) the claims are different from those raised in the Lien Foreclosure Action and involve different questions of fact, law and

proof; and (3) given that Virginia and not New York law controls the parties' contract claims, neither the first, second and fourth counterclaims nor the first, second and fourth causes-of action in the Third-Party Complaint are controlled, much less barred, by RPAPL §1301.

1. RPAPL §1301 Is Inapplicable Because LAG Did Not Commence This Action

RPAPL §1301 is inapplicable where, as here, the non-moving party did not commence the action. For example, in Anron Air Sys. v. Columbia Sussex Corp., 202 A.D.2d 460, 609 N.Y.S.2d 49 (2d Dep't 1994), the Second Department declined to dismiss the claim asserted by Anron even though a separate Lien Foreclosure Action was pending where Anron as a defendant asserted a cross-claim seeking to foreclose its lien. In so holding, the Court noted that Anron did not elect to enter the foreclosure action, but was named as a defendant and was obligated to raise its claims or have them deemed waived. The Court further noted that Anron should not have been penalized by dismissal of the action because it was forced to preserve its claims by asserting them in a separate action.

Likewise, in Valley Savings Bank v. Rose, 228 A.D.2d 666, 646 N.Y.S.2d 349 (2d Dep't 1996), the Second Department held that "equitable concerns militate against a mechanistic application of RPAPL 1301." In so holding, the Court found that plaintiff bank's failure to attempt to execute against the defendant's property upon the judgment did not preclude it from maintaining a separate foreclosure action.

The Court further noted that the bank did not "elect" to mount a separate action in New Jersey, and therefore, the Court refused to dismiss the bank's complaint.

Similar to the non-moving parties in Valley Savings Bank and Anron Air, LAG in this case was sued by Fleet and, once it was, LAG was forced to raise all necessary defenses, counterclaims and third-party claims. Simply put, LAG as the non-moving party, should not be penalized for asserting the claims necessary to properly defend itself in a litigation that it did not commence, and the movants should not be heard to complain for LAG's having done what they insisted LAG do; bring LAG's claims in this Court.

Further, in contrast to the situation present in this case where LAG was sued by Fleet and asserted claims in order to defend its interests, the cases cited by Fleet and its alter egos involve circumstances where the non-moving party initiating the subsequent claim was also the party that sued in the first instance. Specifically, in Aurora Loan Services, LLC v. Spearman, 68 A.D.3d 796, 890 N.Y.S.2d 124 (2d Dep't 2009); Security National Servicing Corp. v. Liebowitz, 281 A.D.2d 615, 722 N.Y.S.2d 69 (2d Dep't 2001) and Westnine Assoc. v. West 109th Street Associates, 247 A.D.2d 76, 677 N.Y.S.2d 557 (1st Dep't 1998), those courts dismissed the second actions because they were commenced by the same parties as in the initial litigation. In none of those three cases was the situation similar to this case; where the claims sought to be dismissed were counterclaims or third-party claims asserted by the defendant.

2. Dismissal Under RPAPL §1301 Is Not Proper Where LAG's Claims Are Different Than Those Raised In The Lien Foreclosure Action

Dismissal under RPAPL §1301 is not proper where, as here, LAG's first, second and fourth counterclaims and third-party claims are different than those raised in the Lien Foreclosure Action, and involve different questions of fact, law and proof. See, e.g., Dollar Dry Dock Bank, 181 A.D.2d 709, 581 N.Y.S.2d 361 (2d Dep't 1992); Rainbow Venture Associates, L.P., supra. Whereas LAG's Complaint in the Lien Foreclosure Action asserts one cause of action to foreclose a mechanic's lien and seeks damages of exactly $880,452.63, plus costs and disbursements, LAG's instant counterclaims and third-party claims assert causes of action for breach of contract, unjust enrichment, infringement of intellectual property rights, and intentional misrepresentation and fraud, which involve different questions of fact, law and proof than what is required to foreclose upon the mechanic's lien.

For example, LAG's second counterclaim/third-party quasi-contract claims (unjust enrichment) and LAG's fourth counterclaim/third-party tort claims (intentional misrepresentation and fraud) require different factual showings and involve different legal standards of proof and questions of law than the lien foreclosure. The former quasi-contract claims require evidence of "reasonable value" as opposed to "contractual damages" enjoyed by persons and entities not parties to the Lien Foreclosure Action; the latter tort claims require evidence of intent and involve legal

standards governing, inter alia, punitive damages nowhere relevant to the lien foreclosure.

LAG's breach of contract counterclaims and third-party claims involve combined issues of fact and law nowhere raised nor necessary in the Lien Foreclosure Action; alter ego liability for Fleet's acts and omissions (Fleet is not a party to the Lien Foreclosure Action) given the third-party defendants' inter-relationships with Fleet. LAG's counterclaims and third-party claims also involve combined questions of fact and law as well as a measure of damages nowhere relevant to the Lien Foreclosure Action, i.e., LAG's potential recovery of "termination damages."

Further, it is indisputable that LAG's third-party claims involve different questions of fact, law and proof from the Lien Foreclosure Action given that the third-party defendants Xia, Yue and Samuel Development are neither plaintiffs in this case nor parties to the Lien Foreclosure Action.

Finally, LAG's counterclaims against Fleet in this case require different questions of fact and law than the lien foreclosure. In this case, the questions are whether Fleet breached the contract or was excused from performance whereas, in the lien foreclosure, the question is whether X & Y is required to pay for LAG's services independent of Fleet's liability. Indeed, Fleet is not even a party to the Lien Foreclosure Action.

3. The Motion To Dismiss LAG's Breach Of Contract Claims Must Be Denied Because Virginia Law, Not NY RPAPL §1301(3) Controls, And The Moving Parties Are Collaterally Estopped From Arguing Otherwise

The motion to dismiss' reliance on RPAPL §1301(3) cannot control LAG's breach of contract claims in its counterclaims and its third-party causes of action because Virginia contract law not New York law (including RPAPL §1301(3)) controls those claims.

The issue of what law controls the parties' contract disputes has already been fully litigated in the Virginia Action. Annexed to the Schwartzberg Aff. as Exhibits "C" through "E" are the parties' briefs and the Court's final Order, all of which are hereby incorporated by reference. In the interests of judicial economy, the Court is respectfully directed to those papers rather than LAG's re-stating the arguments in full herein. Basically, the contract's mandatory Virginia choice of law provision has been twice attacked by counsel for Fleet and the third-party defendants and has twice been rejected. The moving parties' counsel raised all the choice of law arguments raised in this case and not only lost, but omitted any reference thereto where in their motion they argue the issue yet again.

Specifically, the Virginia Court rejected the arguments of counsel for Fleet and its co-defendants (the moving parties in this case) and found that Virginia and not New York law controlled. In doing so, the Court was fully apprised by the moving parties' current arguments of comity, New York public policy, New York statutes regarding construction contracts and the like. Movants here are collaterally estopped

from re-litigating this issue.

Collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. Ryan v. New York Telephone Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984); see, also, Parker v. Blauvelt Volunteer Fire Co., Inc., 93 N.Y.2d 343, 690 N.Y.S.2d 478 (1999). As the Court of Appeals held in Ryan:

> A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the "realities of the prior litigation", including the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination with which is now asserted against him. (citation omitted). Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation.

Ryan at 501.

The fundamental inquiry regarding collateral estoppel is whether re-litigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the Court and the litigants, and a societal interest in consistent and accurate results. Staatsburg Water Co. v. Staatsburg Fire District, 72 N.Y.2d 147, 531 N.Y.S.2d 876 (1988). The policies underlying the application of collateral estoppel are avoiding re-

litigation of a decided issue and the possibility of an inconsistent result. Buechel v. Bain, 97 N.Y.2d 295, 740 N.Y.S.2d 252 (2001), cert. denied, 535 U.S. 1096, 122 S.Ct. 2293, 152 L.Ed.2d 1051 (2002).

Based upon the foregoing case law, there can be no question that the moving parties in this case are collaterally estopped from arguing that the choice of law provision in the parties' contract is unenforceable; they had a full and fair opportunity to challenge the validity of that provision in the Virginia Action where they vigorously challenged the choice of law contract provision by their own motions in Virginia not once, but twice. After the first failed motion arguing that, inter alia, New York and not Virginia law controlled, a second motion for reconsideration was also denied. It bears re-emphasizing that those motions raised the issues of comity to New York policies and not just the substance of the allegedly applicable New York statutes and case law.

Also consistent with the Ryan court's articulation of collateral estoppel principles, it bears noting that the Virginia choice of law issue was clearly critical to the moving parties' motion in the Virginia Action. As such, the moving parties' incentive to fully litigate the issue is self-evident.

Moreover, given that the parties to both the Virginia and New York actions are identical, another principle of collateral estoppel has been met. Both in the Virginia case and now, again in the New York case, the moving parties must be bound by the prior Court's determination that Virginia law applied to the contract claims. Yet

another "identity" relevant to collateral is present here, i.e., the issue in the prior Virginia Action's motions is the same that the moving parties are trying to re-litigate now; whether Virginia rather than New York law controls and whether the choice of law provision in the contract should be enforced. The moving parties may not re-litigate the issue of choice of law; it risks the possibility of inconsistent results, one of the main public policy reasons for the principle of collateral estoppel. The moving parties, having had a full and fair opportunity to litigate the issue in Virginia, cannot be given another opportunity to re-litigate the issue just because they were unsuccessful in the prior litigation.

The relevance of the choice of law issue is plain: because Virginia and not New York law applies to LAG's contract claims, the gravamen of the instant motion to dismiss - RPAPL §1301 - is not applicable and, therefore, the motion to dismiss must be denied.

D. If RPAPL §1301(3) Was In A Meaningful Way Violated, The Appropriate Remedy Would Be A Stay Of This Action And/Or Leave To Amend, But Not Dismissal Of LAG's Claims

If this Court were to find that RPAPL §1301(3) was violated, the appropriate remedy would be a leave to amend or a stay of this action pending the outcome of the Lien Foreclosure Action, but not dismissal of LAG's claims. See, e.g., Rainbow Venture, supra; Citibank, N.A. v. Covenant Ins. Co., supra; Anron Air Sys., supra; Sudit v. Roth, 35 Misc.3d 1237(A), 2012 WL 2120088 (Sup. Ct. Kings County 2012); Orchard Hotel, LLC v. Zhavian, 34 Misc.3d 1219(A), 2012 WL 319046 (Sup. Ct. Kings

County 2012); Greystone Bank v. 15 Hoover Street, LLC, 29 Misc.3d 1209(A), 2010 WL 4026387 (Sup. Ct. Nassau County 2010).

POINT III

LAG STATES A VALID CLAIM FOR UNJUST ENRICHMENT

It is axiomatic that "[c]auses of action or defenses may be stated alternatively or hypothetically." CPLR §3014; Winick Realty Group, LLC v. Austin & Assoc., 51 A.D.3d 408, 857 N.Y.S.2d 114 (1st Dep't 2008) ("Since plaintiff is entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement."). The motion to dismiss' argument that LAG cannot assert causes of action for both breach of contract and unjust enrichment is simply wrong as a matter of law where Fleet and the third-party defendants have all disputed the existence of an enforceable contract between them and LAG.

A. The Motion To Dismiss Is Incorrect As A Matter Of Law

In support of the motion to dismiss' argument that LAG is not entitled to assert alternative theories of recovery, the moving parties rely upon the Court of Appeals case of Clark-Fitzpatrick, Inc. v. Long Island Railroad, 70 N.Y.2d 382, 521 N.Y.S.2d 653 (1987). However, as the Appellate Division stated in Sternberg v. Walber 36th Street Associates, 187 A.D.2d 225, 594 N.Y.S.2d 144 (1st Dep't 1993), the decision in Clark-Fitzpatrick "does not hold that a claim in contract and one in quasi contract are

mutually exclusive in all events and under all circumstances. Indeed, this has never been the law in New York." Id. at 227-228. As a result, the Court in Sternberg held that the trial court erred in finding that the contract barred recovery of a commission on a theory of quantum meruit and that the plaintiff was required to elect its remedy.

The controlling standard is that where, as here, there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a party may proceed upon a theory of quasi-contract as well as breach of contract and will not be required to elect his or her remedies. AHA Sales, Inc. v. Creative Bath Products, Inc., 58 A.D.3d 6, 867 N.Y.S.2d 169 (2d Dep't 2008); Hochman v. LaRea, 14 A.D.3d 653, 789 N.Y.S.2d 300 (2d Dep't 2005); Zuccarini v. Ziff-Davis Media, 306 A.D.2d 404, 762 N.Y.S.2d 621 (2d Dep't 2003); Old Salem Development Group, Ltd. v. Town of Fishkill, 301 A.D.2d 639, 754 N.Y.S.2d 333 (2d Dep't 2003); Parkash v. Utilisave Corp., 295 A.D.2d 330, 743 N.Y.S.2d 889 (2d Dep't 2002); Breslin Realty Dev. Corp. v. 112 Leasehold, 270 A.D.2d 299, 704 N.Y.S.2d 861 (2d Dep't 2000).

B. The Moving Parties Dispute A Contract Exists Between Them And LAG

Given the foregoing, the moving parties should not be heard to move for dismissal because they have disputed the existence of a contract between them and LAG.[21] For example:

[21] See, X & Y's Demurrer and Answer in the Virginia Action (annexed to the Schwartzberg Aff. as
(footnote cont'd on next page)

(a) Fleet, in its Complaint in this case, has argued that there is no enforceable contract that covers this dispute. For example, Fleet has argued in its second cause of action in this case that it was fraudulently induced to enter into the contract.

(b) Fleet, in the Virginia Action, disputed that all of the alleged contracts were binding and enforceable against it.

(c) X & Y, in the Virginia Action, denied it had any contacts or contracts with LAG.

(d) Xia, in the Virginia Action, moved for dismissal of LAG's claims by claiming he had no contract with LAG and therefore insufficient minimum contacts with Virginia.

Given the foregoing as well as the cases cited supra, the moving parties here should not be heard that LAG cannot argue in the alternative under breach of contract and quasi-contract theories. Fleet and the third-party defendants themselves have all created disputes that a contract exists with LAG, much less a contract that covers the claims in this case.

POINT IV

LAG'S AND LGI'S INTELLECTUAL PROPERTY RIGHTS CLAIMS ARE NOT PREEMPTED BY THE COPYRIGHT ACT AND THEREFORE SHOULD NOT BE DISMISSED[22]

Preliminarily, it bears noting that LAG's and LGI's claims for breach of intellectual property rights and requests for preliminary and permanent injunctive relief do not fall within the scope of RPAPL §1301(3) inasmuch as the intellectual

Exhibit "I") at ¶2; Xia's motion to dismiss (annexed to the Schwartzberg Aff. as Exhibit "J") at ¶14.

[22] In Fleet's Complaint (Exhibit "A" to the moving papers), Fleet's fourth cause of action asserts allegations against LAG and LGI jointly. Accordingly, since Fleet has alleged that both entities are jointly liable, LGI "stands in the shoes" of LAG for the purposes of this motion, and therefore, this Point applies equally to LGI.

property claims do not seek to recover unpaid debts. Moreover, LAG's and LGI's counterclaims and third-party claims relating to their intellectual property rights are not preempted by the Copyright Act as movants have argued because, as recognized by the below-cited controlling authorities, these claims are premised upon the moving parties' contractual obligations concerning LAG's Instruments of Service. Specifically, actions arising out of contractual relationships rather than rights created under the Federal Copyright Act are not preempted by the statute. Bryant v. Broadcast Music, Inc., 27 A.D.3d 683, 810 N.Y.S.2d 910 (2d Dep't 2006); Grecco v. Corbis Sygma, 284 A.D.2d 234, 726 N.Y.S.2d 653 (1st Dep't 2001); Hicinbothem v. Natural Golf Corp., 266 A.D.2d 637, 697 N.Y.S.2d 760 (3d Dep't 1999); Jordan v. Aarismaa, 245 A.D.2d 616, 665 N.Y.S.2d 973 (3d Dep't 1997); General Mills, Inc. v. Filmtel International Corp., 178 A.D.2d 296, 577 N.Y.S.2d 384 (1st Dep't 1991).

The contract provides, in relevant part, as follows (italicized bold added):

> **§ 1.3.2 INSTRUMENTS OF SERVICE**
> **§ 1.3.2.1** Drawings, specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service for use solely with respect to this Project. The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights.
>
> **§ 1.3.2.2** Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to reproduce the Architect's Instruments of Service solely for purposes of constructing, using and maintaining the Project, ***provided that the Owner shall comply with all obligations, including prompt payment of all sums when due, under this Agreement***. The Architect shall obtain similar

nonexclusive licenses from the Architect's consultants consistent with this Agreement. ***Any termination of this Agreement prior to completion of the Project shall terminate this license. Upon such termination, the Owner shall refrain from making further reproductions of Instruments of Service and shall return to the Architect within seven days of termination all originals and reproductions in the Owner's possession or control.*** If and upon the date the Architect is adjudged in default of this Agreement, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting the Owner to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the Project.

§ 1.3.2.3 ***Except for the licenses granted in Section 1.3.2.2, no other license or right shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect.*** However, the Owner shall be permitted to authorize the Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers to reproduce applicable portions of the Instruments of Service appropriate to and for use in their execution of the Work by license granted in Section 1.3.2.2. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants. The Owner shall not use the Instruments of Service for future additions or alterations to this Project or for other projects, unless the Owner obtains the prior written agreement of the Architect and the Architect's consultants. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's consultants.

§ 1.3.2.4 Prior to the Architect providing to the Owner any Instruments of Service in electronic form or the Owner providing to the Architect any electronic data for

> incorporation into the Instruments of Service, the Owner and the Architect shall by separate written agreement set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations or licenses not otherwise provided in this Agreement.

The Bryant case is directly on point and controlling. In Bryant, the Second Department held that the trial court properly determined that the appellee/plaintiff's claims pertaining to the appellant's unauthorized use of plaintiff's musical compositions were premised upon her contractual relationship with appellant and, therefore, not preempted by the Copyright Act. See Bryant at 683. Similarly, in the case at bar, LAG and LGI allege that the moving parties had and have been improperly using the Instruments of Service in direct violation of the terms and conditions of the contract between the parties. See, e.g., Counterclaim at ¶117; Third-Party Complaint at ¶34. Because LAG's and LGI's claims against Fleet and the third-party defendants are premised upon the terms and conditions of the contract, and not solely on the Federal Copyright Act, the claims are not preempted. As the Court held in Pro CD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996): "Courts usually read preemption clauses to leave private contracts unaffected," citing to the Supreme Court case of American Airlines, Inc. v. Wolens, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) as an example.

In Hicinbothem, supra, the Court again reiterated the principle that where a plaintiff's action seeks to protect rights that arise out of the parties' contractual relationship, and not solely out of copyright law, the claims are not federally

preempted.[23] In the case at bar, pursuant to the Instruments of Service provisions of the contract, the moving parties' entitlement to use LAG's Instruments of Service were the result of LAG granting Fleet "a non-exclusive license to reproduce the Architect's Instruments of Service . . . provided that the Owner shall comply with all obligations, including prompt payment of all sums when due, under this Agreement . . . Any termination of this Agreement prior to completion of the Project shall terminate this license."[24] Accordingly, it is clear that LAG's intellectual property rights claim is not based solely upon federal copyright law, but also on the terms and conditions of the contract between the parties.

In Jordan, supra, the Appellate Division again held that actions arising out of contractual relationships rather than rights created under the Copyright Act are not federally preempted. Notably, the Court further noted that "While issues of copyright infringement may be involved or implicated, the contract issues raised here belong in the State Court as they 'depend upon common law or equitable principles.'"

In Lennon v. Seaman, 63 F.Supp.2d 428 (S.D.N.Y. 1999), the Court held that where the plaintiff's claims related to ownership rights in, and possession of, the tangible items themselves and not to intangible copyright ownership, the claims are not preempted. In so holding, the Court held that where a state law claim is based on interference with tangible property rather than intangible copyrights, the claim is not

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[23] The Court in Hicinbothem found that the plaintiff's Complaint did not allege that the defendant breached any promise made in the parties' contract or infringed upon any rights created by the contract.

[24] See contract, annexed to the moving papers as Exhibit "B", p. 6.

premised upon the equivalent of rights protected by the copyright laws. Here, the moving parties were obligated to "return to the Architect within seven days of termination all originals and reproductions in the Owner's possession or control" which instruments of service are tangible plans and drawings. As alleged in both the Counterclaims and Third-Party Complaint, Fleet and the third-party defendants continued and continue to use the Instruments of Service and have failed to return them.[25] Indeed, both the Counterclaims and Third-Party Complaint demand a return of LAG's Instruments of Service.[26]

In Grecco, supra, the Appellate Division upheld the trial court's refusal to dismiss that plaintiff's complaint where it held that the state common law claims, which arose out of and related back to plaintiff's contractual relationship with the defendants, and were grounded in theories of negligence, conversion and breach of contract, were qualitatively different from a copyright infringement claim, and therefore not federally preempted. Notably, analogous to the Grecco case, LAG also alleged that the moving parties' actionable malfeasance arose out of the common law and in doing so set forth as an example of qualitative differences from a copyright infringement claim; the infringement of LAG's licenses as well as the moving parties' failure to return LAG's instruments of service. In fact, the moving parties, through Xia, have admitted they are using LAG's instruments of service and have argued they are entitled to do so because they have paid for them.

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[25] Counterclaims, ¶120; Third-Party Complaint, ¶36.
[26] Counterclaims, ¶123; Third-Party Complaint, ¶39.

Fleet's heavy reliance upon the trial court decision of Giumenta Corp. v. Desktop Solutions Software, Inc., 2012 WL 1451753, 2012 NY Slip Op. 30944(U) (Sup. Ct. Suffolk County 2012) is severely misplaced as that case is factually distinguishable. In Giumenta, the issue concerned the alleged misappropriation of intellectual property in conjunction with the development of a website. The defendant's counterclaim alleged the misappropriation of "original ideas" or "concrete work product", referring to the intellectual property contained within the subject website. The trial court held that the counterclaims sought protection of rights equivalent to those exclusively protected by the Copyright Act. In contrast, it is clear that the claims being asserted in the Counterclaims and Third-Party Complaint are not exclusively based on the moving parties' use of LAG's work product on their websites (an allegation which the moving parties have denied in the Virginia Action). Thus, LAG's claims do not involve the same rights and protection involved in the Giumenta case and thus LAG's claims are not solely rights afforded and preempted under the Copyright Act.

POINT V

LAG'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT STATE VALID CLAIMS FOR FRAUD IN THE INDUCEMENT

The moving parties in their motion to dismiss advance several arguments standing for the proposition that LAG has failed to state valid claims of fraudulent inducement of contract. However, as discussed below, those arguments are inaccurate as a matter of fact and law.

A. The Intentional Misstatements Of Material Facts By Fleet And The Third-Party Defendants Establish A Valid Cause Of Action For Fraud In The Inducement

LAG's counterclaims and third-party claims contain a detailed recital of the fraudulent scheme by Fleet and the third-party defendants which were used to induce LAG to enter into its contract signed by third-party defendant Xia under the name of Fleet as the "Owner" of the Property and Project (Xia intentionally misrepresented to LAG that Fleet was the owner knowing all the time that he had no intention of paying for LAG's services in full - as he has done in the past with other projects - and that Fleet was not the owner but instead a shell entity with no assets to pay LAG whether during performance or upon suit for payment).[27] Had LAG known the facts as opposed to the lies, LAG would have among other things entered into an AIA architect-owner contract with the actual owner and/or an architect-developer contract with Fleet including a guarantee or other security. As a result of Xia's deliberate and intentional misrepresentations, and as detailed in the case law set forth below, the counterclaims and third-party claims state valid causes of action against Fleet and the third-party defendants for fraudulent inducement of contract.

It is well established that a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud. Deerfield Communications Corp. v.

[27] See, Counterclaim, ¶¶124-135; and Third-Party Complaint, ¶¶40-54.

Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 510 N.Y.S.2d 88 (1986); Lius Group International Endwell, LLC v. HFS International, Inc., 92 A.D.3d 918, 939 N.Y.S.2d 525 (2d Dep't 2012); Introna v. Huntington Learning Centers, Inc., 78 A.D.3d 896, 911 N.Y.S.2d 442 (2d Dep't 2010); Selinger Enterprises, Inc. v. Cassuto, 50 A.D.3d 766, 860 N.Y.S.2d 533 (2d Dep't 2008); Fresh Direct, LLC v. Blue Martini Software, Inc., 7 A.D.3d 487, 776 N.Y.S.2d 301 (2d Dep't 2004); WIT Holding Corp. v. Klein, 282 A.D.2d 527, 724 N.Y.S.2d 66 (2d Dep't 2001); MBIA Insurance Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d 287, 928 N.Y.S.2d 229 (1st Dep't 2011); Mañas v. VMS Associates, LLC, 53 A.D.3d 451, 863 N.Y.S.2d 4 (1st Dep't 2008); Gizzi v. Hall, 300 A.D.2d 879, 754 N.Y.S.2d 373 (3d Dep't 2002); First Bank of the Americas v. Motor Car Funding, Inc., 257 A.D.2d 287, 690 N.Y.S.2d 17 (1st Dep't 1999). A fraud claim may be based upon allegations that the defendant fraudulently induced the plaintiff to enter into a contract, and a party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract where the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future. See, Deerfield Communications Corp., 68 N.Y.2d at 956; Selinger Enterprises, Inc., 50 A.D.3d at 768; and First Bank of the Americas, 257 A.D.2d at 291-292.

Where the plaintiff pleads that it was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing the

contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud. Mañas, supra, at 453.

It is clear that the allegations contained in the Counterclaims and Third-Party Complaint concern present misrepresentations of material fact which induced LAG to enter into the contract and, moreover, the allegations set forth that the tortfeasors had a preconceived and undisclosed intention of not performing under the contract. Therefore, LAG's pleadings assert valid claims for fraud in the inducement. For example, the pleadings allege as follows:

> By way of representative example, Xia willfully misrepresented to LAG that Fleet was the owner of the Property and, therefore, that the Contract should name Fleet as the Owner even though Xia knew Fleet was not the Owner of the Property. Xia's fraudulent and intentional misrepresentations were intended to disguise his undisclosed, willful and malicious intent and scheme to leave LAG with no recourse through the Contract to any entity that was sufficiently capitalized or solvent to pay for the contracted for Services. Upon information and belief, Xia had utilized a similar scheme in the past in another construction project using Samuel as a means for denying that project's contractor recourse through the courts of New York.[28]

LAG's pleadings make clear that Fleet and the third-party defendants had no intention of performing under the contract (in fact, Fleet was never able to perform owing to the scheme of Xia and Yue to keep Fleet under-capitalized). Had Fleet, through Xia, not made intentional misrepresentations to LAG to induce LAG to enter into the contract in the first instance, LAG would not have agreed to enter into the

[28] Counterclaim, ¶126; Third-Party Complaint, ¶42.

contract with Fleet as opposed to the true owner of the Property and Project. Had LAG known it was contracting with a shell entity, the contract would not have contained language which Xia relies on as allegedly relieving him and Fleet's chief financial officer Yue of liability. Had LAG known that the person negotiating the contract had no ability or intention of performing under the contract, and instead would string LAG along, LAG would either have never entered into any agreements or would have mitigated its damages much earlier. If LAG had known that during its performance of the contract, Xia had always intended on divesting the moving parties of all assets through diversions to still further sham entities (again, sharing officers, addresses, even similar names as the moving parties), LAG would have acted more quickly or, more to the point, might never have entered into the contract. Moreover, there can be no question that the above example of fraud is material since there can be no more essential fact to an AIA architect-owner contract than who actually owns the property and has the ability to perform the obligations under the contract.

As stated above, the foregoing is only an example of the moving parties' fraudulent inducements; the Court is respectfully directed to the myriad of other allegations of fraud which induced LAG to enter into the contract.[29]

[29] See, e.g., ¶¶124-135 of the Counterclaims and ¶¶40-51 of the Third-Party Complaint.

B. The Fraud Claims Against The Third-Party Defendants Are Not Barred; They Are Not Duplicative Of LAG's Contract Breach Claims

The moving parties' argument that LAG's fraudulent inducement claims should be dismissed as duplicative of its contract breach claims leaves unmentioned controlling case law to the contrary. The case law is clear that a cause of action sounding in fraud is not duplicative of a cause of action to recover damages for breach of contract where the plaintiff sues individuals who are not parties to the contract and seeks compensatory damages which are not recoverable for breach of contract. Lius Group International Endwell, LLC, supra; Introna, supra; Selinger Enterprises, Inc., supra.

The first prong of the Luis Group test is amply met by LAG's pleadings. Specifically, LAG's Third-Party Complaint makes clear that the third-party defendants, all of whom are not named as parties to the contract, were instrumentally involved in Fleet's fraudulent scheme. Indeed, it was third-party defendants Xia and his wife Yue who perpetrated the fraud through their actions and manipulation of their shell entities X & Y, Fleet and Samuel. X & Y was the actual, fraudulently undisclosed owner of the Property who would benefit from the bargain while LAG was left to chase Fleet under its breach of contract action (the third-party defendants have vigorously opposed alter ego liability in the Virginia Action for LAG's breach of contract claims relying, in part, on the absence of a contract between them and LAG). Yue, Xia and

Samuel all took actions in furtherance of the fraudulent scheme and in order to conceal Fleet's inability to perform under the contract by each sending a minor payment to LAG from their respective bank accounts (Fleet in the Virginia Action refused on relevancy grounds to produce any evidence of a Fleet bank account, much less any ability by Fleet to pay for LAG's services). Thus, the first prong of the Lius Group test is apparent on the face of LAG's Counterclaims/Third-Party Complaint.

The second prong of the Lius Group test (i.e., that a fraud claim is proper where the claim seeks compensatory damages not recoverable under contract) is established by the third-party defendants' own argument that LAG allegedly cannot recover compensatory damages from them under the contract because they are not parties to the contract. Moreover, they have previously argued in the Virginia Action and will continue to argue that LAG cannot collect compensatory damages under the contract given the express terms of the contract. For example, third-party defendant Xia previously argued in the Virginia Action that LAG cannot recover compensatory damages from him under the contract because certain exculpatory provisions in the contract covering officers, directors, principals and the like of the contracting parties allegedly bar such claims.[30] That argument presumably will be likewise advanced by Fleet's chief financial officer: third-party defendant Yue. Third-party defendant X & Y has likewise sought to escape liability for compensatory damages under the contract

[30] See Xia's Supplemental Brief in support of his motion to dismiss in the Virginia Action, annexed to the Schwartzberg Aff. as Exhibit "K". The Virginia Court did not reach that argument because it ruled it had no personal jurisdiction over Xia.

in the Virginia Action and is expected to re-assert such arguments should it not prevail on its motion to dismiss.

C. The Contract Merger Clause Does Not Bar LAG's Fraud In The Inducement Cause Of Action.

The moving parties incorrectly argue for dismissal of LAG's fraudulent inducement claims due to the contract's merger clause. It is beyond any question that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing a contract. In fact, the Court of Appeals case of Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959), heavily relied upon by the moving parties, provides as follows:

> A reiteration of the fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract would then be dispositive of the issue (citation omitted). To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud either in the inducement or in the execution despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made (citations omitted).

Danann at 320.

The principle that a cause of action for fraudulent inducement cannot be barred by a general merger clause contained in the contract was reaffirmed by the Court of Appeals in Deerfield Communications Corp., supra; See, also, Sabo v. Delman, 3 N.Y.2d 155, 164 N.Y.S.2d 714 (1957).

Based upon the foregoing, there is no question that the merger clause contained within the contract does not bar LAG's fraudulent inducement claims. This is especially evident as there are fraudulent inducement claims against the same third-party defendants who have vigorously argued that they are not parties to the contract and therefore do not have any liability under that contract.

D. LAG's Allegations Of Fraud Were Pleaded With Sufficient Particularity In Compliance With CPLR §3016.

CPLR §3016(b) provides, in its entirety, as follows:

> (b) Fraud or Mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

Simply put, the case law interpreting this section in no way requires the type of detail that the moving parties allege is needed in order to sustain a cause of action for fraud when faced with a motion to dismiss pursuant to CPLR §3211. As the Court of Appeals stated in Pludeman v. Northern Leasing Systems, Inc., 10 N.Y.3d 486, 860 N.Y.S.2d 422 (2008):

> The purpose of §3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that §3016(b) should not be so strictly interpreted "as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." (citations omitted). Thus, where concrete facts "are peculiarly within the knowledge of the party" charged with the fraud (citation omitted), it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured

> later in the proceedings. (citations omitted). . . . Critical to a fraud claim is that a Complaint allege the basic facts to establish the elements of the cause of action. Although under §3016(b) the Complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, §3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct.

Pludeman at 187.

In Pludeman, the plaintiffs alleged a fraudulent scheme with regard to leasing equipment. In holding that the plaintiffs had sufficiently pleaded a cause of action for fraud against individually-named corporate defendants, the Court found as follows:

> The very nature of the scheme, as alleged, gives rise to the reasonable inference - rebuttable though it may later prove to be - that the officers, as individuals and in the key positions they held, knew of and/or were involved in the fraud . . . . Taken in a light most favorable to the non-moving party, and according that party the benefit of every possible favorable inference, we determine only whether the facts as alleged are cognizable within the claim asserted to §3016(b)'s satisfaction.

Pludeman at 188.

Further, as the Court of Appeals also held in Lanzi v. Brooks, 43 N.Y.2d 778, 402 N.Y.S.2d 384 (1977), CPLR §3016(b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting fraud. As the Court also noted in Jered Contracting Corp. v. New York City Transit Authority, 22 N.Y.2d 187, 292 N.Y.S.2d

98 (1968), "it is almost impossible to state in detail the circumstances constituting fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted." Jered at 94.

In Caprer v. Nussbaum, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2d Dep't 2006), the Second Department reversed the trial court and reinstated a fraud cause of action, notwithstanding the failure to allege specifics as to the time and place of the alleged fraud. Rather, and similar to the case at bar, the Complaint detailed the claimed fraudulent scheme. The Court further noted that, even if the Complaint was not pleaded in sufficient detail, it nonetheless was adequate for the purpose of proceeding at the early stage of the litigation.

Simply put, the detailed allegations of Fleet's and the third-party defendants' fraudulent scheme clearly place them on notice of the alleged fraud committed by them. The pleadings meet all of the requirements of CPLR §3016(b) to adequately plead a fraud cause of action; misrepresentation of material fact which was false and known to be false for the purposes of inducing LAG to enter into the contract which resulted in LAG sustaining damages. For example, the moving parties falsely represented, knowing its representations were untrue, that it owned the property and were solvent. Further, LAG's pleadings detail actions taken by Xia, Fleet and the other third-party defendants to create sham entities and to divest themselves of their assets so as to insulate themselves from enforcement of any judgment. Such misrepresentations were made and such actions were taken with the intent to mislead and defraud LAG to perform services which the moving parties knew they

could not and would not pay. It is apparent on the face of the pleadings that LAG relied on these misrepresentations and was unaware of these actions in furtherance of the fraudulent scheme, and, as a direct and proximate result, LAG performed its contractual obligations to its detriment.

The moving parties' motion to dismiss ignores the Court of Appeals decision in Pludeman, which found fraud to be sufficiently pled without specificity as to when and where the alleged misrepresentations were made. In Pludeman, the Complaint failed to include the corporate officers' positions and titles and did not contain any allegations (specific or general) about the officers' conduct or knowledge, let alone that the conduct was wrongful in some way. Nevertheless, the Court of Appeals found that:

> Although plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery. Lest we fully ignore the obvious - or the strong suspicion of fraud, we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud.

Pludeman at 188.

LAG's pleadings clearly exceed the level of specificity found to be sufficient by the Pludeman court. LAG identified with great detail acts of fraud as well as Fleet's and the third-party defendants' fraudulent schemes including, but not limited to, the following allegations contained in the Counterclaims and Third-Party Complaint:

- Xia misrepresented that he was the owner of the property to induce LAG to enter into the contract;[31]

- Xia misrepresented that Fleet was the owner of the property to induce LAG to enter into the contract;[32]

- Xia induced LAG to perform without disclosing that he had no intention of paying for those services and that he was having Fleet sign the contract while he knew that Fleet was under-capitalized and that he had no intention of capitalizing Fleet;[33]

- Fleet has been party to a series of sham transactions used to funnel the assets of Xia, Yue, Fleet, X & Y and Samuel Development to other sham entities created by Xia and Yue as part of a scheme to defraud Fleet's, Xia's, Yue's X & Y's and Samuel Development's creditors, including LAG;[34] and

- Xia, Yue, X & Y and Samuel Development are alter egos of Fleet and one another, as evidenced by a host of detailed well-recognized indicia including, inter alia, their commingling of funds and their making of some payments from their personal bank accounts for services rendered and fees due and owing to LAG under the contract.[35]

Based upon the detailed allegations of fraud contained in the Counterclaims and Third-Party Complaint, and giving LAG the benefit of every possible inference as is required on a motion to dismiss, it is respectfully submitted that the pleadings provide the required "stated detail" required under CPLR §3016(b), and therefore, the motion should be denied.

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[31] Counterclaim, ¶101; Third-Party Complaint, ¶18.
[32] Counterclaim, ¶126, Third-Party Complaint, ¶42.
[33] Counterclaim, ¶127, Third-Party Complaint, ¶43.
[34] Counterclaim, ¶104; Third-Party Complaint, ¶21.
[35] Counterclaim, ¶132; Third-Party Complaint, ¶49

POINT VI

THE COUNTERCLAIM AND THIRD-PARTY COMPLAINT STATE A VALID CAUSE OF ACTION FOR CONTRACTUAL INDEMNIFICATION

It is well-settled New York law that attorneys' fees are not collectible from the losing party in a litigation ***unless*** an award is authorized by ***agreement between the parties***, statute or court rule. Chapel v. Mitchell, 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994); Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 549 N.Y.S.2d 365 (1989). It is LAG's position that the two indemnity provisions contained within the contract clearly provide that LAG is entitled to be indemnified for its legal fees.

A reading of the two indemnity provisions supports LAG's claims for contractual indemnification:

> **§1.2.2.11** . . . In addition, the **Owner** agrees, to the fullest extent permitted by law, to **indemnify and hold the Design Professional harmless from any loss**, claim or **cost, including reasonable attorneys' fees and costs of defense, arising or resulting from the performance of such services by other persons** or entities and from any and all claims arising from modifications, clarifications, interpretations, adjustments or changes made to the Contract Documents to reflect field changes or other conditions, except for claims arising from the sole negligence or willful misconduct of the Architect. If the Owner requests in writing that the Architect provide any specific Construction Administration Phase services, and if the Architect agrees in writing to provide such services, then such services shall be considered a Change in Service as provided in Article 1.3. (emphasis added)

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To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Architect and its officers, representatives, employees, consultants, and agents from and against **all** liabilities, claims, damages, losses, **costs, and expenses, including, but not limited to, attorney's fees**:

(i) arising out of or resulting in whole or in part from the failure of Owner, any Subcontractor of Owner, or the officers, representatives, consultants, employees, or agents of Owner to perform the construction of the Project in conformance with Architect's final construction documents;

(ii) arising out of, or resulting in whole or in part from, any modification to the final construction documents that is not approved by the Architect; or

(iii) **arising out of, or resulting in whole or in part from, any errors or omissions in the Construction Documents caused by inaccurate or incomplete information provided to the Architect**. (emphasis added)

The basis for LAG's entitlement to indemnification arises out of, inter alia, the actions of Wang (Fleet's and Xia's sometimes employee/sometimes consultant from yet another sham entity Fleet Architects/sometimes representative of the Property and Project owner X & Y), who was responsible for taking LAG's work product, meeting with the DOB Plan Examiner, and expediting the permitting process. Wang was the Owner's Representative who was supposed to shepherd the DOB approval process. It is LAG's contention that to the extent that there was a delay in obtaining zoning approval, it was because Fleet/Xia/X & Y would not permit LAG to meet with the Plan

Examiner directly. LAG repeatedly objected to its not being permitted by the moving parties to be present at the plan review meetings with the DOB Examiner. Because Fleet is wrongfully seeking to hold LAG liable for the allegedly actionable delays in the approval process, which LAG claims are the result of the actions of Wang and in any event are not cognizable claims against LAG, the indemnity provisions cited above are triggered and that LAG is entitled to its reasonable attorneys' fees in defending against the claims being made by Fleet. These provisions require that Fleet indemnify LAG for its damages, including its reasonable attorneys' fees and the costs of defense, arising or resulting from the performance of services by other persons, including Wang. Based upon the foregoing, the indemnity causes of action are not subject to dismissal, especially at this early juncture of the proceedings, before LAG has had a full and fair opportunity to develop its basis for the indemnification claims.

As for Fleet's claim that the phrase "Design Professional" does not apply to LAG, that argument is just nonsensical. Notably, Fleet does not posit who else that phrase could possibly be referring to, with good reason; LAG is the Design Professional being referred to in the standard AIA contract between the parties. Contrary to Fleet's contentions, LAG is not trying to "stretch the meaning of the provisions at issue beyond recognition".

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court deny the pending motion to dismiss LAG's Counterclaims and Third-Party Complaint; that it

grant LAG's cross-motion pursuant to CPLR §3025(b) and RPAPL §1301(3) for leave to amend the pleadings and permission to file its counterclaims and third-party claims nunc pro tunc; and that to the extent that the Court were to find that some relief is to be accorded the moving parties, it is respectfully submitted that the appropriate relief is a stay rather than dismissal.

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Respectfully submitted,

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